

Pt. 107

49 CFR Ch. I (10–1–00 Edition)

reconsideration of that direct final rule.

(e) If an adverse comment or notice of intent to file an adverse comment is received, a timely document will be published in the FEDERAL REGISTER advising the public and withdrawing the direct final rule in whole or in part. The Administrator may then incorporate the adverse comment into a subsequent direct final rule or may publish a notice of proposed rulemaking. A notice of proposed rulemaking will provide an opportunity for public comment, generally a minimum of 60 days, and will be processed in accordance with §§ 106.11–106.29.

[Amdt. 106–11, 61 FR 30181, June 14, 1996]

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

Subpart A—General Provisions

Sec.

- 107.1 Purpose and scope.
- 107.3 Definitions.
- 107.5 Request for confidential treatment.
- 107.7 Service of process on non-residents of the United States.
- 107.9 Public docket room.
- 107.11 Service.
- 107.13 Subpoenas, witness fees.
- 107.14 Availability of informal guidance and interpretive assistance.

Subpart B—Exemptions

- 107.101 Purpose and scope.
- 107.105 Application for exemption.
- 107.107 Application for party status.
- 107.109 Application for renewal.
- 107.111 Withdrawal.
- 107.113 Application processing and evaluation.
- 107.117 Emergency processing.
- 107.121 Modification, suspension or termination of exemption or grant of party status.
- 107.123 Reconsideration.
- 107.125 Appeal.
- 107.127 Availability of documents for public inspection.

Subpart C—Preemption

- 107.201 Purpose and scope.
- 107.202 Standards for determining preemption.

PREEMPTION DETERMINATIONS

- 107.203 Application.
- 107.205 Notice.
- 107.207 Processing.

- 107.209 Determination.
- 107.211 Petition for reconsideration.
- 107.213 Judicial review.

WAIVER OF PREEMPTION DETERMINATIONS

- 107.215 Application.
- 107.217 Notice.
- 107.219 Processing.
- 107.221 Determination.
- 107.223 Petition for reconsideration.
- 107.227 Judicial review.

Subpart D—Enforcement

- 107.301 Delegated authority for enforcement.
- 107.303 Purpose and scope.
- 107.305 Investigations.

COMPLIANCE ORDERS AND CIVIL PENALTIES

- 107.307 General.
- 107.309 Warning letters.
- 107.310 Ticketing.
- 107.311 Notice of probable violation.
- 107.313 Reply.
- 107.315 Admission of violations.
- 107.317 Informal response.
- 107.319 Request for a hearing.
- 107.321 Hearing.
- 107.323 ALJ's decision.
- 107.325 Appeals.
- 107.327 Compromise and settlement.
- 107.329 Maximum penalties.
- 107.331 Assessment considerations.

CRIMINAL PENALTIES

- 107.333 Criminal penalties generally.
- 107.335 Referral for prosecution.
- 107.336 Limitation on fines and penalties.

INJUNCTIVE ACTION

- 107.337 Injunctions generally.
- 107.339 Imminent hazards.

APPENDIX A TO SUBPART D OF PART 107—GUIDELINES FOR CIVIL PENALTIES

Subpart E—Designation of Approval and Certification Agencies

- 107.401 Purpose and scope.
- 107.402 Application for designation as an approval or certification agency.
- 107.403 Designation of approval agencies.
- 107.404 Conditions of designation.
- 107.405 Termination of designation.

Subpart F—Registration of Cargo Tank and Cargo Tank Motor Vehicle Manufacturers and Repairers and Cargo Tank Motor Vehicle Assemblers

- 107.501 Scope.
- 107.502 General registration requirements.
- 107.503 Registration statement.
- 107.504 Period of registration, updates, and record retention.

Subpart G—Registration of Persons Who Offer or Transport Hazardous Materials

- 107.601 Applicability.
- 107.606 Exceptions.
- 107.608 General registration requirements.
- 107.612 Amount of fee.
- 107.616 Payment procedures.
- 107.620 Recordkeeping requirements.

Subpart H—Approvals, Registrations and Submissions

- 107.701 Purpose and scope.
- 107.705 Registrations, reports, and applications for approval.
- 107.709 Processing of an application for approval, including an application for renewal or modification.
- 107.711 Withdrawal.
- 107.713 Approval modification, suspension or termination.
- 107.715 Reconsideration.
- 107.717 Appeal.

AUTHORITY: 49 U.S.C. 5101-5127, 44701; Sec. 212-213, Pub. L. 104-121, 110 Stat. 857; 49 CFR 1.45, 1.53.

Subpart A—General Provisions

§ 107.1 Purpose and scope.

(a) This part prescribes procedures utilized by the Research and Special Programs Administration, the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel in carrying out their duties under the laws pertaining to the transportation of hazardous materials.

(b) This subpart defines certain terms and prescribes procedures that are applicable to each proceeding described in this part.

[40 FR 48470, Oct. 15, 1975, as amended by Amdt. 107-4, 43 FR 43307, Sept. 25, 1978; Amdt. 107-23, 56 FR 66156, Dec. 20, 1991]

§ 107.3 Definitions.

All terms defined in 49 U.S.C. 5102 are used in their statutory meaning. Other terms used in this part are defined as follows:

Acting knowingly means acting or failing to act while

- (1) Having actual knowledge of the facts giving rise to the violation, or
- (2) Having the knowledge that a reasonable person acting in the same circumstances and exercising due care would have had.

Administrator means the Administrator, Research and Special Programs Administration.

Applicant means the person in whose name an exemption, approval, registration, a renewed or modified exemption or approval, or party status to an exemption is requested to be issued.

Application means a request under subpart B of this part for an exemption, a renewal or modification of an exemption, party status to an exemption, or a request under subpart H of this part for an approval, or renewal or modification of an approval.

Approval means a written authorization, including a competent authority approval, from the Associate Administrator to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter.

Approval Agency means an organization or a person designated by the RSPA to certify packagings as having been designed, manufactured, tested, modified, marked or maintained in compliance with applicable DOT regulations.

Associate Administrator means the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

Competent Authority means a national agency responsible under its national law for the control or regulation of a particular aspect of the transportation of hazardous materials (dangerous goods). The term *Appropriate authority*, as used in the ICAO Technical Instructions, has the same meaning as *Competent Authority*. The Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, is the United States Competent Authority for purposes of this part.

Competent Authority Approval means an approval by the competent authority which is required under the provisions of an international standard, such as the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air or the International Maritime Dangerous Goods Code. To the extent that it satisfies the requirement of the international standard, any of the following may serve as

a competent authority approval: a specific regulation of this subchapter or subchapter C of this chapter, an exemption or approval issued under the provisions of this subchapter or subchapter C of this chapter, or a separate document issued to one or more persons by the Associate Administrator.

Exemption means a document issued under the authority of 49 U.S.C. 5117 by the Associate Administrator that authorizes a person to perform a function that is not otherwise authorized under this subchapter, subchapter C, or other regulations issued under 49 U.S.C. 5101–5127 (e.g., Federal Motor Carrier Safety Administration routing).

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

Filed means received at the Research and Special Programs Administration office designated in the applicable provision or, if no office is specified, at the Office of Hazardous Materials Exemptions and Approvals (DHM-30), Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street SW., Washington DC, 20590-0001.

Holder means the person in whose name an exemption or approval has been issued.

Imminent Hazard means the existence of a condition which presents a substantial likelihood that death, serious illness, severe personal injury, or substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion of an administrative hearing or other formal proceeding initiated to abate the risks of those effects.

Incident means an event resulting in the unintended and unanticipated release of a hazardous material or an event meeting incident reporting requirements in §171.15 or §171.16 of this chapter.

Indian Tribe shall have the meaning given that term under section 4 of the Indian Self-Determination and Education Act (25 U.S.C. 450b).

Investigation includes investigations authorized under 49 U.S.C. 5121 and inspections authorized under 49 U.S.C. 5118 and 5121.

Manufacturing exemption means an exemption from compliance with specified requirements that otherwise must

be met before representing, marking, certifying (including requalifying, inspecting, and testing), selling or offering a packaging or container as meeting the requirements of subchapter C of this chapter governing its use in the transportation in commerce of a hazardous material. A manufacturing exemption is an exemption issued to a manufacturer of packagings who does not offer for transportation or transport hazardous materials in packagings subject to the exemption.

Party means a person, other than a holder, authorized to act under the terms of an exemption.

Person means an individual, firm, partnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or agency or instrumentality of any government or Indian tribe when it offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise, but such term does not include:

(1) The United States Postal Service, or

(2) For the purposes of 49 U.S.C. 5123 and 5124, any agency or instrumentality of the Federal Government.

Registration means a written acknowledgment from the Associate Administrator that a registrant is authorized to perform a function for which registration is required under subchapter C of this chapter (e.g., registration with RSPA as a cylinder retester pursuant to 49 CFR 173.34(e)(1), or registration in accordance with 49 CFR 178.503 regarding marking of packagings). For purposes of subparts A through E, “registration” does not include registration under subpart F or G of this part.

Report means information, other than an application, registration or part thereof, required to be submitted to the Associate Administrator pursuant to this subchapter, subchapter B or subchapter C of this chapter.

Respondent means a person upon whom the RSPA has served a notice of probable violation.

State means a State of the United States, the District of Columbia, the

Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, American Samoa, Guam, or any other territory or possession of the United States designated by the Secretary; except that as used in 49 U.S.C. 5119, relating to uniformity of State registration and permitting forms and procedures, such term means a State of the United States and the District of Columbia.

Transports or transportation means any movement of property by any mode, and any loading, unloading, or storage incidental thereto.

[Amdt. 107-3, 41 FR 38170, Sept. 9, 1976, as amended by Amdt. 107-4, 43 FR 43307, Sept. 25, 1978; Amdt. 107-5, 43 FR 48642, Oct. 19, 1978; Amdt. 107-8, 46 FR 9888, Jan. 29, 1981; Amdt. 107-12, 48 FR 53711, Nov. 29, 1983; 50 FR 45730, Nov. 1, 1985; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-23, 56 FR 66157, Dec. 20, 1991; Amdt. 107-32, 59 FR 49130, Sept. 26, 1994; Amdt. 107-38, 61 FR 21094, May 9, 1996; 65 FR 58618, Sept. 29, 2000]

§ 107.5 Request for confidential treatment.

(a) If any person filing a document with the Associate Administrator claims that some or all the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if that person requests the Associate Administrator not to disclose the information, that person shall file, together with the document, a second copy of the document with the confidential information deleted. The person shall indicate each page of the original document that is confidential or contains confidential information by marking or stamping "confidential" on each page for which a claim of confidentiality is made, and may file a statement specifying the justification for the claim of confidentiality. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, that person shall include a statement as to why the information is privileged or confidential. If the person filing a document does not mark or stamp a document as confidential or submit a sec-

ond copy of the document with the confidential information deleted, the Associate Administrator may assume that there is no objection to public disclosure of the document in its entirety.

(b) The Associate Administrator retains the right to make its own determination with regard to any claim of confidentiality. Notice of a decision by the Associate Administrator to deny the claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

[40 FR 48470, Oct. 15, 1975, as amended by Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-38, 61 FR 21095, May 9, 1996]

§ 107.7 Service of process on non-residents of the United States.

(a) *Designation of agent for service.* When a person who is not a resident of the United States is required by this subchapter or subchapter C of this chapter to designate a permanent resident of the United States as his agent upon whom service of process may be made for him and on his behalf, the agent may be an individual, a firm, or a domestic corporation. Any number of principals may designate the same person as agent. A designation is binding on a principal even if the designation is not in compliance with all the requirements of this section, until rejected by the Associate Administrator for Hazardous Materials Safety. A designated agent may not assign performance of his functions under the designation to another person.

(b) *Form and contents of designation.* The designation shall:

- (1) Be in writing and dated;
- (2) Be made in the legal form required to make it valid and binding on the principal under the laws, corporate bylaws, or other requirements governing the making of the designation by the principal at the place and time where it is made and the person or persons signing the designation shall certify that it is so made;
- (3) State the full legal name, principal name of business and mailing address of the principal;
- (4) Provide that it remains in effect until withdrawn or replaced by the principal;

§ 107.9

(5) State the legal name and mailing address of the agent; and

(6) Bear a declaration of acceptance duly signed by the designated agent.

(c) *Method of service.* Service of any process, notice, order, decision, or requirement of the Associate Administrator for Hazardous Materials Safety may be made by registered or certified mail addressed to the agent with return receipt requested or in any other manner authorized by law. If service cannot be effected because the agent has died (or, if a firm or a corporation ceases to exist) or moved, or otherwise does not receive correctly addressed mail, service may be made by publication in the FEDERAL REGISTER.

[Amdt. 107-2, 41 FR 7509, Feb. 19, 1976, as amended by Amdt. 107-24, 56 FR 8621, Feb. 28, 1991]

§ 107.9 Public docket room.

There is established in the RSPA offices at 400 7th Street, SW., Washington, DC, a public docket room in which there is available for public inspection and copying:

(a) Copies of notices of proposed rulemaking issued by the RSPA or its predecessor agency, including advance notices, together with the comments received thereon during rulemaking proceedings, copies of any related FEDERAL REGISTER notices, final rules, petitions for reconsideration, and decisions issued in response to petitions for reconsideration;

(b) Applications for exemptions from the Department of Transportation's regulations governing the transportation of hazardous materials, including supporting data, memoranda of any informal meetings with applicants, related FEDERAL REGISTER notices, comments received thereon during the public comment period and copies of decisions issued granting or denying applications for exemptions;

(c) Applications for preemption and waiver of preemption determinations under subpart C of this part, together with the comments received thereon, related documents filed with the RSPA, copies of related FEDERAL REGISTER notices, and rulings, determinations and orders issued in response to those applications;

49 CFR Ch. I (10-1-00 Edition)

(d) Records of compliance order proceedings and copies of RSPA compliance orders;

(e) Appeals filed under this part and RSPA decisions issued in response to those appeals; and

(f) Such other information pertaining to the RSPA's hazardous materials program required by statute to be made available for public inspection and copying and any information which the RSPA determines should be made available to the public.

[Amdt. 107-3, 41 FR 38170, Sept. 9, 1976, as amended by Amdt. 107-8, 45 FR 81571, Dec. 11, 1980; Amdt. 107-24, 56 FR 8622, Feb. 28, 1991]

§ 107.11 Service.

(a) Each order, notice, or other document required to be served under this part shall be served personally or by registered or certified mail, except as otherwise provided.

(b) Service upon a person's duly authorized representative constitutes service upon that person.

(c) Service by registered or certified mail is complete upon mailing. An official United States Postal Service receipt from the registered or certified mailing constitutes prima facie evidence of service.

[Amdt. 107-3, 41 FR 38170, Sept. 9, 1976]

§ 107.13 Subpoenas, witness fees.

(a) The Administrator, RSPA, the Chief Counsel, Research and Special Programs Administration, or the Official designated to preside over a hearing convened in accordance with this part, may sign and issue subpoenas either on his own initiative or, upon an adequate showing that the information sought will materially advance the proceeding, upon the request of any person participating in that proceeding.

(b) A subpoena may require the attendance of a witness, or the production of documentary or other tangible evidence in the possession or under the control of the person served, or both.

(c) A subpoena may be served personally by any person who is not an interested person and is not less than 18 years of age, or by certified or registered mail.

(d) Service of a subpoena upon the person named therein shall be made by

delivering a copy of the subpoena to such person and by tendering the fees for one day's attendance and mileage as specified by paragraph (f) of this section. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person, leaving them at his office with the person in charge thereof, leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, by mailing them by registered or certified mail to him at his last known address, or by any method whereby actual notice is given to him and the fees are made available prior to the return date. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of the person, or by mailing them by registered or certified mail to that representative at his last known address or by any method whereby actual notice is given to the representative and the fees are made available prior to the return date.

(e) The original subpoena bearing a certificate of service shall be filed with the RSPA official having responsibility for the proceeding in connection with which the subpoena was issued.

(f) A witness subpoenaed by the RSPA shall be paid the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. The witness fees and mileage shall be paid by the person at whose instance the subpoena was issued.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, the witness fees and mileage may be paid by the RSPA if the RSPA official who issued the subpoena determines on the basis of good cause shown, that:

- (1) The presence of the subpoenaed witness will materially advance the proceeding; and
- (2) The person at whose instance the subpoena was issued would suffer a se-

rious hardship if required to pay the witness fees and mileage.

(h) Any person to whom a subpoena is directed may apply no later than 10 days after service thereof, to the person who issued the subpoena to quash or modify it. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The person who issued the subpoena may:

- (1) Deny the application;
- (2) Quash or modify the subpoena; or
- (3) Condition denial of the application to quash or modify the subpoena upon the satisfaction of certain just and reasonable requirements. The denial may be summary.

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, the RSPA may request the Attorney General to seek the aid of the United States District Court for any District in which the person is found to compel that person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the RSPA, or both.

[Amdt. 107-3, 41 FR 38170, Sept. 9, 1976, as amended by Amdt. 107-11, 48 FR 2651, Jan. 20, 1983]

§ 107.14 Availability of informal guidance and interpretive assistance.

(a) *Availability of telephonic and Internet assistance.* (1) RSPA has a toll-free, telephonic information line which provides answers to inquiries by small entities and other parties concerning information on and advice about compliance with the hazardous materials regulations, 49 CFR parts 171-180. The information line is staffed from 9:00 a.m. through 5:00 p.m., Eastern time, Monday through Friday, except Federal holidays. When the information line is not staffed, callers may leave a recorded message, which will be answered by the end of the next business day. The telephone numbers for the information line are: 1-800-HMR-4922 (that is; 1-800-467-4922 toll free), or 202-366-4488 (in the Washington, D.C. area). Additionally, information may be obtained from the Office of Hazardous Materials Safety via the Internet at <http://hazmat.dot.gov>.

(2) RSPA's Office of the Chief Counsel (OCC) is available to answer questions concerning Federal hazardous material transportation law, 49 USC 5101 *et seq.* and Federal preemption of state, local and Indian tribe hazardous material transportation requirements. OCC may be contacted by telephone (202-366-4400) from 9:00 a.m. to 4:00 p.m. Eastern time, Monday through Friday, except Federal holidays. Information and guidance concerning Federal hazardous material transportation law and preemption may also be obtained by contacting OCC via the Internet at <http://rspa-atty.dot.gov>.

(b) *Availability of Written Interpretations.* (1) A written regulatory clarification, response to a question, or an opinion concerning hazardous materials offering, transporting, or packaging requirements may be obtained by submitting a written request to the RSPA Office of Hazardous Materials Standards (DHM-10), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. The requestor must include his or her return address and should also include a daytime telephone number.

(2) A written interpretation regarding Federal hazardous material transportation law, 49 USC 5101 *et seq.*, may be obtained from the Office of the Chief Counsel (DCC-1) RSPA, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. The requestor must include his or her return address and should also include a daytime telephone number.

[62 FR 24057, May 2, 1997 as amended at 62 FR 34415, June 26, 1997; 64 FR 51914, Sept. 27, 1999; 65 FR 58618, Sept. 29, 2000]

Subpart B—Exemptions

SOURCE: Amdt. 107-38, 61 FR 21095, May 9, 1996, unless otherwise noted.

§ 107.101 Purpose and scope.

This subpart prescribes procedures for the issuance, modification and termination of exemptions from requirements of this subchapter, subchapter C of this chapter, or regulations issued under chapter 51 of 49 U.S.C.

§ 107.105 Application for exemption.

(a) *General.* Each application for an exemption or modification of an exemption must be written in English and must—

(1) Be submitted in duplicate and, for timely consideration, at least 120 days before the requested effective date to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001. Attention: Exemptions, DHM-31;

(2) State the name, street and mailing addresses, e-mail address optional, and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, e-mail address optional, and telephone number of an individual designated as an agent of the applicant for all purposes related to the application;

(3) If the applicant is not a resident of the United States, a designation of agent for service in accordance with § 107.7 of this part; and

(4) For a manufacturing exemption, a statement of the name and street address of each facility where manufacturing under the exemption will occur.

(b) *Confidential treatment.* To request confidential treatment for information contained in the application, the applicant shall comply with § 107.5(a).

(c) *Description of exemption proposal.* The application must include the following information that is relevant to the exemption proposal:

(1) A citation of the specific regulation from which the applicant seeks relief;

(2) Specification of the proposed mode or modes of transportation;

(3) A detailed description of the proposed exemption (e.g., alternative packaging, test, procedure or activity) including, as appropriate, written descriptions, drawings, flow charts, plans and other supporting documents;

(4) A specification of the proposed duration or schedule of events for which the exemption is sought;

(5) A statement outlining the applicant's basis for seeking relief from compliance with the specified regulations and, if the exemption is requested for a fixed period, a description of how

compliance will be achieved at the end of that period;

(6) If the applicant seeks emergency processing specified in §107.117, a statement of supporting facts and reasons;

(7) Identification and description of the hazardous materials planned for transportation under the exemption;

(8) Description of each packaging, including specification or exemption number, as applicable, to be used in conjunction with the requested exemption;

(9) For alternative packagings, documentation of quality assurance controls, package design, manufacture, performance test criteria, in-service performance and service-life limitations.

(d) *Justification of exemption proposal.* The application must demonstrate that an exemption achieves a level of safety at least equal to that required by regulation, or if a required safety level does not exist, is consistent with the public interest. At a minimum, the application must provide the following:

(1) Information describing all relevant shipping and incident experience of which the applicant is aware that relates to the application;

(2) A statement identifying any increased risk to safety or property that may result if the exemption is granted, and a description of the measures to be taken to address that risk; and

(3) Either—

(i) Substantiation, with applicable analyses, data or test results, that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the exemption is sought; or

(ii) If the regulations do not establish a level of safety, an analysis that identifies each hazard, potential failure mode and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled for the duration of an activity or life-cycle of a packaging.

[Amdt. 107-38, 61 FR 21095, May 9, 1996, as amended at 62 FR 51556, Oct. 1, 1997; 65 FR 50457, Aug. 18, 2000; 65 FR 58618, Sept. 29, 2000]

§ 107.107 Application for party status.

(a) Any person eligible to apply for an exemption may apply to be made

party to an application or an existing exemption, other than a manufacturing exemption.

(b) Each application filed under this section must—

(1) Be submitted in duplicate to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001. Attention: Exemptions, DHM-31;

(2) Identify by number the exemption application or exemption to which the applicant seeks to become a party;

(3) State the name, street and mailing addresses, e-mail address optional, and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, e-mail address optional, and telephone number of an individual designated as the applicant's agent for all purposes related to the application; and

(4) If the applicant is not a resident of the United States, provide a designation of agent for service in accordance with §107.7.

(c) The Associate Administrator grants or denies an application for party status in the manner specified in §107.113(e) and (f) of this subpart.

(d) A party to an exemption is subject to all terms of that exemption, including the expiration date. If a party to an exemption wishes to renew party status, the exemption renewal procedures set forth in §107.109 apply.

[Amdt. 107-38, 61 FR 21095, May 9, 1996, as amended at 65 FR 50457, Aug. 18, 2000]

§ 107.109 Application for renewal.

(a) Each application for renewal of an exemption or party status to an exemption must—

(1) Be submitted in duplicate to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001. Attention: Exemptions, DHM-31;

(2) Identify by number the exemption for which renewal is requested;

(3) State the name, street and mailing addresses, e-mail address optional, and telephone number of the applicant; if the applicant is not an individual,

§ 107.111

state the name, street and mailing addresses, e-mail address optional, and telephone number of an individual designated as an agent of the applicant for all purposes related to the application;

(4) Include either a certification by the applicant that the original application, as it may have been updated by any application for renewal, remains accurate and complete; or include an amendment to the previously submitted application as is necessary to update and assure the accuracy and completeness of the application, with certification by the applicant that the application as amended is accurate and complete; and

(5) Include a statement describing all relevant shipping and incident experience of which the applicant is aware in connection with the exemption since its issuance or most recent renewal. If the applicant is aware of no incidents, the applicant shall so certify. When known to the applicant, the statement should indicate the approximate number of shipments made or packages shipped, as the case may be, and number of shipments or packages involved in any loss of contents, including loss by venting other than as authorized in subchapter C.

(b) If at least 60 days before an existing exemption expires the holder files an application for renewal that is complete and conforms to the requirements of this section, the exemption will not expire until final administrative action on the application for renewal has been taken.

[Amdt. 107-38, 61 FR 21095, May 9, 1996, as amended at 65 FR 50457, Aug. 18, 2000]

§ 107.111 **Withdrawal.**

An application may be withdrawn at any time before a decision to grant or deny it is made. Withdrawal of an application does not authorize the removal of any related records from the RSPA dockets or files. Applications that are eligible for confidential treatment under § 107.5 will remain confidential after the application is withdrawn. The duration of this confidential treatment for trade secrets and commercial or financial information is indefinite, unless the party requesting the confidential treatment of the materials notifies the Associate Administrator

49 CFR Ch. I (10-1-00 Edition)

that the confidential treatment is no longer required.

§ 107.113 **Application processing and evaluation.**

(a) The Associate Administrator reviews an application for exemption, modification of exemption, party to exemption, or renewal of an exemption to determine if it is complete and conforms with the requirements of this subpart. This determination will be made within 30 days of receipt of the application for exemption, modification of exemption, or party to exemption, and within 15 days of receipt of an application for renewal of an exemption. If an application is determined to be incomplete, the applicant is informed of the reasons.

(b) An application, other than a renewal, party to, or emergency exemption application, that is determined to be complete is docketed. Notice of the application is published in the FEDERAL REGISTER, and an opportunity for public comment is provided. All comments received during the comment period are considered before final action is taken on the application.

(c) No public hearing or other formal proceeding is required under this subpart before the disposition of an application. Unless emergency processing under § 107.117 is requested and granted, applications are usually processed in the order in which they are filed.

(d) During the processing and evaluation of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, the application may be deemed incomplete and denied. However, if the applicant responds in writing within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension.

(e) The Associate Administrator may grant or deny an application, in whole or in part. In the Associate Administrator's discretion, an application may be granted subject to provisions that

are appropriate to protect health, safety or property. The Associate Administrator may impose additional provisions not specified in the application or remove conditions in the application that are unnecessary.

(f) The Associate Administrator may grant an application on finding that—

(1) The application complies with this subpart;

(2) The application demonstrates that the proposed alternative will achieve a level of safety that:

(i) Is at least equal to that required by the regulation from which the exemption is sought, or

(ii) If the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce;

(3) The application states all material facts, and contains no materially false or materially misleading statement;

(4) The applicant meets the qualifications required by applicable regulations; and

(5) The applicant is fit to conduct the activity authorized by the exemption. This assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.

(g) An applicant is notified in writing whether the application is granted or denied. A denial contains a brief statement of reasons.

(h) An exemption and any renewal thereof terminates according to its terms or, if not otherwise specified, two years after the date of issuance. A grant of party status to an exemption, unless otherwise stated, terminates on the date that the exemption expires.

(i) The Associate Administrator, on determining that an application concerns a matter of general applicability and future effect and should be the subject of rulemaking, may initiate rulemaking under part 106 of this chapter in addition to or instead of acting on the application.

(j) The Associate Administrator publishes in the FEDERAL REGISTER a list of all exemption grants, denials, and

modifications and all exemption applications withdrawn under this section.

§ 107.117 Emergency processing.

(a) An application is granted emergency processing if the Associate Administrator, on the basis of the application and any inquiry undertaken, finds that—

(1) Emergency processing is necessary to prevent significant injury to persons or property (other than the hazardous material to be transported) that could not be prevented if the application were processed on a routine basis; or

(2) Emergency processing is necessary for immediate national security purposes or to prevent significant economic loss that could not be prevented if the application were processed on a routine basis.

(b) Where the significant economic loss is to the applicant, or to a party in a contractual relationship to the applicant with respect to the activity to be undertaken, the Associate Administrator may deny emergency processing if timely application could have been made.

(c) A request for emergency processing on the basis of potential economic loss must reasonably describe and estimate the potential loss.

(d) An application submitted under this section must conform to § 107.105 to the extent that the receiving U.S. Department of Transportation official deems necessary to process the application. An application on an emergency basis must be submitted to the U.S. Department of Transportation modal contact official for the initial mode of transportation to be utilized, as follows:

(1) *Certificate-Holding Aircraft*: The Federal Aviation Administration Civil Aviation Security Office that serves the place where the flight will originate or that is responsible for the aircraft operator's overall aviation security program. The nearest Civil Aviation Security Office may be located by calling the FAA Duty Officer, 202-267-3333 (any hour).

(2) *Noncertificate-Holding Aircraft (Those Which Operate Under 14 CFR Part 91)*: The Federal Aviation Administration Civil Aviation Security Office that

§ 107.121

49 CFR Ch. I (10–1–00 Edition)

serves the place where the flight will originate. The nearest Civil Aviation Security Office may be located by calling the FAA Duty Officer, 202–267–3333 (any hour).

(3) *Motor Vehicle Transportation*: Director, Office of Motor Carrier Research and Standards, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, Washington, DC 20590–0001, 202–366–4001 (day); 202–267–2100 (night).

(4) *Rail Transportation*: Staff Director, Hazardous Materials Division, Office of Safety Assurance and Compliance, Federal Railroad Administration, U.S. Department of Transportation, Washington, DC 20590–0001, 202–493–6247 or 202–493–6244 (day); 202–267–2100 (night).

(5) *Water Transportation*: Chief, Hazardous Materials Standards Division, Office of Operating and Environmental Standards, United States Coast Guard, U.S. Department of Transportation, Washington, DC 20593–0001, 202–267–1577 (day); 202–267–2100 (night).

(e) On receipt of all information necessary to process the application, the receiving Department of Transportation official transmits to the Associate Administrator, by the most rapid available means of communication, an evaluation as to whether an emergency exists under § 107.117(a) and, if appropriate, recommendations as to the conditions to be included in the exemption. If the Associate Administrator determines that an emergency exists under § 107.117(a) and that, with reference to the criteria of § 107.113(f), granting of the application is in the public interest, the Associate Administrator grants the application subject to such terms as necessary and immediately notifies the applicant. If the Associate Administrator determines that an emergency does not exist or that granting of the application is not in the public interest, the applicant immediately is so notified.

(f) A determination that an emergency does not exist is not subject to reconsideration under § 107.123 of this part.

(g) Within 90 days following issuance of an emergency exemption, the Associate Administrator will publish, in the FEDERAL REGISTER, a notice of issuance with a statement of the basis

for the finding of emergency and the scope and duration of the exemption.

[Amdt. 107–38, 61 FR 21095, May 9, 1996, as amended at 62 FR 51556, Oct. 1, 1997; 64 FR 51914, Sept. 27, 1999; 65 FR 58618, Sept. 29, 2000]

§ 107.121 Modification, suspension or termination of exemption or grant of party status.

(a) The Associate Administrator may modify an exemption or grant of party status on finding that—

(1) Modification is necessary so that an exemption reflects current statutes and regulations; or

(2) Modification is required by changed circumstances to meet the standards of § 107.113(f).

(b) The Associate Administrator may modify, suspend or terminate an exemption or grant of party status, as appropriate, on finding that—

(1) Because of a change in circumstances, the exemption or party status no longer is needed or no longer would be granted if applied for;

(2) The application contained inaccurate or incomplete information, and the exemption or party status would not have been granted had the application been accurate and complete;

(3) The application contained deliberately inaccurate or incomplete information; or

(4) The holder or party knowingly has violated the terms of the exemption or an applicable requirement of this chapter, in a manner demonstrating the holder or party is not fit to conduct the activity authorized by the exemption.

(c) Except as provided in paragraph (d) of this section, before an exemption or grant of party status is modified, suspended or terminated, the Associate Administrator notifies the holder or party in writing of the proposed action and the reasons for it, and provides an opportunity to show cause why the proposed action should not be taken.

(1) The holder or party may file a written response that shows cause why the proposed action should not be taken within 30 days of receipt of notice of the proposed action.

(2) After considering the holder's or party's written response, or after 30 days have passed without response

since receipt of the notice, the Associate Administrator notifies the holder or party in writing of the final decision with a brief statement of reasons.

(d) The Associate Administrator, if necessary to avoid a risk of significant harm to persons or property, may in the notification declare the proposed action immediately effective.

§ 107.123 Reconsideration.

(a) An applicant for exemption, an exemption holder, or an applicant for party status to an exemption may request that the Associate Administrator reconsider a decision under §107.113(g), §107.117(e) or §107.121(c) of this part. The request must—

(1) Be in writing and filed within 20 days of receipt of the decision;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the request to reconsider; and

(4) State in detail the modification of the final decision sought.

(b) The Associate Administrator grants or denies, in whole or in part, the relief requested and informs the requesting person in writing of the decision. If necessary to avoid a risk of significant harm to persons or property, the Associate Administrator may, in the notification, declare the action immediately effective.

§ 107.125 Appeal.

(a) A person who requested reconsideration under §107.123 and is denied the relief requested may appeal to the Administrator. The appeal must—

(1) Be in writing and filed within 30 days of receipt of the Associate Administrator's decision on reconsideration;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the appeal; and

(4) State in detail the modification of the final decision sought.

(b) The Administrator, if necessary to avoid a risk of significant harm to persons or property, may declare the Associate Administrator's action effective pending a decision on appeal.

(c) The Administrator grants or denies, in whole or in part, the relief requested and informs the appellant in

writing of the decision. The Administrator's decision is the final administrative action.

§ 107.127 Availability of documents for public inspection.

(a) Documents related to an application under this subpart, including the application itself, are available for public inspection, except as specified in paragraph (b) of this section, at the Office of the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, Dockets Unit, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001, Room 8421. Office hours are 8:30 a.m. to 5:00 p.m., Monday through Friday, except holidays when the office is closed. Copies of available documents may be obtained as provided in part 7 of this title. Documents numbered 11832 and above may also be viewed at the internet website address <http://dms.dot.gov>.

(b) Documents available for inspection do not include materials determined to be withheld from public disclosure under §107.5 and in accordance with the applicable provisions of section 552(b) of title 5, United States Code, and part 7 of this title.

[Amdt. 107-38, 61 FR 21095, May 9, 1996, as amended at 65 FR 58618, Sept. 29, 2000]

Subpart C—Preemption

§ 107.201 Purpose and scope.

(a) This subpart prescribes procedures by which:

(1) Any person, including a State, political subdivision, or Indian tribe, directly affected by any requirement of a State, political subdivision, or Indian tribe, may apply for a determination as to whether that requirement is preempted under 49 U.S.C. 5125, or regulations issued thereunder; and

(2) A State, political subdivision, or Indian tribe may apply for a waiver of preemption with respect to any requirement that the State, political subdivision, or Indian tribe acknowledges to be preempted by 49 U.S.C. 5125, or regulations issued thereunder, or that has been determined by a court of competent jurisdiction to be so preempted.

§ 107.202

49 CFR Ch. I (10–1–00 Edition)

(b) For purposes of this subpart “political subdivision” includes a municipality; a public agency or other instrumentality of one or more States, municipalities, or other political subdivisions of a State; or a public corporation, board, or commission established under the laws of one or more States.

(c) For purposes of this subpart, “regulations issued under the Federal hazardous material transportation law” means the regulations contained in this subchapter and subchapter C of this chapter.

(d) Unless otherwise ordered by the Associate Administrator, an application for a preemption determination which includes an application for a waiver of preemption will be treated and processed solely as an application for a preemption determination.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-24, 56 FR 8622, Feb. 28, 1991; Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-32, 59 FR 49130, Sept. 26, 1994; Amdt. 107-35, 60 FR 49108, Sept. 21, 1995; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.202 Standards for determining preemption.

(a) Except as provided in § 107.221 and unless otherwise authorized by Federal law, any requirement of a State or political subdivision thereof or an Indian tribe, that concerns one of the following subjects and that is not substantively the same as any provision of the Federal hazardous material transportation law, this subchapter or subchapter C that concerns that subject, is preempted:

(1) The designation, description, and classification of hazardous material.

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(3) The preparation, execution, and use of shipping documents pertaining to hazardous material and requirements related to the number, content, and placement of those documents.

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(5) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container which is rep-

resented, marked, certified, or sold as qualified for use in the transportation of hazardous material.

(b) Except as provided in § 107.221 and unless otherwise authorized by Federal law, any requirement of a State or political subdivision or Indian tribe is preempted if—

(1) Complying with a requirement of the State, political subdivision, or Indian tribe and a requirement under the Federal hazardous material transportation law or regulations issued thereunder is not possible;

(2) The requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law or regulations issued thereunder; or

(3) It is preempted under 49 U.S.C. 5125 (c).

(c) A State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing and maintaining a capability for emergency response.

(d) For purposes of this section, “substantively the same” means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.

[Amdt. 107-24, 56 FR 8622, Feb. 28, 1991, as amended by Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-29, 58 FR 51527, Oct. 1, 1993; Amdt. 107-32, 59 FR 49130, Sept. 26, 1994; Amdt. 107-38, 61 FR 21098, May 9, 1996; Amdt. 107-39, 61 FR 51337, Oct. 1, 1996]

PREEMPTION DETERMINATIONS

§ 107.203 Application.

(a) With the exception of highway routing matters covered under 49 U.S.C. 5125(c), any person, including a State or political subdivision thereof or an Indian tribe, directly affected by any requirement of a State or political subdivision thereof or an Indian tribe, may apply to the Associate Administrator for a determination of whether that requirement is preempted by § 107.202 (a) or (b).

(b) Each application filed under this section for a determination must:

(1) Be submitted to Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Attention: Hazardous Materials Preemption Docket;

(2) Set forth the text of the State or political subdivision or Indian tribe requirement for which the determination is sought;

(3) Specify each requirement of the Federal hazardous material transportation law or the regulations issued thereunder with which the applicant seeks the State or political subdivision or Indian tribe requirement to be compared;

(4) Explain why the applicant believes the State or political subdivision or Indian tribe requirement should or should not be preempted under the standards of § 107.202; and

(5) State how the applicant is affected by the State or political subdivision or Indian tribe requirement.

(c) The filing of an application for a determination under this section does not constitute grounds for noncompliance with any requirement of the Federal hazardous material transportation law or the regulations issued thereunder.

(d) Once the Associate Administrator has published notice in the FEDERAL REGISTER of an application received under paragraph (a) of this section, no applicant for such determination may seek relief with respect to the same or substantially the same issue in any court until final action has been taken on the application or until 180 days after filing of the application, whichever occurs first. Nothing in § 107.203(a) prohibits a State or political subdivision or Indian tribe, or any other person directly affected by any requirement of a State or political subdivision thereof or Indian tribe, from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Associate Adminis-

trator under paragraph (a) of this section.

[Amdt. 107-24, 56 FR 8622, Feb. 28, 1991, as amended by Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.205 Notice.

(a) If the applicant is other than a State, political subdivision, or Indian tribe, the applicant shall mail a copy of the application to the State, political subdivision, or Indian tribe concerned accompanied by a statement that the State, political subdivision, or Indian tribe may submit comments regarding the application to the Associate Administrator. The application filed with the Associate Administrator must include a certification that the applicant has complied with this paragraph and must include the names and addresses of each State, political subdivision, or Indian tribe official to whom a copy of the application was sent.

(b) The Associate Administrator will publish notice of, including an opportunity to comment on, an application in the FEDERAL REGISTER and may notify in writing any person readily identifiable as affected by the outcome of the determination.

(c) Each person submitting written comments to the Associate Administrator with respect to an application filed under this section shall send a copy of the comments to the applicant and certify to the Associate Administrator that he or she has complied with this requirement. The Associate Administrator may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond. Late-filed comments are considered so far as practicable.

[Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.207 Processing.

(a) The Associate Administrator may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Associate Administrator may solicit and accept submissions from third persons

§ 107.209

relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Associate Administrator may consider any other source of information. The Associate Administrator on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Associate Administrator may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination; or

(2) He or she requests additional information from the applicant and it is not submitted.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-24, 56 FR 8621, 8622, Feb. 28, 1991; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.209 Determination.

(a) Upon consideration of the application and other relevant information received, the Associate Administrator issues a determination.

(b) The determination includes a written statement setting forth the relevant facts and the legal basis for the determination, and provides that any person aggrieved thereby may file a petition for reconsideration with the Associate Administrator.

(c) The Associate Administrator provides a copy of the determination to the applicant and to any other person who substantially participated in the proceeding or requested in comments to the docket to be notified of the determination. A copy of each determination is placed on file in the public docket. The Associate Administrator will publish the determination or notice of the determination in the FEDERAL REGISTER.

(d) A determination issued under this section constitutes an administrative determination as to whether a particular requirement of a State or political subdivision or Indian tribe is preempted under the Federal hazardous material transportation law or regulations issued thereunder. The fact that a determination has not been issued

49 CFR Ch. I (10-1-00 Edition)

under this section with respect to a particular requirement of a State or political subdivision or Indian tribe carries no implication as to whether the requirement is preempted under the Federal hazardous material transportation law or regulations issued hereunder.

[Amdt. 107-24, 56 FR 8623, Feb. 28, 1991, as amended by Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.211 Petition for reconsideration.

(a) Any person aggrieved by a determination issued under § 107.209 may file a petition for reconsideration with the Associate Administrator. The petition must be filed within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of information that was not previously made available to the Associate Administrator, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the preemption determination proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Associate Administrator within 20 days. The petition filed with the Associate Administrator must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Associate Administrator's decision constitutes final agency action.

[Amdt. 107-25, 57 FR 20428, May 13, 1992, as amended by Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.213 Judicial review.

A party to a proceeding under § 107.203(a) may seek review by the appropriate district court of the United States of a decision of the Associate Administrator by filing a petition with

the court within 60 days after the Associate Administrator's determination becomes final. The determination becomes final when it is published in the FEDERAL REGISTER.

[Amdt. 107-38, 61 FR 21099, May 9, 1996]

WAIVER OF PREEMPTION
DETERMINATIONS

§ 107.215 Application.

(a) With the exception of requirements preempted under 49 U.S.C. 5125(c), any State or political subdivision thereof, or Indian tribe may apply to the Associate Administrator for a waiver of preemption with respect to any requirement that the State or political subdivision thereof or an Indian tribe acknowledges to be preempted under the Federal hazardous material transportation law or the regulations issued thereunder, or that has been determined by a court of competent jurisdiction to be so preempted. The Associate Administrator may waive preemption with respect to such requirement upon a determination that such requirement—

(1) Affords an equal or greater level of protection to the public than is afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder, and

(2) Does not unreasonably burden commerce.

(b) Each application filed under this section for a waiver of preemption determination must:

(1) Be submitted to the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Attention: Hazardous Materials Preemption Docket;

(2) Set forth the text of the State or political subdivision requirement for which the determination is being sought;

(3) Include a copy of any court order and any ruling issued under § 107.209 having a bearing on the application;

(4) Contain an express acknowledgment by the applicant that the State, political subdivision, or Indian tribe requirement is preempted under the Federal hazardous material transpor-

tation law or the regulations issued thereunder, unless it has been so determined by a court of competent jurisdiction or in a determination issued under § 107.209;

(5) Specify each requirement of the Federal hazardous material transportation law or the regulations issued thereunder that preempts the State, political subdivision, or Indian tribe requirement;

(6) State why the applicant believes the State, political subdivision or Indian tribe requirements affords an equal or greater level of protection to the public than is afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder;

(7) State why the applicant believes the State, political subdivision or Indian tribe requirement does not unreasonably burden commerce; and

(8) Specify what steps the State, political subdivision or Indian tribe is taking to administer and enforce effectively its inconsistent requirement.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-22, 55 FR 39978, Oct. 1, 1990; Amdt. 107-24, 56 FR 8621, 8623, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107-23, 56 FR 66156, Dec. 20, 1991; Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.217 Notice.

(a) The applicant shall mail a copy of the application and any subsequent amendments or other documents relating to the application to each person who is reasonably ascertainable by the applicant as a person who will be affected by the determination sought. The copy of the application must be accompanied by a statement that the person may submit comments regarding the application to the Associate Administrator within 45 days. The application filed with the Associate Administrator must include a certification that the application has complied with this paragraph and must include the names and addresses of each person to whom the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the

§ 107.219

49 CFR Ch. I (10-1-00 Edition)

State or political subdivision determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application filed with the Associate Administrator a description of the persons or class or classes of persons to whom notice was not sent.

(c) The Associate Administrator may require the applicant to provide notice in addition to that required by paragraphs (a) and (b) of this section, or may determine that the notice required by paragraph (a) of the section is not impracticable, or that notice should be published in the FEDERAL REGISTER. Late-filed comments are considered so far as practicable.

(d) The Associate Administrator may notify any other persons who may be affected by the outcome of a determination on the application.

(e) Any person submitting written comments to the Associate Administrator with respect to an application filed under this section shall send a copy of the comments to the applicant. The person shall certify to the Associate Administrator that he has complied with the requirements of this paragraph. The Associate Administrator may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-25, 57 FR 20429, May 13, 1992; Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.219 Processing.

(a) The Associate Administrator may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Associate Administrator may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Associate Administrator on his or her own initiative may convene a hearing

or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Associate Administrator may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination;

(2) Upon his or her request, additional information is not submitted by the applicant; or

(3) The applicant fails to provide the notice required by § 107.217.

(c) Except as provided in § 107.201(c), the Associate Administrator will only consider an application for a waiver of preemption determination if:

(1) The applicant State or political subdivision thereof or Indian tribe expressly acknowledges in its application that the State or political subdivision thereof or Indian tribe requirement for which the determination is sought is inconsistent with the requirements of the Federal hazardous material transportation law or the regulations issued thereunder; or

(2) The State or political subdivision thereof or Indian tribe requirement has been determined by a court of competent jurisdiction or in a ruling issued under § 107.209 to be inconsistent with the requirements of the Federal hazardous material transportation law or the regulations issued thereunder.

(d) When the Associate Administrator has received all substantive information it considers necessary to process an application for a waiver of preemption determination, it serves notice of that fact upon the applicant and all other persons who received notice of the proceeding pursuant to § 107.217.

(e) To the extent possible, each application for a waiver of preemption determination will be acted upon in a manner consistent with the disposition of previous applications for waiver of preemption determinations.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-24, 56 FR 8621, 8623, Feb. 28, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21099, May 9, 1996; 65 FR 58618, Sept. 29, 2000]

§ 107.221 Determination.

(a) After considering the application and other relevant information received or obtained during the proceeding, the Associate Administrator issues a determination.

(b) The Associate Administrator may issue a waiver of preemption only on finding that the requirement of the State or political subdivision thereof or Indian tribe affords the public a level of safety at least equal to that afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder and does not unreasonably burden commerce. In determining if the requirement of the State or political subdivision thereof or Indian tribe unreasonably burdens commerce, the Associate Administrator considers:

(1) The extent to which increased costs and impairment of efficiency result from the requirement of the State or political subdivision thereof or Indian tribe.

(2) Whether the requirement of the State or political subdivision thereof or Indian tribe has a rational basis.

(3) Whether the requirement of the State or political subdivision thereof or Indian tribe achieves its stated purpose.

(4) Whether there is need for uniformity with regard to the subject concerned and if so, whether the requirement of the State or political subdivision thereof or Indian tribe competes or conflicts with those of other States or political subdivisions thereof or Indian tribes.

(c) The determination includes a written statement setting forth relevant facts and legal bases and providing that any person aggrieved by the determination may file a petition for reconsideration with the Associate Administrator.

(d) The Associate Administrator provides a copy of the determination to the applicant and to any other person who substantially participated in the proceeding or requested in comments to the docket to be notified of the determination. A copy of the determination is placed on file in the public docket. The Associate Administrator will publish the determination or no-

tice of the determination in the FEDERAL REGISTER.

(e) A determination under this section constitutes an administrative finding of whether a particular requirement of a State or political subdivision thereof or Indian tribe is preempted under the Federal hazardous material transportation law or any regulation issued thereunder, or whether preemption is waived.

[Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.223 Petition for reconsideration.

(a) Any person aggrieved by a determination under § 107.221 may file a petition for reconsideration with the Associate Administrator. The petition must be filed within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of information that was not previously made available to the Associate Administrator, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the waiver of preemption proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Associate Administrator within 20 days. The petition filed with the Associate Administrator must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Associate Administrator's decision constitutes final agency action.

[Amdt. 107-25, 57 FR 20429, May 13, 1992, as amended by Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.227 Judicial review.

A party to a proceeding under § 107.215(a) may seek review by the appropriate district court of the United States of a decision of the Associate

§ 107.301

Administrator by filing a petition with the court within 60 days after the Associate Administrator's determination becomes final. The determination becomes final when it is published in the FEDERAL REGISTER.

[Amdt. 107-38, 61 FR 21099, May 9, 1996]

Subpart D—Enforcement

SOURCE: Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, unless otherwise noted.

§ 107.301 Delegated authority for enforcement.

Under redelegation from the Administrator, Research and Special Programs Administration, the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel exercise their authority for enforcement of the Federal hazardous material transportation law, this subchapter, and subchapter C of this subchapter, in accordance with §1.53 of this title.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

§ 107.303 Purpose and scope.

This subchapter describes the various enforcement authorities exercised by the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel and the associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposition of those sanctions.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-15, 51 FR 34986, Oct. 1, 1986; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991]

§ 107.305 Investigations.

(a) *General.* In accordance with its delegated authority under part 1 of this title, the Associate Administrator for Hazardous Materials Safety may initiate investigations relating to compliance by any person with any provisions of this subchapter or subchapter C of this chapter, or any exemption, approval, or order issued thereunder, or any court decree relating thereto. The Associate Administrator for Hazardous Materials Safety encourages voluntary production of documents in accordance

49 CFR Ch. I (10-1-00 Edition)

with and subject to §107.13, and hearings may be conducted, and depositions taken pursuant to 49 U.S.C. 5121(a). The Associate Administrator for Hazardous Materials Safety may conduct investigative conferences and hearings in the course of any investigation.

(b) *Investigations and Inspections.* Investigations under 49 U.S.C. 5121(a) are conducted by personnel duly authorized for that purpose by the Associate Administrator. Inspections under 49 U.S.C. 5121(c) are conducted by Hazardous Materials Enforcement Specialists, also known as "hazmat inspectors" or "inspectors," whom the Associate Administrator has designated for that purpose.

(1) An inspector will, on request, present his or her credentials for examination, but the credentials may not be reproduced.

(2) An inspector may administer oaths and receive affirmations in any matter under investigation by the Associate Administrator.

(3) An inspector may gather information by reasonable means including, but not limited to, interviews, statements, photocopying, photography, and video- and audio-recording.

(4) With concurrence of the Director, Office of Hazardous Materials Enforcement, Research and Special Programs Administration, an inspector may issue a subpoena for the production of documentary or other tangible evidence if, on the basis of information available to the inspector, the documents and evidence materially will advance a determination of compliance with this subchapter or subchapter C. Service of a subpoena shall be in accordance with §107.13 (c) and (d). A person to whom a subpoena is directed may seek review of the subpoena by applying to the Office of Chief Counsel in accordance with §107.13(h). A subpoena issued under this paragraph may be enforced in accordance with §107.13(i).

(c) *Notification.* Any person who is the subject of an Associate Administrator for Hazardous Materials Safety investigation and who is requested to furnish information or documentary evidence is notified as to the general purpose for which the information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the person being investigated is notified and the investigative file is closed without prejudice to further investigation by the Associate Administrator for Hazardous Materials Safety.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall remain confidential under the investigatory file exception, or other appropriate exception, to the public disclosure requirements of 5 U.S.C. 552.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21099, May 9, 1996]

COMPLIANCE ORDERS AND CIVIL
PENALTIES

§ 107.307 General.

(a) When the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel have reason to believe that a person is knowingly engaging or has knowingly engaged in conduct which is a violation of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, or order issued thereunder, for which the Associate Administrator for Hazardous Materials Safety or the Office of the Chief Counsel exercise enforcement authority, they may—

(1) Issue a warning letter, as provided in § 107.309;

(2) Initiate proceedings to assess a civil penalty, as provided in either §§ 107.310 or 107.311;

(3) Issue an order directing compliance, regardless of whether a warning letter has been issued or a civil penalty assessed; and

(4) Seek any other remedy available under the Federal hazardous material transportation law.

(b) In the case of a proceeding initiated for failure to comply with an exemption, the allegation of a violation of a term or condition thereof is con-

sidered by the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel to constitute an allegation that the exemption holder or party to the exemption is failing, or has failed to comply with the underlying regulations from which relief was granted by the exemption.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-36, 61 FR 7183, Feb. 26, 1996]

§ 107.309 Warning letters.

(a) The Associate Administrator for Hazardous Materials Safety may issue a warning letter to any person whom the Associate Administrator for Hazardous Materials Safety believes to have committed a probable violation of the Federal hazardous material transportation law or any provision of this subchapter, subchapter C of this chapter, or any exemption issued thereunder.

(b) A warning letter issued under this section includes:

(1) A statement of the facts upon which the Associate Administrator for Hazardous Materials Safety bases its determination that the person has committed a probable violation;

(2) A statement that the recurrence of the probable violations cited may subject the person to enforcement action; and

(3) An opportunity to respond to the warning letter by submitting pertinent information or explanations concerning the probable violations cited therein.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-15, 51 FR 34986, Oct. 1, 1986; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-36, 61 FR 7183, Feb. 26, 1996]

§ 107.310 Ticketing.

(a) For an alleged violation that does not have a direct or substantial impact on safety, the Associate Administrator for Hazardous Materials Safety may issue a ticket.

(b) The Associate Administrator for Hazardous Materials Safety issues a ticket by mailing it by certified or registered mail to the person alleged to have committed the violation. The ticket includes:

§ 107.311

49 CFR Ch. I (10–1–00 Edition)

(1) A statement of the facts on which the Associate Administrator bases the conclusion that the person has committed the alleged violation;

(2) The maximum penalty provided for by statute, the proposed full penalty determined according to RSPA's civil penalty guidelines and the statutory criteria for penalty assessment, and the ticket penalty amount; and

(3) A statement that within 45 days of receipt of the ticket, the person must pay the penalty in accordance with paragraph (d) of this section, make an informal response under §107.317, or request a formal administrative hearing under §107.319.

(c) If the person makes an informal response or requests a formal administrative hearing, the Associate Administrator for Hazardous Materials Safety forwards the inspection report, ticket and response to the Office of the Chief Counsel for processing under §§107.307–107.339, except that the Office of the Chief Counsel will not issue a Notice of Probable Violation under §107.311. The Office of the Chief Counsel may impose a civil penalty that does not exceed the proposed full penalty set forth in the ticket.

(d) Payment of the ticket penalty amount must be made in accordance with the instructions on the ticket.

(e) If within 45 days of receiving the ticket the person does not pay the ticket amount, make an informal response, or request a formal administrative hearing, the person has waived the right to make an informal response or request a hearing, has admitted the violation and owes the ticket penalty amount to RSPA.

[Amdt. 107–36, 61 FR 7183, Feb. 26, 1996]

§ 107.311 Notice of probable violation.

(a) The Office of Chief Counsel may serve a notice of probable violation on a person alleging the violation of one or more provisions of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, or order issued thereunder.

(b) A notice of probable violation issued under this section includes the following information:

(1) A citation of the provisions of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or the terms of any exemption issued thereunder which the Office of Chief Counsel believes the respondent is violating or has violated.

(2) A statement of the factual allegations upon which the demand for remedial action, a civil penalty, or both, is based.

(3) A statement of the respondent's right to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the notice of probable violation.

(4) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

(5) In addition, in the case of a notice of probable violation proposing a compliance order, a statement of the proposed actions to be taken by the respondent to achieve compliance.

(6) In addition, in the case of a notice of probable violation proposing a civil penalty:

(i) A statement of the maximum civil penalty for which the respondent may be liable;

(ii) The amount of the preliminary civil penalty being sought by the Office of Chief Counsel, constitutes the maximum amount the Chief Counsel may seek throughout the proceeding; and

(iii) A description of the manner in which the respondent makes payment of any money due the United States as a result of the proceeding.

(c) The Office of Chief Counsel may amend a notice of probable violation at any time before issuance of a compliance order or an order assessing a civil penalty. If the Office of Chief Counsel alleges any new material facts or seeks new or additional remedial action or an increase in the amount of the proposed civil penalty, it issues a new notice of probable violation under this section.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107–24, 56 FR 8624, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; Amdt. 107–36, 61 FR 7184, Feb. 26, 1996]

§ 107.313 Reply.

(a) Within 30 days of receipt of a notice of probable violation, the respondent must either:

(1) Admit the violation under § 107.315;

(2) Make an informal response under § 107.317; or

(3) Request a hearing under § 107.319.

(b) Failure of the respondent to file a reply as provided in this section constitutes a waiver of the respondent's right to appear and contest the allegations and authorizes the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and issue an order directing compliance or assess a civil penalty, or, if proposed in the notice, both. Failure to request a hearing under paragraph (a)(3) of this section constitutes a waiver of the respondent's right to a hearing.

(c) Upon the request of the respondent, the Office of Chief Counsel may, for good cause shown and filed within the 30 days prescribed in the notice of probable violation, extend the 30-day response period.

§ 107.315 Admission of violations.

(a) In responding to a notice of probable violation issued under § 107.311, the respondent may admit the alleged violations and agree to accept the terms of a proposed compliance order or to pay the amount of the preliminarily assessed civil penalty, or, if proposed in the notice, both.

(b) If the respondent agrees to the terms of a proposed compliance order, the Chief Counsel issues a final order prescribing the remedial action to be taken by the respondent.

(c) Payment of a civil penalty, when the amount of the penalty exceeds \$10,000, must be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions on making payments by wire transfer may be obtained from the Financial Operations Division (AMZ-320), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25880, Oklahoma City, OK 73125.

(d) Payment of a civil penalty, when the amount of the penalty is \$10,000 or

less, must be made either by wire transfer, as set forth in paragraph (c) of this section, or certified check or money order payable to "U.S. Department of Transportation" and submitted to the Financial Operations Division (AMZ-320), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25880, Oklahoma City, OK 73125.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-23, 57 FR 45453, Oct. 1, 1992; Amdt. 107-29, 58 FR 51527, Oct. 1, 1993; Amdt. 107-38, 61 FR 21100, May 9, 1996]

§ 107.317 Informal response.

(a) In responding to a notice of probable violation under § 107.311, the respondent may submit to the official who issued the notice, written explanations, information, or arguments in response to the allegations, the terms of a proposed compliance order, or the amount of the preliminarily assessed civil penalty.

(b) The respondent may include in his informal response a request for a conference. Upon the request of the respondent, the conference may be either in person or by telephone. A request for a conference must set forth the issues the respondent will raise at the conference.

(c) Upon receipt of a request for a conference under paragraph (b) of this section, the Chief Counsel's Office, in consultation with the Associate Administrator for Hazardous Materials Safety, arranges for a conference as soon as practicable at a time and place of mutual convenience.

(d) The respondent's written explanations, information, and arguments as well as the respondent's presentation at a conference are considered by the Chief Counsel in reviewing the notice of probable violation. Based upon a review of the proceeding, the Chief Counsel may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991]

§ 107.319

49 CFR Ch. I (10–1–00 Edition)

§ 107.319 Request for a hearing.

(a) In responding to a notice of probable violation under § 107.311, the respondent may request a formal administrative hearing on the record before an Administrative Law Judge (ALJ) obtained by the Office of the Chief Counsel.

(b) A request for a hearing under paragraph (a) of this section must:

(1) State the name and address of the respondent and of the person submitting the request if different from the respondent;

(2) State which allegations of violations, if any, are admitted; and

(3) State generally the issues to be raised by the respondent at the hearing. Issues not raised in the request are not barred from presentation at the hearing; and

(4) Be addressed to the official who issued the notice.

(c) After a request for a hearing that complies with the requirements of paragraph (b) of this section, the Chief Counsel obtains an ALJ to preside over the hearing and notifies the respondent of this fact. Upon assignment of an ALJ, further matters in the proceeding generally are conducted by and through the ALJ, except that the Chief Counsel and respondent may compromise or settle the case under § 107.327 of this subpart without order of the ALJ or voluntarily dismiss the case under Rule 41(a)(1) of the Federal Rules of Civil Procedure without order of the ALJ; in the event of such a compromise, settlement or dismissal, the Chief Counsel expeditiously will notify the ALJ thereof.

(d) At any time after requesting a formal administrative hearing but prior to the issuance of a decision and final order by the ALJ, the respondent may withdraw such request in writing, thereby terminating the jurisdiction of the ALJ in the case. Such a withdrawal constitutes an irrevocable waiver of respondent's right to such a hearing on the facts, allegations, and proposed sanction presented in the notice of probable violation to which the request for hearing relates.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 48 FR 17094, Apr. 21, 1983; Amdt. No. 107–19, 54 FR 22899, May 30, 1989]

§ 107.321 Hearing.

(a) To the extent practicable, the hearing is held in the general vicinity of the place where the alleged violation occurred or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) Hearings are conducted in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure; however, the ALJ may modify them as he determines necessary in the interest of a full development of the facts. In addition, the ALJ may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 107.13;

(3) Adopt procedures for the submission of motions, evidence, and other documents pertinent to the proceeding;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and

(9) Take any other action authorized by, or consistent with, the provisions of this subpart and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The official who issued the notice of probable violation, or his representative, has the burden of proving the facts alleged therein.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in opposition to the allegations or which may bear on the sanction being sought and conduct such cross-examination as may be required for a full disclosure of the facts.

§ 107.323 ALJ's decision.

(a) After consideration of all matters of record in the proceeding, the ALJ

shall issue an order dismissing the notice of probable violation in whole or in part or granting the sanction sought by the Office of Chief Counsel in the notice. If the ALJ does not dismiss the notice of probable violation in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both. The order includes a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(b) If, within 20 days of receipt of an order issued under paragraph (a) of this section, the respondent does not submit in writing his acceptance of the terms of an order directing compliance, or, where appropriate, pay a civil penalty, or file an appeal under §107.325, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of a compliance order or collect the civil penalty.

§ 107.325 Appeals.

(a) *Hearing proceedings.* A party aggrieved by an ALJ's decision and order issued under §107.323, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Research and Special Programs Administration (RSPA), 400 Seventh Street, SW., Washington, DC 20590-0001.

(b) *Non-Hearing proceedings.* A respondent aggrieved by an order issued under §107.317, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, RSPA, 400 Seventh Street, SW., Washington, DC 20590-0001.

(c) An appeal of an order issued under this subpart must:

(1) Be filed within 20 days of receipt of the order by the appealing party; and

(2) State with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto.

(d) If the Administrator, RSPA, affirms the order in whole or in part, the respondent must comply with the terms of the decision within 20 days of the respondent's receipt thereof, or

within the time prescribed in the order. If the respondent does not comply with the terms of the decision within 20 days of receipt, or within the time prescribed in the order, the case may be referred to the Attorney General for action to enforce the terms of the decision.

(e) The filing of an appeal stays the effectiveness of an order issued under §107.317 or §107.323. However, if the Administrator, RSPA, determines that it is in the public interest, he may keep an order directing compliance in force pending appeal.

[[[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107-22, 55 FR 39978, Oct. 1, 1990]

§ 107.327 Compromise and settlement.

(a) At any time before an order issued under §107.317 or §107.323 is referred to the Attorney General for enforcement, the respondent or the Office of Chief Counsel may propose a compromise as follows:

(1) In civil penalty cases, the respondent or Chief Counsel may offer to compromise the amount of the penalty by submitting an offer for a specific amount to the other party. An offer of compromise by the respondent shall be submitted to the Chief Counsel who may, after consultation with Associate Administrator for Hazardous Materials Safety, accept or reject it.

(i) A compromise offer stays the running of any response period then outstanding.

(ii) If a compromise is agreed to by the parties, the respondent is notified in writing. Upon receipt of payment by Office of Chief Counsel, the respondent is notified in writing that acceptance of payment is in full satisfaction of the civil penalty proposed or assessed, and Office of Chief Counsel closes the case with prejudice to the respondent.

(iii) If a compromise cannot be agreed to, the respondent is notified in writing and is given 10 days or the amount of time remaining in the then outstanding response period, whichever is longer, to respond to whatever action was taken by the Office of Chief Counsel or the Administrator, RSPA.

(2) In compliance order cases, the respondent may propose a consent agreement to the Chief Counsel. If the Chief

§ 107.329

49 CFR Ch. I (10-1-00 Edition)

Counsel accepts the agreement, he issues an order in accordance with its terms. If the Chief Counsel rejects the agreement, he directs that the proceeding continue. An agreement submitted to the Chief Counsel must include:

- (i) A statement of any allegations of fact which the respondent challenges;
- (ii) The reasons why the terms of a compliance order or proposed compliance order are or would be too burdensome for the respondent, or why such terms are not supported by the record in the case;
- (iii) A proposed compliance order suitable for issuance by the Chief Counsel;
- (iv) An admission of all jurisdictional facts; and
- (v) An express waiver of further procedural steps and all right to seek judicial review or otherwise challenge or contest the validity of the order.

(b) Notwithstanding paragraph (a)(1) of this section, the respondent or Office of Chief Counsel may propose to settle the case. If the Chief Counsel agrees to a settlement, the respondent is notified and the case is closed without prejudice to the respondent.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107-29, 58 FR 51527, Oct. 1, 1993]

§ 107.329 Maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or an exemption issued under this subchapter applicable to the transporting of hazardous materials or the causing of them to be transported or shipped is liable for a civil penalty of not more than \$25,000 (\$27,500 for a violation occurring after January 21, 1997) and not less than \$250 for each violation. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or an ex-

emption issued under this subchapter applicable to the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a packaging or container which is represented, marked, certified or sold by that person as being qualified for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than \$25,000 (\$27,500 for a violation occurring after January 21, 1997) and not less than \$250 for each violation.

[Amdt. 107-24, 56 FR 8624, Feb. 28, 1991, as amended by Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 17-40, 62 FR 2971, Jan. 21, 1997; 65 FR 58618, Sept. 29, 2000]

§ 107.331 Assessment considerations.

After finding a knowing violation under this subpart, the Office of Chief Counsel assesses a civil penalty taking the following into account:

- (a) The nature and circumstances of the violation;
- (b) The extent and gravity of the violation;
- (c) The degree of the respondent's culpability;
- (d) The respondent's prior violations;
- (e) The respondent's ability to pay;
- (f) The effect on the respondent's ability to continue in business; and
- (g) Such other matters as justice may require.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-30, 58 FR 50500, Sept. 27, 1993; Amdt. 107-38, 61 FR 21100, May 9, 1996]

CRIMINAL PENALTIES

§ 107.333 Criminal penalties generally.

A person who knowingly violates §171.2(g) or willfully violates a provision of the Federal hazardous material transportation law or an order or regulation issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

§ 107.335 Referral for prosecution.

If the Associate Administrator for Hazardous Materials Safety becomes aware of a possible willful violation of

the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any exemption, or order issued thereunder, for which the Associate Administrator for Hazardous Materials Safety exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. If appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-22, 55 FR 39978, Oct. 1, 1990; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-35, 60 FR 49108, Sept. 21, 1995]

§ 107.336 Limitation on fines and penalties.

If a State or political subdivision or Indian tribe assesses any fine or penalty determined by the Secretary to be appropriate for a violation concerning a subject listed in §107.202(a), no additional fine or penalty may be assessed for such violation by any other authority.

[Amdt. 107-24, 56 FR 8624, Feb. 28, 1991]

INJUNCTIVE ACTION

§ 107.337 Injunctions generally.

Whenever it appears to the Office of Chief Counsel that a person has engaged, or is engaged, or is about to engage in any act or practice constituting a violation of any provision of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any exemption, or order issued thereunder, for which the Office of Chief Counsel exercises enforcement responsibility, the Administrator, RSPA, or his delegate, may request the Attorney General to bring an action in the appro-

priate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by 49 U.S.C. 5122(a).

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

§ 107.339 Imminent hazards.

Whenever it appears to the Office of the Chief Counsel that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material or hazardous materials container, before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm can be completed, the Administrator, RSPA, or his delegate, may bring an action under 49 U.S.C. 5122(b) in the appropriate United States District Court for an order suspending or restricting the transportation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-15, 51 FR 34987, Oct. 1, 1986; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

APPENDIX A TO SUBPART D OF PART 107—GUIDELINES FOR CIVIL PENALTIES

I. This appendix sets forth the guidelines used by the Office of Hazardous Materials Safety (as of January 18, 1995) in making initial baseline determinations for recommending civil penalties. The first part of these guidelines is a list of baseline amounts or ranges for probable violations frequently cited in enforcement reports referred for action. Following the list of violations are general guidelines used by OHMS in making initial penalty determinations in enforcement cases.

II. LIST OF FREQUENTLY CITED VIOLATIONS

Violation description	Section or cite	Baseline assessment
PART 107—REQUIREMENTS		
Failure to register as a carrier or shipper of hazardous material	107.608	\$1,000 +, \$500 each add'l year.

Violation description	Section or cite	Baseline assessment
PART 171—REQUIREMENTS		
Failure to give immediate telephone notice of a reportable hazardous materials incident.	171.15	\$3,000.
Failure to file a DOT 5800.1 Hazardous Materials Incident Report within 30 days following an unintentional release of hazardous materials in transportation.	171.16	\$500 to \$2,500.
PART 172—REQUIREMENTS		
Shipping Papers (§ 172.200—172.205):		
Failure to execute a shipping paper for a shipment of hazardous materials	172.201	\$3,000 to \$6,000.
Failure to follow one or more of the three approved formats for listing hazardous materials on a shipping paper.	172.201(a)(1)	\$1,200.
Failure to include a proper shipping name in the shipping description or using an incorrect proper shipping name.	172.202	\$800 to \$1,600.
Failure to include a hazard class/division number in the shipping description.	172.202	\$1,000 to \$2,000.
Using an incorrect hazard class/identification number	172.202	
—that does not affect compatibility requirements .....	.....	\$800,
—that affects compatibility requirements .....	.....	\$3,000 to \$6,000.
Failure to include an identification number in the shipping description	172.202	\$1,000 to \$2,000.
Using an incorrect identification number	172.202	
—that does not change the response information .....	.....	\$800,
—that changes the response information .....	.....	\$3,000 to \$6,000.
Using a shipping description that includes additional unauthorized information (extra or incorrect words).	172.202	\$800.
Using a shipping description not in required sequence	172.202	\$500.
Using a shipping description with two or more required elements missing or incorrect.	172.202	
—such that the material is misdescribed .....	.....	\$3,000.
—such that the material is misclassified .....	.....	\$6,000.
Failure to include the total quantity of hazardous material covered by a shipping description.	172.202(c)	\$400.
The letters "RQ" are not used in the shipping description to identify materials that are hazardous substances.	172.203(c)(2)	\$500.
Using a shipping description for Class 7 (radioactive) material that fails to contain the required additional entries, or contains incorrect information for these additional entries.	172.203(d)	\$2,000 to \$4,000.
Failure to include a required technical name in parentheses for a listed generic or "nos" material.	172.203(k)	\$1,000.
Failure to list an exemption number in association with the shipping description.	172.203(a)	\$800.
Failure to include the required shipper's certification on a shipping paper ...	172.204(a)	\$1,000.
Failure to execute the required shipper's certification on a shipping paper	172.204	\$800.
Emergency Response Information Requirements (§ 172.600—172.604):		
Providing or listing incorrect emergency response information with or on a shipping paper.	172.602	
—no significant difference in response .....	.....	\$800,
—significant difference in response .....	.....	\$3,000 to \$6,000.
Failure to include an emergency response telephone number on a shipping paper.	172.604	\$2,600.
Failure to have the emergency response telephone number monitored while a hazardous material is in transportation or listing multiple telephone numbers (without specifying the times for each) that are not monitored 24 hours a day.	172.604	\$1,300.
Listing a fraudulent emergency response telephone number on a shipping paper.	172.604	\$2,600 to \$4,200.
Listing an incorrect or non-working emergency response telephone number on a shipping paper.	172.604	\$1,300.
Failure to provide required technical information when the listed emergency response telephone number is contacted.	172.604	\$1,300.
Package Marking Requirements (§ 172.300—172.338):		
Failure to mark the proper shipping name on a package or marking an incorrect shipping name on a package.	172.301(a)	\$800 to \$1,600.
Failure to mark the identification number on a package	172.301(a)	\$1,000 to \$2,000.
Marking a package with an incorrect identification number	172.301(a)	
—that does not change the response information .....	.....	\$800,
—that changes the response information .....	.....	\$3,000 to \$6,000.
Failure to mark the proper shipping name and identification number on a package.	172.301(a)	\$3,000 to \$6,000.
Marking a package with an incorrect shipping name and identification number.	172.301(a)	
—that does not change the response information .....	.....	\$1,500 to \$3,000.

Research and Special Programs Admin., DOT

Pt. 107, Subpt. D, App. A

Violation description	Section or cite	Baseline assessment
—that changes the response information .....	.....	\$3,000 to \$6,000.
Failure to include the required technical name(s) in parentheses for a listed generic or “no” entry.	172.301(c)	\$1,000.
Failure to mark a package containing liquid hazardous materials with required orientation marks.	172.312	\$2,500 to \$3,500.
Package Labeling Requirements (§ 172.400–172.450):		
Failure to label a package.	172.400	\$5,000.
Placing a label that represents a hazard other than the hazard presented by the hazardous material in the package..	172.400	\$5,000.
Placing a label on a package that does not contain a hazardous material.	172.401(a)	\$800.
Placing a label on Class 7 (radioactive) material that understates the proper label category..	172.403	\$5,000.
Placing a label on Class 7 (radioactive) material that fails to contain, or has erroneous, entries for the name of the radionuclide(s), activity, and transport index..	172.403(g)	\$2,000 to \$4,000.
Placing a label not conforming to size requirements on a package.	172.407(c)	\$800.
Placing a label on a different surface of the package than, or far away from, the proper shipping name..	172.406(a)	\$800.
Placing a label that does not meet color specification requirements on a package (depending on the variance)..	172.407(d)	\$600 to \$2,500.
Failure to place a required subsidiary label on a package.	172.402	\$500 to \$2,500.
Failure to provide an appropriate class or division number on a label.	172.411	\$2,500.
Placarding Requirements (§ 172.500–172.560):		
Failure to properly placard a freight container or vehicle containing hazardous materials when table 1 is applicable..	172.504	\$1,000 to \$9,000.
Failure to properly placard a freight container or vehicle containing hazardous materials when table 2 is applicable..	172.504	\$800 to \$7,500.
Training Requirements (§ 172.700–172.704):		
Failure to train hazmat employees in the three required areas of training ...	172.702 .....	.....
—more than 10 hazmat employees. ....	.....	\$2,400 and up.
—10 hazmat employees or less. ....	.....	\$1,500 and up.
Failure to train hazmat employees in any one of the three required areas of training.	172.702 .....	.....
—more than 10 hazmat employees. ....	.....	\$800 and up.
—10 hazmat employees or less. ....	.....	\$500 and up.
Failure to maintain training records	172.704.	.....
—more than 10 hazmat employees. ....	.....	800 and up.
—10 hazmat employees or less. ....	.....	\$500 and up.
PART 173—REQUIREMENTS		
Overpack Requirements (§ 173.25)		
Failure to mark an overpack with a statement indicating that the inside packages comply with prescribed specifications when specification packaging is required..	173.25(a)(4)	\$3,000.
Reconditioner Requirements (§173.28):		
Representing, marking, or certifying a drum as a reconditioned UN standard packaging, when the drum did not meet a UN standard..	173.28(c) & (d)	\$6,000 to \$10,800.
Marking an incorrect registration number on a reconditioned packaging	173.28(b)(2)(ii) .....	.....
—incorrect number. ....	.....	\$800.
—fraudulent use of another reconditioner’s number. ....	.....	\$7,200.
Failure to properly conduct alternate leakage test	173.28(b)(2)(i) .....	.....
—improper test. ....	.....	\$2,000.
—no test at all. ....	.....	\$4,000.
Representing, marking, or certifying a drum as altered from one standard to another, when the drum had not actually been altered..	173.28(d)	\$500.
Portable and IM Tank Requirements (§§173.32(e), 173.32c, 173.315)		
Offering hazardous materials for transportation in a DOT specification or exemption portable tank which is out of test..	173.32(a)(1), 173.315(a), Applicable Exemption.	\$3,500 to \$7,000.
Offering an IM portable tank for transportation that has not been hydrostatically tested within the last 2½ years per 173.32b(a)..	173.32c(c)	\$3,500.
Offering an IM portable tank for transportation that has not been visually inspected in last five years per 173.32b(b)..	173.32c(c)	\$3,500.
Offering an IM portable tank for transportation that has not been visually or hydrostatically tested as required, or failing to remove the safety relief valves during testing..	173.32c(c)	\$7,000.
Offering a hazardous material for transportation in an IM portable tank equipped with bottom outlets, when the material contained is prohibited from being offered in this type of packaging.	173.32c(g) .....	.....
—Packing Group II. ....	.....	\$7,000.
—Packing Group III. ....	.....	\$5,000.
Failure to provide the required outage for a shipment of hazardous materials, that results in the release of hazardous materials..	173.32c(k)	\$6,000 to \$12,000.

Violation description	Section or cite	Baseline assessment
Offering a hazardous material for transportation in an DOT, exemption, or IM portable tank which fails to bear markings that it has been properly retested.	173.32(e)(3), 173.32b(d).	\$3,000.
Cylinder Retesters (§§173.23, 173.34, and 173.302):		
Failure to remark as DOT 3AL an aluminum cylinder manufactured under a former exemption.	173.23(c)	\$600.
Certifying or marking as retested a nonspecification cylinder	173.34	\$800.
Marking a cylinder in or on the sidewall area when not permitted by the applicable specification.	173.34(c)(1)	\$6,000 to \$10,800.
Failure to maintain legible markings on a cylinder	173.34(c)	\$800.
Failure to perform hydrostatic retesting at the minimum of 5/3 times the service pressure, or at the minimum specified test pressure.	173.34(e)	\$2,100 to \$5,200.
Failure to conduct a complete visual external and internal examination	173.34(e)(3)	\$2,100 to \$5,200.
Failure to have a retester's identification number (RIN)	173.34(e)(2)(i)	\$4,000.
Failure to have current authority due to failure to renew a retester's identification number.	173.34(e)(2)(i)	\$2,000.
Failure to have a retester's identification number and marking another RIN on a cylinder.	173.34(e)(2)(i)	\$7,200.
Marking a RIN before successfully completing a hydrostatic retest	173.34(e)(1)(ii)	\$800.
Requalifying a DOT cylinder without performing the visual inspection or hydrostatic retest.	173.34(e)(1)(ii)	\$4,200 to \$10,400.
Performing hydrostatic retesting without demonstrating the accuracy of the testing equipment.	173.34(e)(4)	\$2,100 to \$5,200.
Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion.	173.34(e)(4)	\$3,100.
Failure to perform a second retest, after equipment failure, at a pressure of 10% more or 100 psi more, whichever is less (includes exceeding 90% of test pressure prior to conducting a retest).	173.34(e)(4)	\$3,100.
Failure to condemn a cylinder with permanent expansion of 10% or greater (5% for certain exemption cylinders); failure to condemn cylinders with evidence of internal or external corrosion, denting, bulging, or rough usage.	173.34(e)(6)	\$10,000.
Marking an FRP cylinder with steel stamps in the FRP area of the cylinder such that the integrity of the cylinder is compromised.	Applicable Exemption	\$6,000 to \$10,800.
Failure to keep complete and accurate records of cylinder reinspection and retest.		
—No records kept		\$4,000.
—Incomplete or inaccurate records	173.34(e)(8)	\$1,000 to \$3,000.
Improper marking of the RIN or retest date on a cylinder	173.34(e)(7)	\$800
Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp.	173.34(e)(15)	\$6,000 to \$10,800.
Marking a "+" sign on a cylinder without determining the average or maximum wall stress, by calculation or reference to CGA Pamphlet C-5.	173.302(c)(3)	\$3,000 to \$4,000.
Representing, marking, or certifying a cylinder as meeting the requirements of an exemption, when the cylinder was not maintained or retested in accordance with the exemption.	171.2(c), Applicable Exemption.	\$2,000 to \$6,000.
Rebuilder Requirements (§173.34):		
Representing a DOT-4 series cylinder as meeting the requirements of the Hazardous Materials Regulations without being authorized to do so by the Associate Administrator for Hazardous Materials Safety.	173.34(l)	\$6,000 to \$10,800.
Offeror Requirements (General):		
Offering a hazardous material for transportation in an unauthorized non-UN standard or nonspecification packaging (includes the failure to comply with the terms of an exemption authorizing the use of a nonstandard or nonspecification packaging).	Various	
—Packing Group I (includes §172.504 table 1 materials)		\$9,000.
—Packing Group II		\$7,000.
—Packing Group III		\$5,000.
Offering a hazardous material for transportation in a packaging that has successfully been tested to an applicable UN standard, but is not marked with the required UN marking.	178.3(a), 178.503(a) ..	\$3,600.
Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation.	173.24(b)	
—Packing Group I (includes §172.504 table 2 materials)		\$12,000.
—Packing Group II		\$9,000.
—Packing Group III		\$6,000.
Overfilling a package so that the effectiveness is substantially reduced	173.24(b)	
—Packing Group I (includes §172.504 table 1 materials)		\$9,000.
—Packing Group II		\$6,000.
—Packing Group III		\$3,000.
Offering a hazardous material for transportation after October 1, 1996, in an unauthorized non-UN standard packaging marked as manufactured to a DOT specification.	171.14	
—packaging meets DOT specification		\$3,000.

Research and Special Programs Admin., DOT

Pt. 107, Subpt. D, App. A

Violation description	Section or cite	Baseline assessment
—packaging does not meet DOT specification .....	.....	\$5,000 to \$9,000.
Offeror Requirements (Class 1—Explosives):		
Failing to mark the “EX” approval number on a package containing an explosive.	172.320	\$1,200.
Offering an unapproved explosive for transportation	173.54 and 173.56(b)	\$5,000 to \$10,000.
—Div 1.3 & 1.4 fireworks meeting the chemistry requirements (both quantity and type) of APA Standard 87–1.	.....	\$10,000 to \$27,500.
—all other explosives (including forbidden explosives) .....	.....	\$10,000 to \$27,500.
Offering a leaking or damaged package of explosives for transportation	173.54(c)	\$10,000 to \$27,500.
Offeror Requirements (Class 7—Radioactive Materials):		
Offering a DOT specification 7A packaging without maintaining complete documentation of tests and an engineering evaluation or comparative data.	173.415(a), 173.461 ..	
—tests and evaluation not performed .....	.....	\$8,400.
—complete records not maintained .....	.....	\$2,000 to \$5,000.
Offering a Type B packaging without holding a valid NRC approval certificate.	173.471(a)	
—never having obtained one .....	.....	\$2,500.
—holding an expired certificate .....	.....	\$1,000.
Offering a limited quantity of radioactive materials without marking the inner (or single) packaging “Radioactive.”	177.421(d)	\$5,000 and up.
Offering low specific activity (LSA) radioactive materials consigned as exclusive use without providing instructions for maintenance of exclusive use shipment controls.	173.427(a)(6)	\$800.
Offering a package that exceeds the permitted limits for surface radiation or transport index.	173.441	\$10,000 and up.
Offering a package without determining the level of removable external contamination, or that exceeds the limit for removable external contamination.	173.443	\$5,000 and up.
Storing packages of radioactive material in a group with a total transport index more than 50.	173.447(a)	\$5,000 and up.
Offering special form radioactive materials without maintaining a complete safety analysis or Certificate of Competent Authority.	173.476(a) & (b)	\$2,500.
Offeror Requirements (Cylinders):		
Offering a compressed gas for transportation in a cylinder that is out of test.	173.301(c)	\$4,200 to \$10,400.
Failure to check each day the pressure of a cylinder charged with acetylene that is representative of that day’s compression, after the cylinder has cooled to a settled temperature, or failure to keep a record of this test for at least 30 days.	173.303(d)	\$5,000.
Offering a limited quantity of a compressed gas in a metal container for the purpose of propelling a nonpoisonous material and failing to heat the cylinder until the pressure is equivalent to the equilibrium pressure at 130 °F, without evidence of leakage, distortion, or other defect.	173.306(a)(3), (h)	\$1,500 to \$6,000.

PART 178—REQUIREMENTS

Third-Party Packaging Certifiers (General):		
Issuing a certification that directs the packaging manufacturer to improperly mark a packaging (e.g., steel drum to be marked UN 4G).	1171.2(e), 1178.2(b), 178.3(a), 178.503(a).	\$500 per item.
Manufacturers (General):		
Failure to insure a packaging certified as meeting the UN standard is capable of passing the required performance testing.	178.601(b)	
—Packing Group I (includes § 172.504 table 1 materials) .....	.....	\$10,800.
—Packing Group II .....	.....	\$8,400.
—Packing Group III .....	.....	\$6,000.
Certifying a packaging as meeting a UN standard when design qualification testing was not performed.	178.601(d)	
—Packing Group I (includes §172 504 table 2 materials) .....	.....	\$10,800.
—Packing Group II .....	.....	\$8,400.
—Packing Group III .....	.....	\$6,000.
Failure to conduct periodic retesting on UN standard packaging (depending on length of time and Packing Group).	178.601(e)	\$2,000 to \$10,800.
Failure to properly conduct testing for UN standard packaging (e.g., testing with less weight than marked on packaging; drop testing from lesser height than required; failing to condition fiberboard boxes before design test).	.....
—design qualification testing	178.601(d)	\$2,000 to \$10,800.
—periodic retesting	178.601(e)	\$500 to \$10,800.
Marking, or causing the marking of, a packaging with the symbol of a manufacturer or packaging certifier other than the company that actually manufactured or certified the packaging.	178.2(b), 178.3(a), 178.503(a)(8).	\$7,200.
Failure to maintain testing records	178.601(1)	

Violation description	Section or cite	Baseline assessment
—design qualification testing .....	.....	\$1,000 to \$5,000.
—periodic retesting .....	.....	\$500 to \$2,000.
Improper marking of UN certification	178.503	\$500 per item.
Manufacturing DOT specification packaging after October 1, 1994 that is not marked as meeting a UN performance standard.	171.14	
—if packaging does meet DOT specification .....	.....	\$3,000.
—if packaging does not meet DOT specification .....	.....	\$6,000 to \$10,800.
Manufacturing Requirements—Drums		
Failure to properly conduct production leakproofness test	178.604(b)(1)	
—improper testing	173.28	\$2,000.
—no testing performed .....	.....	\$2,000 to \$10,800.
Manufacturing Requirements—Cylinders		
Manufacturing, representing, marking, certifying, or selling a DOT high-pressure cylinder that was not inspected and verified by an approved independent inspection agency.	Various	\$7,500 to \$15,000.
Failure to have a registration number or failure to mark the registration number on the cylinder.	Various	\$800.
Marking another company's number on a cylinder	Various	\$7,200.
Failure to mark the date of manufacture or lot number on a DOT-39 cylinder.	178.65	\$3,000.
Failure to have a chemical analysis performed in the US for a material manufactured outside the US/failure to obtain a chemical analysis from the foreign manufacturer.	Various	\$5,000.
Failure to meet wall thickness requirements	Various	\$7,500 to \$15,000.
Failure to heat treat cylinders prior to testing	Various	\$5,000 to \$15,000.
Failure to conduct a complete visual internal examination	Various	\$2,500 to \$6,200.
Failure to conduct a hydrostatic test, or conducting a hydrostatic test with inaccurate test equipment.	Various	\$2,500 to \$6,200.
Failure to conduct a flattening test	Various	\$7,500 to \$15,000.
Failure to conduct a burst test on a DOT-39 cylinder	178.65-11	\$5,000 to \$15,000.
Failure to have inspections and verifications performed by an inspector	Various	\$7,500 to \$15,000.
Failure to maintain a required inspector's reports	Various	
—no reports at all .....	.....	\$5,000.
—incomplete or inaccurate reports .....	.....	\$1,000 to \$4,000.
Other Requirements		
Carrier Requirements:		
Transporting packages of hazardous materials that have not been secured against movement within the vehicle.	177.834(a) & (g)	\$3,000.
Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage such explosives or any package in which they are contained, without segregating in different parts of the load or securing them in place in or on the motor vehicle and separated by bulkheads or other suitable means to prevent such damage.	177.835(i)	\$5,200.
Transporting railway track torpedoes outside of flagging kits, in violation of E-7991.	171.2(b)	\$7,000.
Transporting Class 7 (radioactive) material having a total transport index more than 50.	177.842(a)	\$5,000 and up.
Transporting Class 7 (radioactive) material without maintaining the required separation distance.	177.842(b)	\$5,000 and up.
Failing to comply with requirements of an exemption authorizing the transportation of Class 7 (radioactive) material having a total transport index more than 50.	171.2(b)	
—failure to have the radiation survey record required by ¶¶ 7(f), 8(b)(3).	.....	\$5,000.
—failure to have other accompanying documents required by ¶ 8(b) ...	.....	\$500 each.
—other violations of ¶¶ 7 and 8 .....	.....	\$5,000 and up.
Exemptions:		
Offering or transporting hazardous materials, or otherwise performing a function, covered by an exemption after expiration of the exemption.	171.2(a), (b), (c), Various.	\$1,000 + \$500 each add'l year.

III. CONSIDERATION OF STATUTORY CRITERIA

A. These guidelines are used by the Office of Hazardous Materials Safety (OHMS) in setting initial proposed penalties for hazmat violations. They indicate baseline amounts or ranges for probable violations frequently cited in enforcement reports and set forth

general OHMS policy for considering statutory criteria.

B. The initial baseline determination partially considers the nature, extent, circumstances, and gravity of the alleged violation. That determination then is adjusted to consider all other evidence concerning the nature, extent, circumstances, and gravity of

the alleged violation; degree of culpability; history of prior violations; ability to pay; effect of the penalty on ability to continue to do business; and such other matters as justice may require (a major component of which is corrective action taken by a respondent to prevent a recurrence of similar violations). In making a penalty recommendation, the baseline or range may be increased or decreased on the basis of evidence pertaining to these factors.

C. The following miscellaneous factors are used to implement one or more of the statutory assessment criteria.

IV. MISCELLANEOUS FACTORS AFFECTING PENALTY AMOUNTS

A. Corrective Action

1. A proposed penalty is mitigated for documented corrective action of alleged violations taken by a respondent. Corrective action may occur: (1) After an inspection and before a Notice of Probable Violation (NOPV) is issued; (2) on receipt of an NOPV; or (3) after receipt of an NOPV (possibly after it is solicited by an RSPA attorney). In general, corrective action may reduce a penalty up to 25%. Mitigation may be taken into account in the referral memo or may be recommended prior to issuance of an Order by RSPA's Chief Counsel.

2. The two primary factors in determining the penalty reduction are extent and timing of the corrective action. In other words, mitigation will be determined on the basis of how much corrective action was taken and when it was taken. Systemic action to prevent future violations is given greater consideration than action simply to remedy violations identified during the inspection.

3. Mitigation is applied to individual violations. Thus, in a case with two violations, if corrective action for the first violation is more extensive than for the second, the penalty for the first will be mitigated more than that for the second.

B. Respondents That Re-Ship

A shipper that reships materials received from another company, in the same packaging and without opening or altering the package, independently is responsible for ensuring that the shipment complies with Federal hazmat law, and independently may be subject to enforcement action if the package does not comply. Nevertheless, the reshipper is considered to have a lesser level of responsibility for compliance in those respects in which it reasonably relies on the compliance of the package as received. In most cases of this type, OHMS will discount the applicable baseline standard by about 25%. The specific knowledge and expertise of all parties must be considered in discounting for reliance on a prior shipper. This discount is applied be-

fore any consideration of mitigation based on corrective action.

C. Penalty Increases for Multiple Counts

Under the Federal hazmat law, 49 U.S.C. 5213(a), each violation of the HMR and each day of a continuing violation (except for violations pertaining to packaging manufacture or qualification) is subject to a civil penalty of up to \$25,000 (\$27,500 for a violation occurring after January 21, 1997). Absent aggravating factors, OHMS, in its exercise of discretion, ordinarily will apply a single penalty for multiple counts or days of violation. In a number of cases, particularly those involving shippers, an inspector may cite two or more similar packaging violations for different hazardous materials. For example, the inspector may cite the same marking violation for two or more packages. OHMS usually will consider those additional violations as counts of the same violation and will not recommend multiples of the same baseline penalty. Rather, OHMS usually will recommend the baseline penalty for a single violation, increased by 25% for each additional violation.

D. Financial Considerations

1. Mitigation is appropriate when the baseline penalty would (1) exceed an amount that the respondent is able to pay, or (2) have an adverse effect on the respondent's ability to continue in business. These criteria relate to a respondent's entire business, and not just the product line or part of its operations involved in the violation(s). Beyond the overall financial size of the respondent's business, the relevant items of information on a respondent's balance sheet include the current ratio (current assets to current liabilities), the nature of current assets, and net worth (total assets minus total liabilities).

2. These figures are considered on a case-by-case basis. In general, however, a current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty, and may justify reduction of the penalty or an installment payment plan. A small amount of cash on hand representing limited liquidity, even with substantial other current assets (such as accounts receivable or inventory), may warrant a short-term payment plan. Respondent's income statement also will be reviewed to determine whether a payment plan is appropriate.

3. Many companies are able to continue in business for extended periods of time with a small or negative net worth, and many respondents have paid substantial civil penalties in installments even though net worth was negative. For this reason, negative net worth alone does not always warrant reduction of a proposed penalty or even, in the absence of factors discussed above, a payment plan.

4. In general, an installment payment plan may be justified where reduction of a proposed penalty is not, but the appropriateness of either (or both) will depend on the circumstances of the case. The length of a payment plan should be as short as possible, but the plan may consider seasonal fluctuations in a company's income if the company's business is seasonal (e.g., swimming pool chemical sales, fireworks sales) or if the company has documented specific reasons for current non-liquidity.

5. Evidence of financial condition is used only to decrease a penalty, and not to increase it.

E. Penalty Increases for Prior Violations

1. The baseline penalty presumes an absence of prior violations. If prior violations exist, generally they will serve to increase a proposed penalty. The general standard for increasing a baseline proposed penalty on the basis of prior violations is as follows:

- a. One prior case—25% increase over the pre-mitigation recommended penalty
 - b. Two prior cases—50% increase over the pre-mitigation recommended penalty
 - c. Three prior cases—75% increase over the pre-mitigation recommended penalty
 - d. Four or more prior cases—100% increase over the pre-mitigation recommended penalty
2. A case of prior violations closed more than five years previously normally will not be considered in determining a proposed penalty.

F. Penalty Increases for Use of Expired Exemptions

Adjustments to the base line figures for use of expired exemptions can be made depending on how much material has been shipped during the period between the expiration date and the renewal date. If the company previously has been found to have operated under an expired exemption, the penalty is normally doubled. If the company has been previously cited for other violations, the penalty generally will be increased by about 25%.

[Amdt. 107-33, 60 FR 12141, Mar. 6, 1995, as amended by Amdt. 107-40, 62 FR 2972, 2977, Jan. 21, 1997; 62 FR 51556, Oct. 1, 1997; 65 FR 58618, Sept. 29, 2000]

Subpart E—Designation of Approval and Certification Agencies

§ 107.401 Purpose and scope.

(a) This subpart establishes procedures for the designation of agencies to issue approval certificates and certifi-

cations for types of packagings designed, manufactured, tested, or maintained in conformance with the requirements of this subchapter, subchapter C of this chapter, and standards set forth in the United Nations (U.N.) Recommendations (Transport of Dangerous Goods). Except for certifications of compliance with U.N. packaging standards, this subpart does not apply unless made applicable by a rule in subchapter C of this chapter.

(b) The Associate Administrator for Hazardous Materials Safety may issue approval certificates and certifications addressed in paragraph (a) of this section.

[Amdt. 107-31, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991]

§ 107.402 Application for designation as an approval or certification agency.

(a) Any organization or person seeking designation as an approval or certification agency shall apply in writing to the Associate Administrator for Hazardous Materials Safety (DHM-32), Department of Transportation, 400 Seventh Street, SW., Washington DC 20590-0001. Each application must be signed and certified to be correct by the applicant or, if the applicant is an organization, by an authorized officer or official representative of the organization. Any false statement or representation, or the knowing and willful concealment of a material fact, may subject the applicant to prosecution under the provisions of 18 U.S.C. 1001, result in the denial or termination of a designation.

(b) Each application for designation must be in English and include the following information:

(1) Name and address of the applicant, including place of incorporation if a corporation. In addition, if the applicant is not a resident of the United States, the name and address of a permanent resident of the United States designated in accordance with § 107.7 to serve as agent for service of process.

(2) If the applicant's principal place of business is in a country other than the United States, a copy of the designation from the Competent Authority of that country delegating to the

applicant an approval or designated agency authority for the type of packaging for which a DOT designation is sought, and a statement that the Competent Authority also delegates similar authority to U.S. Citizens or organizations having designations under this subpart from the RSPA.

(3) A listing, by DOT specification (or exemption) number, or U.N. designation, of the types of packagings for which approval authority is sought.

(4) A personnel qualifications plan listing the qualifications that the applicant will require of each person to be used in the performance of each packaging approval or certification function. As a minimum, these qualifications must include:

(i) The ability to review and evaluate design drawings, design and stress calculations;

(ii) A knowledge of the applicable regulations of subchapter C of this chapter and, when applicable, U.N. standards; and

(iii) The ability to conduct or monitor and evaluate test procedures and results; and

(iv) The ability to review and evaluate the qualifications of materials and fabrication procedures.

(5) A statement that the applicant will perform its functions independent of the manufacturers and owners of the packagings concerned.

(6) A statement that the applicant will allow the Associate Administrator for Hazardous Materials Safety or his representative to inspect its records and facilities in so far as they relate to the approval or certification of specification packagings and shall cooperate in the conduct of such inspections.

(c) The applicant shall furnish any additional information relevant to the applicant's qualifications, if requested by the Associate Administrator for Hazardous Materials Safety.

[Amdt. 107-13, 50 FR 10062, Mar. 13, 1985; 50 FR 16089, Apr. 24, 1985, as amended by Amdt. 107-22, 55 FR 39978, Oct. 1, 1990; Amdt. 107-23, 56 FR 66157, Dec. 20, 1991]

§ 107.403 Designation of approval agencies.

(a) If the Associate Administrator for Hazardous Materials Safety determines that an application contains all the re-

quired information, the applicant is sent a letter of designation and assigned an identification code.

(b) If the Associate Administrator for Hazardous Materials Safety determines that an application does not contain all the required information, the application is denied and the applicant is sent a written notice containing all the reasons for the denial.

(c) Within 30 days of an initial denial of an application under paragraph (b) of this section, the applicant may file an amended application. If after considering the amended application, the Associate Administrator for Hazardous Materials Safety determines that it should be denied, he notifies the applicant, and the denial constitutes the final action of the Associate Administrator for Hazardous Materials Safety on the application. Within 60 days of receipt of the final denial the applicant may appeal the denial to the Administrator, RSPA, setting forth in writing where the Associate Administrator for Hazardous Materials Safety erred in this determination.

[Amdt. 107-13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

§ 107.404 Conditions of designation.

(a) Each designation made under this subpart contains the following conditions:

(1) The designated approval or certification agency may use only testing equipment that it has determined, through personal inspection, to be suitable for the purpose.

(2) Each approval certificate and certification issued by the designated approval agency must contain the name and identification code of the approval agency.

(3) Each approval certificate and certification must be in a format acceptable to the Associate Administrator for Hazardous Materials Safety.

(b) The designated approval agency shall notify the Associate Administrator for Hazardous Materials Safety within 20 days after the date there is any change in the information submitted under § 107.402.

(c) The designated approval agency shall comply with all of the terms and

§ 107.405

conditions stated in its letter of designation under the subpart.

(d) Nothing in this part relieves a manufacturer or owner of a packaging of responsibility for compliance with any of the applicable requirements of this title.

[Amdt. 107-13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991]

§ 107.405 Termination of designation.

(a) Any designation issued under § 107.403 of this subchapter may be suspended or terminated if the Associate Administrator for Hazardous Materials Safety determines that:

(1) The application for designation contained a misrepresentation, or the applicant willfully concealed a material fact.

(2) The approval agency failed to comply with a term or condition stated in the agency's letter of designation.

(3) The Competent Authority of an approval agency of a country outside the United States has failed to initiate, maintain or recognize a qualified U.S. approval agency.

(b) Before a designation is suspended or terminated, the Associate Administrator for Hazardous Materials Safety shall give to the approval agency:

(1) Written notice of the facts or conduct believed to warrant suspension or termination of the designation.

(2) Sixty days in which to show in writing why the designation should not be suspended or terminated.

[Amdt. 107-13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991]

Subpart F—Registration of Cargo Tank and Cargo Tank Motor Vehicle Manufacturers and Repairers and Cargo Tank Motor Vehicle Assemblers

§ 107.501 Scope.

(a) This subpart establishes a registration procedure for persons who are engaged in the manufacture, assembly, inspection and testing, certification, or repair of a cargo tank or a cargo tank motor vehicle manufactured in accordance with a DOT specification under subchapter C of this chapter or under

49 CFR Ch. I (10-1-00 Edition)

terms of an exemption issued under this part.

(b) Persons engaged in continuing qualification and maintenance of cargo tanks and cargo tank motor vehicles must be familiar with the requirements set forth in part 180, subpart E, of this chapter.

[Amdt. 107-20, 55 FR 37047, Sept. 7, 1990]

§ 107.502 General registration requirements.

(a) *Definitions:* For purposes of this subpart—

(1) *Assembly* means the assembly of one or more tanks or cargo tanks to a motor vehicle or to a motor vehicle suspension component and involves no welding on the cargo tank wall.

(2) The terms *Authorized Inspector*, *Cargo tank*, *Cargo tank motor vehicle*, *Design Certifying Engineer*, *Registered Inspector*, and *Person* are defined in § 171.8 of this chapter.

(3) The terms *cargo tank wall* and *manufacturer* are defined in § 178.320(a), and *repair* is defined in § 180.403 of this chapter.

(b) No person may engage in the manufacture, assembly, certification, inspection or repair of a cargo tank or cargo tank motor vehicle manufactured under the terms of a DOT specification under subchapter C of this chapter or an exemption issued under this part unless the person is registered with the Department in accordance with the provisions of this subpart. A person employed as an inspector or design certifying engineer is considered to be registered if the person's employer is registered.

(c) A person who performs functions which are subject to the provisions of this subpart may perform only those functions which have been identified to the Department in accordance with the procedures of this subpart.

(d) Registration statements must be in English, contain all of the information required by this subpart, and be submitted to: Approvals Branch, Associate Administrator for Hazardous Materials Safety, Attn: DHM-32, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590-0001.

(e) Upon determination that a registration statement contains all the information required by this subpart, the Department will send the registrant a letter confirming receipt of the registration application and assigning a registration number to that person. A separate registration number will be assigned for each cargo tank manufacturing, assembly, repair facility or other place of business identified by the registrant.

[Amdt. 107-20, 54 FR 25003, June 12, 1989; 55 FR 37047, Sept. 7, 1990, as amended by Amdt. 107-22, 55 FR 39978, Oct. 1, 1990; Amdt. 107-23, 56 FR 66157, Dec. 20, 1991; Amdt. 107-28, 58 FR 46873, Sept. 3, 1993; Amdt. 107-39, 61 FR 51337, Oct. 1, 1996]

§ 107.503 Registration statement.

(a) Each registration statement must be in English and contain the following information:

- (1) Name;
- (2) Street address, mailing address and telephone number for each facility or place of business;
- (3) A statement signed by the person responsible for compliance with the applicable requirements of this chapter, certifying knowledge of those requirements and that each employee who is a Registered Inspector or Design Certifying Engineer meets the minimum qualification requirements set forth in §171.8 of this chapter for "Registered Inspector" or "Design Certifying Engineer". The following language may be used.

I certify that all Registered Inspectors and Design Certifying Engineers used in performance of the prescribed functions meet the minimum qualification requirements set forth in 49 CFR 171.8, that I am the person responsible for ensuring compliance with the applicable requirements of this chapter, and that I have knowledge of the requirements applicable to the functions to be performed.

(4) A description of the specific functions to be performed on cargo tanks or cargo tank motor vehicles, e.g.:

- (i) Manufacture,
- (ii) Assembly,
- (iii) Inspection and testing (specify type, e.g., external or internal visual inspection, lining inspection, hydrostatic pressure test, leakage test, thickness test),
- (iv) Certification,

- (v) Repair, or
 - (vi) Equipment manufacture;
- (5) An identification of the types of DOT specification and exemption cargo tanks or cargo tank motor vehicles which the registrant intends to manufacture, assemble, repair, inspect, test or certify;
- (6) A statement indicating whether the registrant employs Registered Inspectors or Design Certifying Engineers to conduct certification, inspection or testing functions addressed by this subpart. If the registrant engages a person who is not an employee of the registrant to perform these functions, provide the name, address and registration number of that person; and
- (7) If the registrant is not a resident of the United States, the name and address of a permanent resident of the United States designated in accordance with §107.7 to serve as agent for service of process.

(b) In addition to the information required under paragraph (a) of this section, each person who manufactures a cargo tank or cargo tank motor vehicle must submit a copy of the manufacturer's current ASME Certificate of Authorization for the use of the ASME "U" stamp.

(c) In addition to the information required under paragraph (a) of this section, each person who repairs a cargo tank or cargo tank motor vehicle must submit a copy of the repair facility's current National Board Certificate of Authorization for the use of the "R" stamp or ASME Certificate of Authorization for the use of the ASME "U" stamp. Any person who repairs MC-series cargo tanks which are not certified to the ASME Code must submit a copy of the National Board or ASME Certificate of Authorization to RSPA before June 30, 1992.

[Amdt. 107-20, 54 FR 25003, June 12, 1989; 55 FR 37047, Sept. 7, 1990; 57 FR 365, Jan. 6, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-39, 61 FR 51337, Oct. 1, 1996; 63 FR 52846, Oct. 1, 1998]

§ 107.504 Period of registration, updates, and record retention.

(a) Registration will be for a maximum of six years from the date of the original registration.

(b) Any correspondence with the Department must contain the registrant's name and registration number.

(c) A registration must be renewed every six years or within thirty days of reissuance of an ASME or National Board Certification, whichever occurs first, by submitting an up-to-date registration statement containing the information prescribed by § 107.503. Any person initially registered under the provisions of § 107.502 and who is in good standing is eligible for renewal.

(d) A registrant shall provide written notification to the Department within thirty days of any of the following occurrences:

(1) Any change in the registration information submitted under § 107.503;

(2) Replacement of the person responsible for compliance with the requirements in § 107.503(a)(3). If this occurs, the registrant shall resubmit the required certification;

(3) Loss of ASME or National Board Certificate of Authorization; or

(4) A change in function; such as, from assembly to manufacture, an addition of a function, or a change to the types of inspections, tests or certifications of cargo tanks or cargo tank motor vehicles.

(e) Each registrant shall maintain a current copy of the registration information submitted to the Department and a current copy of the registration number identification received from the Department at the location identified in § 107.503(a)(2) during such time the person is registered with the Department and for two years thereafter.

(f) The issuance of a registration number under this subpart is not an approval or endorsement by the Department of the qualifications of any person to perform the specified functions.

[Amdt. 107–20, 54 FR 25003, June 12, 1989; 55 FR 37048, Sept. 7, 1990, as amended by Amdt. 107–20, 56 FR 27875, June 17, 1991; Amdt. 107–37, 61 FR 18931, Apr. 29, 1996]

Subpart G—Registration of Persons Who Offer or Transport Hazardous Materials

SOURCE: Amdt. No. 107–26, 57 FR 30630, July 9, 1992, unless otherwise noted.

§ 107.601 Applicability.

(a) The registration and fee requirements of this subpart apply to any person who offers for transportation, or transports, in foreign, interstate or intrastate commerce—

(1) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in § 173.403 of this chapter;

(2) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material (see § 173.50 of this chapter) in a motor vehicle, rail car or freight container;

(3) More than one L (1.06 quarts) per package of a material extremely toxic by inhalation (*i.e.*, “material poisonous by inhalation,” as defined in § 171.8 of this chapter, that meets the criteria for “hazard zone A,” as specified in §§ 173.116(a) or 173.133(a) of this chapter);

(4) A shipment of a quantity of hazardous materials in a bulk packaging (see § 171.8 of this chapter) having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;

(5) A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required for that class, under the provisions of subpart F of part 172 of this chapter; or

(6) Except as provided in paragraph (b) of this section, a quantity of hazardous material that requires placarding, under provisions of subpart F of part 172 of this chapter.

(b) Paragraph (a)(6) of this section does not apply to those activities of a farmer, as defined in § 171.8 of this chapter, that are in direct support of the farmer's farming operations.

(c) In this subpart, the term “shipment” means the offering or loading of hazardous material at one loading facility using one transport vehicle, or the transport of that transport vehicle.

[65 FR 7309, Feb. 14, 2000]

§ 107.606 Exceptions.

(a) The following are excepted from the requirements of this subpart:

(1) An agency of the Federal government.

(2) A State agency.

(3) An agency of a political subdivision of a State.

(4) An employee of any of those agencies in paragraphs (a)(1) through (a)(3) of this section with respect to the employee's official duties.

(5) A hazmat employee (including, for purposes of this subpart, the owner-operator of a motor vehicle that transports in commerce hazardous materials, if that vehicle at the time of those activities, is leased to a registered motor carrier under a 30-day or longer lease as prescribed in 49 CFR part 376 or an equivalent contractual agreement).

(6) A person domiciled outside the United States, who offers solely from a location outside the United States, hazardous materials for transportation in commerce, *provided* that the country of which such a person is a domiciliary does not require persons domiciled in the United States, who solely offer hazardous materials for transportation to the foreign country from places in the United States, to file a registration statement or to pay a registration fee.

(b) Upon making a determination that persons domiciled in the United States, who offer hazardous materials for transportation to a foreign country solely from places in the United States, must file registration statements or pay fees to that foreign country, the U.S. Competent Authority will provide notice of such determination directly to the Competent Authority of that foreign country and by publication in the FEDERAL REGISTER. Persons who offer hazardous materials for transportation to the United States from that foreign country must file a registration statement and pay the required fee no later than 60 days following publication of the determination in the FEDERAL REGISTER.

[Amdt 107-34, 60 FR 27233, May 23, 1995, as amended at 63 FR 52847, Oct. 1, 1998]

§ 107.608 General registration requirements.

(a) Except as provided in §107.616(d), each person subject to this subpart must submit a complete and accurate registration statement on DOT Form F

5800.2 not later than June 30 for each registration year, or in time to comply with paragraph (b) of this section, whichever is later. Each registration year begins on July 1 and ends on June 30 of the following year.

(b) No person required to file a registration statement may transport a hazardous material or cause a hazardous material to be transported or shipped, unless such person has on file, in accordance with §107.620, a current Certificate of Registration in accordance with the requirements of this subpart.

(c) A registrant whose name or principal place of business has changed during the year of registration must notify RSPA of that change by submitting an amended registration statement not later than 30 days after the change.

(d) Copies of DOT Form F 5800.2 and instructions for its completion may be obtained from the Hazardous Materials Registration Program, DHM-60, U.S. Department of Transportation, Washington, DC 20590-0001, by calling 617-494-2545 or 202-366-4109, or via the Internet at "http://hazmat.dot.gov".

(e) If the registrant is not a resident of the United States, the registrant must attach to the registration statement the name and address of a permanent resident of the United States, designated in accordance with §107.7, to serve as agent for service of process.

[Amdt. No. 107-26, 57 FR 30630, July 9, 1992, as amended by Amdt. 107-31, 59 FR 32932, June 27, 1994; 65 FR 7309, Feb. 14, 2000]

§ 107.612 Amount of fee.

(a) *Registration year 1999-2000 and earlier.* For all registration years through 1999-2000, each person subject to the requirements of §107.601(a)(1)-(5) of this subpart must pay an annual fee of \$300 (which includes a \$50 processing fee).

(b) *Registration year 2000-2001 and following.* For each registration year beginning with 2000-2001, each person subject to the requirements of this subpart must pay an annual fee as follows:

(1) *Small business.* Each person that qualifies as a small business under criteria specified in 13 CFR part 121 applicable to the standard industrial classification (SIC) code that describes that person's primary commercial activity

§ 107.616

must pay an annual fee of \$275 and the processing fee required by paragraph (b)(3) of this section.

(2) *Other than a small business.* Each person that does not meet criteria specified in paragraph (b)(1) of this section must pay an annual fee of \$1,975 and the processing fee required by paragraph (b)(3) of this section.

(3) *Processing fee.* The processing fee is \$25 for each registration statement filed. A single statement may be filed for one, two, or three registration years as provided in §107.616(c).

[65 FR 7309, Feb. 14, 2000]

§ 107.616 Payment procedures.

(a) Except as provided in paragraph (d) of this section, each person subject to the requirements of this subpart must mail the registration statement and payment in full to the U.S. Department of Transportation, Hazardous Materials Registration, P.O. Box 740188, Atlanta, Georgia 30374-0188. A registrant required to file an amended registration statement under §107.608(c) must mail it to the same address.

(b) Payment must be made by certified check, cashier's check, personal check, or money order in U.S. funds and drawn on a U.S. bank, payable to the U.S. Department of Transportation and identified as payment for the "Hazmat Registration Fee" or by a VISA or MasterCard credit card authorization completed and signed on the registration statement.

(c) Payment must correspond to the total fees properly calculated in the "Amount Due" block of the DOT form F 5800.2. A person may elect to register and pay the required fees for up to three registration years by filing one complete and accurate registration statement.

(d) A person may obtain a temporary registration number, valid for 45 days from the date of issuance, through an expedited registration process as follows:

(1) Contact RSPA by telephone (800-942-6990 or 617-494-2545) and provide name, principal place of business, and credit card payment information;

(2) Pay a registration and processing fee of \$350 (including a \$50 expedited handling fee). For registration years 2000-2001 and following, persons who do

49 CFR Ch. I (10-1-00 Edition)

not meet the criteria for a small business, as specified in §107.612(b)(1), must enclose an additional payment of \$1,700 with the expedited follow-up material, for a total of \$2,050 (including a \$50 expedited handling fee); and

(3) Submit a completed registration statement and proof of payment to RSPA before the expiration date of the temporary registration number.

[Amdt. 107-26, 57 FR 30630, July 9, 1992, as amended by Amdt. 107-26, 58 FR 12545, Mar. 5, 1993; 65 FR 7310, Feb. 14, 2000]

§ 107.620 Recordkeeping requirements.

(a) Each person subject to the requirements of this subpart, or its agent designated under §107.608(e), must maintain at its principal place of business for a period of three years from the date of issuance of each Certificate of Registration:

(1) A copy of the registration statement filed with RSPA; and

(2) The Certificate of Registration issued to the registrant by RSPA.

(b) After January 1, 1993, each motor carrier subject to the requirements of this subpart must carry a copy of its current Certificate of Registration issued by RSPA or another document bearing the registration number identified as the "U.S. DOT Hazmat Reg. No." on board each truck and truck tractor (not including trailers and semi-trailers) used to transport hazardous materials subject to the requirements of this subpart. The Certificate of Registration or document bearing the registration number must be made available, upon request, to enforcement personnel.

(c) In addition to the requirements of paragraph (a) of this section, after January 1, 1995, each person who transports by vessel a hazardous material subject to the requirements of this subpart must carry on board the vessel a copy of its current Certificate of Registration or another document bearing the current registration number identified as the "U.S. DOT Hazmat Reg. No."

(d) Each person subject to this subpart must furnish its Certificate of Registration (or a copy thereof) and all other records and information pertaining to the information contained in

the registration statement to an authorized representative or special agent of DOT upon request.

[Amdt. No. 107-26, 57 FR 30630, July 9, 1992, as amended at 57 FR 37902, August 21, 1992; Amdt. 107-26, 58 FR 12545, Mar. 5, 1993; Amdt. 107-31, 59 FR 32932, June 27, 1994]

Subpart H—Approvals, Registrations and Submissions

SOURCE: Amdt. 107-38, 61 FR 21100, May 9, 1996, unless otherwise noted.

§ 107.701 Purpose and scope.

(a) This subpart prescribes procedures for the issuance, modification and termination of approvals, and the submission of registrations and reports, as required by this chapter.

(b) The procedures of this subpart are in addition to any requirements in subchapter C of this chapter applicable to a specific approval, registration or report. If compliance with both a specific requirement of subchapter C of this chapter and a procedure of this subpart is not possible, the specific requirement applies.

(c) Registration under subpart F or G of this part is not subject to the procedures of this subpart.

[Amdt. 107-38, 61 FR 21100, May 9, 1996; Amdt. 107-38, 61 FR 27948, June 3, 1996]

§ 107.705 Registrations, reports, and applications for approval.

(a) A person filing a registration, report, or application for an approval, or a renewal or modification of an approval subject to the provisions of this subpart must—

(1) File the registration, report, or application with the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001, Attention: Approvals, DHM-32;

(2) Identify the section of the chapter under which the registration, report, or application is made;

(3) If a report is required by an approval, a registration or an exemption, identify the approval, registration or exemption number;

(4) Provide the name, street and mailing addresses, e-mail address optional, and telephone number of the person on whose behalf the registration, report, or application is made and, if different, the person making the filing;

(5) If the person on whose behalf the filing is made is not a resident of the United States, provide a designation of agent for service in accordance with § 107.7;

(6) Provide a description of the activity for which the registration or report is required; and

(7) Provide additional information as requested by the Associate Administrator, if the Associate Administrator determines that a filing lacks pertinent information or otherwise does not comply with applicable requirements.

(b) In addition to the provisions in paragraph (a) for an approval, an application for an approval, or an application for modification or renewal of an approval, the applicant must provide—

(1) A description of the activity for which the approval is required;

(2) The proposed duration of the approval;

(3) The transport mode or modes affected, as applicable;

(4) Any additional information specified in the section containing the approval; and

(5) For an approval which provides exceptions from regulatory requirements or prohibitions—

(i) Identification of any increased risk to safety or property that may result if the approval is granted, and specification of the measures that the applicant considers necessary or appropriate to address that risk; and

(ii) Substantiation, with applicable analyses or evaluations, if appropriate, demonstrating that the proposed activity will achieve a level of safety that is at least equal to that required by the regulation.

(c) For an approval with an expiration date, each application for renewal or modification must be filed in the same manner as an original application. If a complete and conforming renewal application is filed at least 60 days before the expiration date of an approval, the Associate Administrator, on written request from the applicant,

§ 107.709

49 CFR Ch. I (10–1–00 Edition)

will issue a written extension to permit operation under the terms of the expired approval until a final decision on the application for renewal has been made. Operation under an expired approval is prohibited absent a written extension. This paragraph does not limit the authority of the Associate Administrator to modify, suspend or terminate an approval under § 107.713.

(d) To request confidential treatment for information contained in the application, the applicant shall comply with § 107.5(a).

[Amdt. 107-38, 61 FR 21100, May 9, 1996, as amended at 65 FR 50457, Aug. 18, 2000]

§ 107.709 Processing of an application for approval, including an application for renewal or modification.

(a) No public hearing or other formal proceeding is required under this subpart before the disposition of an application.

(b) At any time during the processing of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, the application may be deemed incomplete and denied. However, if the applicant responds in writing within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension.

(c) The Associate Administrator may grant or deny an application, in whole or in part. At the Associate Administrator's discretion, an application may be granted subject to provisions that are appropriate to protect health, safety and property. The Associate Administrator may impose additional provisions not specified in the application, or delete conditions in the application which are unnecessary.

(d) The Associate Administrator may grant an application on finding that—

(1) The application complies with this subpart;

(2) The application demonstrates that the proposed activity will achieve a level of safety that—

(i) Is at least equal to that required by the regulation, or

(ii) If the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce;

(3) The application states all material facts, and contains no materially false or materially misleading statement;

(4) The applicant meets the qualifications required by applicable regulations; and

(5) The applicant is fit to conduct the activity authorized by the approval, or renewal or modification of approval. This assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.

(e) Unless otherwise specified in this chapter or by the Associate Administrator, an approval in which a term is not specified does not expire.

(f) The Associate Administrator notifies the applicant in writing of the decision on the application. A denial contains a brief statement of reasons.

§ 107.711 Withdrawal.

An application may be withdrawn at any time before a decision to grant or deny it is made. Withdrawal of an application does not authorize the removal of any related records from the RSPA dockets or files. Applications that are eligible for confidential treatment under § 107.5 will remain confidential after the application is withdrawn. The duration of this confidential treatment for trade secrets and commercial or financial information is indefinite, unless the party requesting the confidential treatment of the materials notifies the Associate Administrator that the confidential treatment is no longer required.

§ 107.713 Approval modification, suspension or termination.

(a) The Associate Administrator may modify an approval on finding that—

(1) Modification is necessary to conform an existing approval to relevant statutes and regulations as they may be amended from time to time; or

(2) Modification is required by changed circumstances to enable the

approval to continue to meet the standards of §107.709(d).

(b) The Associate Administrator may modify, suspend or terminate an approval, as appropriate, on finding that—

(1) Because of a change in circumstances, the approval no longer is needed or no longer would be granted if applied for;

(2) The application contained inaccurate or incomplete information, and the approval would not have been granted had the application been accurate and complete;

(3) The application contained deliberately inaccurate or incomplete information; or

(4) The holder knowingly has violated the terms of the approval or an applicable requirement of this chapter in a manner demonstrating lack of fitness to conduct the activity for which the approval is required.

(c) Except as provided in paragraph (d) of this section, before an approval is modified, suspended or terminated, the Associate Administrator notifies the holder in writing of the proposed action and the reasons for it, and provides an opportunity to show cause why the proposed action should not be taken.

(1) The holder may file a written response with the Associate Administrator within 30 days of receipt of notice of the proposed action.

(2) After considering the holder's or party's written response, or after 30 days have passed without response since receipt of the notice, the Associate Administrator notifies the holder in writing of the final decision with a brief statement of reasons.

(d) The Associate Administrator, if necessary to avoid a risk of significant harm to persons or property, may in the notification declare the proposed action immediately effective.

§107.715 Reconsideration.

(a) An applicant or a holder may request that the Associate Administrator reconsider a decision under §107.709(f) or §107.713(c). The request must:

(1) Be in writing and filed within 20 days of receipt of the decision;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the request to reconsider; and

(4) State in detail the modification of the final decision sought.

(b) The Associate Administrator considers newly submitted information on a showing that the information could not reasonably have been submitted during application processing.

(c) The Associate Administrator grants or denies, in whole or in part, the relief requested and informs the requesting person in writing of the decision.

§107.717 Appeal.

(a) A person who requested reconsideration under §107.715 may appeal to the Administrator the Associate Administrator's decision on the request. The appeal must:

(1) Be in writing and filed within 30 days of receipt of the Associate Administrator's decision on reconsideration;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the appeal; and

(4) State in detail the modification of the final decision sought.

(b) The Administrator, if necessary to avoid a risk of significant harm to persons or property, may declare the Associate Administrator's action effective pending a decision on appeal.

(c) The Administrator grants or denies, in whole or in part, the relief requested and informs the appellant in writing of the decision on appeal. The Administrator's decision on appeal is the final administrative action.

PART 110—HAZARDOUS MATERIALS PUBLIC SECTOR TRAINING AND PLANNING GRANTS

Sec.
 110.1 Purpose.
 110.5 Scope.
 110.7 Control Number under the Paperwork Reduction Act.
 110.10 Eligibility.
 110.20 Definitions.
 110.30 Grant application.
 110.40 Activities eligible for funding.
 110.50 Disbursement of Federal funds.
 110.60 Cost sharing for planning and training.
 110.70 Financial administration.