Sincerely,

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

Issued in Washington, DC on September 20, 1996, under the authority delegated in 49 CFR part 1.

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Associate Administrator for Hazardous Materials Safety.

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49 CFR Part 172 and 173

[Docket HM–220A; Amdt Nos. 172–150 and 173–258]

RIN 2137–AC59

Periodic Inspection and Testing of Cylinders; Response to Petitions for Reconsideration, Clarification and Editorial Correction

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

ACTION: Final rule; response to petitions for reconsideration, clarification and editorial correction.

SUMMARY: On May 28, 1996, RSPA published a final rule under Docket HM–220A which amended the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) pertaining to the maintenance and requalification of DOT specification and exemption cylinders used for the transport of compressed gases in commerce. The intent of these changes was to enhance public safety by clarifying the regulations for those persons who perform periodic inspection and testing of these cylinders. This final rule responds to petitions for reconsideration, further clarifies the regulations for cylinder retest, and makes minor editorial corrections.

EFFECTIVE DATE: The effective date of these amendments is October 1, 1996.

FOR FURTHER INFORMATION CONTACT: Theresa Gwynn, telephone (202) 366–4488, Office of Hazardous Materials Standards, Research and Special Programs Administration, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: On May 28, 1996, RSPA published a final rule under Docket HM–220A (61 FR 26750) that revised the HMR by clarifying current inspection and retest requirements for compressed gas cylinders used to transport hazardous materials in commerce. The final rule also incorporated certain long-standing regulatory interpretations, and added several new provisions. RSPA received four petitions for reconsideration of provisions in the final rule. These petitions were from representatives of compressed gas suppliers and fire extinguisher manufacturers, including petitions from the National Propane Gas Association (NPGA) and the Fire Equipment Manufacturers Association (FEMA). In this document, RSPA responds to these petitions, clarifies two additional provisions and corrects three editorial errors.

Petitions Granted

Retest Intervals for Fire Extinguishers using CO_2

FEMA and another petitioner requested that RSPA reconsider the language adopted in § 173.34(e)(19)(ii). Both petitioners stated that the revisions could be easily misconstrued to allow DOT 3A, 3AA, and 3AL cylinders used as fire extinguishers to be retested at a 12-year interval ''regardless of their lading'' instead of a 5-year interval. In addition, they stated that because fire extinguishers containing carbon dioxide or certain carbon dioxide mixtures may be corrosive to cylinders, a 12-year retest is insufficient to detect possible corrosion before an unsafe condition might occur.

It is not RSPA's intent for a cylinder containing a corrosive extinguishing agent to be granted a 12-year periodic inspection and retest, nor is it authorized in the final rule. Section 173.34(e)(19) specifically states that ''[a] DOT specification cylinder used as a fire extinguisher in compliance with § 173.309 may be retested in accordance with this paragraph (e)(19).'' Under § 173.309, cylinders used for fire extinguishers may only contain extinguishing agents that are nonflammable, non-poisonous, *non-corrosive and commercially free from corroding components,* and must be charged with nonflammable, nonpoisonous, *dry gas that has a dew-point at or below minus 46.7 °C (minus 52 °F) at 101 kPa (1 atmosphere) and is free of corroding components.*

RSPA stated in the preambles to the notice of proposed rulemaking (60 FR 54008; October 18, 1995) and the final rule that any fire extinguisher containing a fire extinguishing medium or propellant gas not meeting the requirements in § 173.309(b) (1) and (2) may not be shipped under those provisions. Therefore, they do not qualify under § 173.34(e)(19) for the 12-year retest interval. For greater emphasis, RSPA is adding Special provision 18, in column 7, for the entry ''Fire extinguishers *containing compressed or liquefied gas*'' in the Hazardous Materials Table. This special provision is added in § 172.102 and contains the lading restriction currently found in § 173.309(b). It further provides that any lading not conforming to these requirements, including mixtures of 30% or more carbon dioxide by volume, must be described by a proper shipping name other than ''Fire extinguishers *containing compressed or liquefied gas*''. In § 173.309(b) paragraph (b) (1), (2), and (3) are removed, and the introductory text is revised for consistency with this change.

Computing Wall Stress for Overfill Authorization

In the final rule, RSPA adopted an option in Note 3 of § 173.302(c)(3) to provide an alternative for the determination of average wall stress limitation through the computation of the Elastic Expansion Rejection limit (REE) by using CGA Pamphlet C–5. A petitioner wrote RSPA in regard to a May 20, 1991, letter of interpretation from the Office of Hazardous Materials Standards (RSPA) which stated, ''* * * an elastic expansion rejection limit marked on a cylinder may be used to comply with § 173.302(c)(3).'' Upon further review, RSPA is allowing the use of REE values computed in accordance with CGA Pamphlet C–5 or marked on cylinders by the manufacturer. This change is incorporated in Note 3.

Petition Denied

Request for Adoption of NPGA Safety Bulletin 118 as an Alternative Standard for Visual Inspection

In the May 28 final rule, RSPA adopted and updated, as material incorporated by reference, several Compressed Gas Association (CGA) Pamphlets. Among these, CGA Pamphlet C–6, ''Standards for Visual Inspections of Steel Compressed Gas Cylinders'', was updated from the 1984 to the 1993 edition.

The NPGA petitioned RSPA to reconsider the language in § 173.34(e)(3) and (10), requiring cylinders to be visually inspected, internally and externally, in accordance with CGA Pamphlet C–6. NPGA stated:

The present provisions of § 173.34(e)(10) read as follows:

(10) Cylinders made in compliance with the specifications listed in the table below and used exclusively in the service indicated may, in lieu of the periodic hydrostatic retest, be given a complete external visual inspection at the time such periodic retest becomes due. External visual inspection as described in CGA Pamphlet C–6 will, in addition to the following requirements prescribed herein, meet the requirements for visual inspection. When this inspection is

used in lieu of hydrostatic retesting, subsequent * * *

As proposed in the NPRM published in the October 18, 1995 Federal Register, on page 54016, § 173.34(e)(13) would read:

(13) A cylinder made in conformance with a specification listed in the table in this paragraph (e)(13) and used exclusively in the service indicated may, instead of a periodic hydrostatic retest, be given a complete external visual inspection at the time periodic retest becomes due. External visual inspection in accordance with CGA Pamphlets C–6 or C–6.1, as applicable, in addition to the other requirements of this section, meets the requirement for visual inspection. When this inspection is used instead of hydrostatic testing, * * *

Both of these provisions carry the same feature—they recognize CGA Pamphlet C–6 as one means of performing the subject external visual inspection for requalification of certain cylinders in specified services, while at the same time allowing for other means of inspection that will accomplish an inspection of equal detail and purpose.

However, in the final rule, § 173.34(e)(13) was amended to read:

(13) A cylinder made in conformance with a specification listed in the table in this paragraph (e)(13) and used exclusively in the service indicated may, instead of a periodic hydrostatic retest, be given a complete external visual inspection at the time periodic retest becomes due. External visual inspection must be in accordance with CGA Pamphlets C–6 or C–6.1. When this inspection is used instead of hydrostatic testing, * * *

As a consequence of this change, which was not published for public review and comment in the Notice of Propose Rulemaking, CGA C–6 is now the only recognized method for external visual inspection of these cylinders for the purposes of requalification under the provisions of the Hazardous Materials Regulations, precluding any other valid, equally suitable procedure.

NPGA publishes a safety bulletin presenting an external visual inspection procedure (Safety Bulletin 118 Recommended Procedures for Visual Inspection and Requalification of DOT (ICC) Cylinders in LP-Gas Service) [SB 118–91] for the precise purpose of providing a valid means of compliance with the provisions of the present § 173.34(e)(10) regarding requalification of LP-gas cylinders for continued service. * * *

NPGA strongly objects to the exclusion of SB–118–91 as a valid means of compliance with the provisions of § 173.34(e)(13) as amended under HM–220A. Moreover, we object to a substantive rulemaking change of this kind without the opportunity for public review and comment.

We respectfully request your reconsideration of this amendment and either (1) restoration of the relevant wording from the present § 173.34(e)(10) or from the Notice of Proposed Rulemaking or (2) adoption of SB 118–91 by reference in § 173.34(e)(13) as an alternative procedure of equal stature to CGA Pamphlet C–6.

RSPA disagrees with NPGA's understanding of these requirements. Neither language in § 173.34(e)(10) of Title 49 CFR (parts 100 to 177, revised as of Oct. 1, 1995) or the language in § 173.34(e)(13) of the notice of proposed rulemaking (60 FR 54016, Oct 18, 1995) provide for performing an external visual inspection in accordance with other than the identified CGA pamphlets. RSPA editorially re-worded the cumbersome text in the final rule for clarity only. No advance notice of this editorial change was necessary because RSPA only clarified the provision.

As a part of the review of the NPGA petition, RSPA reviewed NPGA Safety Bulletin SB 118–91. RSPA found this bulletin not to be equivalent to the CGA pamphlets in detail or scope, particularly for the visual inspection of compressed gas cylinders. RSPA believes use of the NPGA bulletin would not achieve the same level of safety as provided in the CGA pamphlets. Therefore, both of the NPGA requests are denied.

RSPA did make an editorial error, however, in the identification of these CGA pamphlets in the final rule. In the final rule, section 173.34(e)(13) was revised to read, ''[e]xternal visual inspection must be in accordance with CGA Pamphlets C–6 or C–6.1.'' See 61 FR 26762. Both pamphlets contain procedures for performing visual inspections. Pamphlet C–6 contains requirements for steel cylinders and C–6.1 contains requirements for high pressure aluminum cylinders. Pamphlet C–6.3 contains requirements for the visual inspection of low pressure aluminum cylinders. The table in paragraph (e)(13) does not list any high pressure aluminum cylinders, but does list a DOT 4E which is a low pressure aluminum cylinder. Therefore, paragraph (e)(13) is corrected to reference CGA Pamphlets C–6 and C–6.3 in this final rule. For this same reason, in § 173.34(e)(10), the reference to CGA Pamphlet C–6.1 is corrected to read C–6.3. Finally, in § 173.34(e)(19)(ii), the parenthetical reference to § 173.36 is corrected to read § 178.36.

Clarification

Must a Visual Examiner Who Does Not Hold a Registered Inspector Number (RIN) Maintain a Copy of CGA Pamphlet C–6 on file?

Since the publication of the final rule, several propane cylinder retailers who conduct only visual inspections of their cylinders have inquired if they must have copies of CGA Pamphlets C–6 and C–6.3 on file when they perform visual inspections. The answer is no, a person who only performs visual inspections is not required to have a RIN or maintain a copy of this pamphlet. However, the person must have been trained and be able to perform the visual inspections in accordance with the appropriate CGA Pamphlet either C–6 or C–6.3.

Although the HMR allow an external visual inspection without the person having a copy of the CGA pamphlets on hand, RSPA discourages this practice. RSPA recommends that a hazmat employer have a copy of all training materials that each hazmat employee is expected to use in the performance of his or her duties, including technical materials. However, as adopted in § 173.34(e)(2)(v)(C) of the May 28 final rule, an approved retester with a RIN shall maintain, at each location at which it inspects, retests or marks cylinders, copies of each CGA pamphlet incorporated by reference in § 171.7 that applies to the retester's cylinder inspection, retesting and marking activities at that location. Finally, the regulated community should be aware that CGA has submitted a petition for rulemaking (P–1090) requesting that any person who only performs visual inspections and marks the cylinder with the inspection date must possess a current RIN. This issue will be addressed in a future rulemaking.

Rulemaking Analyses and Notices

1. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. The rule is not considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). The economic impact of this rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

2. Executive Order 12612

This May 28, 1996 final rule, as amended herein, was analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). Federal law expressly preempts State, local, and Indian tribe requirements applicable to the transportation of hazardous material that cover certain subjects and are not ''substantively the same'' as the Federal requirements. 49 U.S.C. 5125(b)(1). These covered subjects are:

(A) The designation, description, and classification of hazardous material;

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

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

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

(E) The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container which is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule preempts State, local, or Indian tribe requirements concerning these subjects unless the non-Federal requirements are ''substantively the same'' (see 49 CFR 107.202(d)) as the Federal requirements. RSPA lacks discretion in this area, and preparation of a federalism assessment is not warranted.

Federal law (49 U.S.C. 5125(b)(2)) provides that if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the Federal Register the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA determined that the effective date of Federal preemption for these requirements in the June 5, 1996 final rule would be October 1, 1996. The effective date of Federal preemption for the changes made in this final rule will be December 30, 1996.

3. Regulatory Flexibility Act

This final rule responds to petitions for reconsideration and agency review. It is intended to make editorial and technical corrections, provide clarification of the regulations and relax certain requirements. Therefore, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

4. Paperwork Reduction Act

There are no new information collection requirements in this final rule. The May 28, 1996 final rule contains information collection requirements, in § 173.34 pertaining to the testing, inspection and marking of cylinders, that were approved by the Office of Management and Budget under OMB control number 2137–0022 and expires August 31, 1999.

5. Regulation Identifier Number

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

List of Subjects

49 CFR Part 172

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

49 CFR Part 173

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

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

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

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

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

§ 172.101 [Amended]

2. In the Hazardous Materials Table for the entry ''Fire extinguishers containing compressed or liquefied gas'', in Column (7), Special Provision ''18'' is added.

§ 172.102 [Amended]

3. In § 172.102 (c)(1), Special Provision 18 is added to read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

18 This description is authorized only for fire extinguishers listed in § 173.309(b) of this subchapter meeting the following conditions:

a. Each fire extinguisher may only have extinguishing contents that are nonflammable, non-poisonous, non-corrosive and commercially free from corroding components.

b. Each fire extinguisher must be charged with a nonflammable, non- poisonous, dry gas that has a dew-point at or below minus 46.7 °C (minus 52 °F) at 101kPa (1 atmosphere) and is free of corroding components, to not more than the service pressure of the cylinder.

c. A fire extinguisher may not contain more than 30% carbon dioxide by volume or any other corrosive extinguishing agent.

d. Each fire extinguisher must be protected externally by suitable corrosion-resisting coating.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTSAND PACKAGINGS

4. The authority citation for Part 173 continues to read as follows:

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

§ 173.34 [Amended]

5. In § 173.34(e), as revised at 61 FR 26758, effective October 1, 1996, the following changes are made:

a. In paragraphs (e)(10) and (e)(13), the wording ''CGA Pamphlets C–6 or C–6.1'' is removed and ''CGA Pamphlets C–6 or C–6.3'' is added in its place.

b. In paragraph (e)(19)(ii), ''§ 173.36'' is revised to read ''§ 178.36''.

6. In § 173.34, as amended at 61 FR 26758, effective October 1, 1996, paragraph (e)(19) introductory text is revised to read as follows:

§ 173.34 Qualification, maintenance and use of cylinders.

* * * * *

(e) * * *

(19) *Cylinders used as fire extinguishers.* Only DOT specification cylinders used as fire extinguishers and meeting Special Provision 18 in § 172.102(c)(1) of this subchapter may be retested in accordance with this paragraph (e)(19).

* * * * *

7. In § 173.302, in paragraph (c)(3), as amended at 61 FR 26764, effective October 1, 1996, Note 3 following the table is revised to read as follows:

§ 173.302 Charging of cylinders with nonliquefied compressed gases.

* * * * *

(c) * * *

(3) * * *

Note 3: Compliance with average wall stress limitation may be determined through computation of the elastic expansion rejection limit in accordance with CGA Pamphlet C–5 or through the use of the manufacturer's marked elastic expansion rejection limit (REE) on the cylinder.

* * * * *

8. In § 173.309, as amended at 61 FR 26764, effective October 1, 1996, paragraph (b) is revised to read as follows:

§ 173.309 Fire extinguishers.

* * * * *

(b) Specification 3A, 3AA, 3E, 3AL, 4B, 4BA, 4B240ET or 4BW (§§ 178.36, 178.37, 178.42, 178.46, 178.50, 178.51, 178.55 and 178.61 of this subchapter)

cylinders are authorized for use as fire extinguishers.

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

Kelley S. Coyner,

Deputy Administrator.

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49 CFR Part 173

[Docket HM–207C, Amdt. No. 173–249]

RIN 2137–AC63

Exemption, Approval, Registration and Reporting Procedures; Miscellaneous Provisions

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

ACTION: Final rule; Revision made in response to petition for reconsideration.

SUMMARY: In response to a petition for reconsideration, this final rule deletes a requirement that, when the provisions of an exemption require that a copy be in a carrier's possession during transportation, the carrier must maintain a copy of the exemption in the same manner as required for shipping papers. This amendment will allow the carrier to use any appropriate method for making the exemption available, unless otherwise specified by the provisions of the exemption.

EFFECTIVE DATE: The effective date of this final rule and the final rule published under Docket HM–207C on May 9, 1996 (61 FR 21084) is October 1, 1996.

FOR FURTHER INFORMATION CONTACT: Kathleen Stokes Molinar, Office of the Chief Counsel, (202) 366–4400, or Diane LaValle, Office of Hazardous Materials Standards, (202) 366–8553, RSPA, U.S. Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590–0001.

SUPPLEMENTARY INFORMATION: On May 9, 1996, RSPA published a final rule under docket HM–207C (61 FR 21084) that revised and clarified RSPA's procedures and requirements for its exemption, approvals, registration, reporting, preemption, and enforcement procedures and programs. These revisions and clarifications included addition of a new paragraph (c) to 49 CFR 173.22a. The last sentence of this paragraph states: ''When the provisions of the exemption require it to be in the possession of a carrier during transportation in commerce, the carrier shall maintain the copy of the exemption in the same manner as required for a shipping paper.''

On June 3, 1996, United Parcel Service (UPS) filed a petition for reconsideration, requesting that RSPA delete the last sentence of paragraph (c) to 49 CFR 173.22a. UPS claimed that the new requirement is not practicable, is both unreasonable and unnecessary, and was issued without notice and opportunity for comment.

UPS contended that the requirement would cause major operational difficulties within its system, especially in ensuring that a copy of the exemption when detached from the package ''tracks'' with the package. UPS stated that its daily business operations include transporting thousands of DOT exemption packages. Typically, UPS stated, an exemption package may be transported aboard up to five UPS vehicles, and subjected to as many sorting and transferral operations. UPS stated that, prior to the publication of HM–207C, when an exemption contained language mandating that the exemption must be carried by the carrier, UPS physically attached a copy of the exemption to each exemption package, thus facilitating the transportation of the exemption with the package through the myriad of sorting, transfer, and transportation operations necessary to deliver the package to its destination. UPS stated that requiring a driver to detach the exemption from the package, place it with the shipping papers, and transfer it each time the package was rerouted would render it extremely difficult to ensure that each exemption document was able to ''track'' its attendant package to the package's final destination.

UPS further stated that this new requirement would achieve little, if anything, in terms of improved safety and cannot be justified in light of the increased administrative and paperwork burdens associated with the new requirement. Further, UPS claimed that the new requirement was adopted without proper notice and without affording the public an opportunity for comment.

RSPA adopted the new requirement in the May 9, 1996 final rule as a clarification, with the understanding that the provision would impose no additional costs and that the vast majority of carriers already conform to the new requirement, as the most practicable way to ensure that the exemption is available during transportation. RSPA did not consider that some companies, such as UPS, may use other methods of ensuring that an exemption is on the transport vehicle and that costs would be incurred by them in conforming to the new requirement. Based on the comments presented by UPS, RSPA agrees that there may be operational burdens imposed on UPS and others which were not considered in the May 9, 1996 final rule and that the requirement may entail costs which would exceed its benefits. RSPA notes that if there is a need to ensure that an exemption is immediately accessible during transportation, such as where an exemption contains information related to the safe handling of a shipment, RSPA can specify the manner of maintaining the exemption in specific provisions in the exemption.

Based on the foregoing, RSPA is deleting the requirement as requested by UPS. Because this revision is within the scope of the rulemaking under docket HM–207C, lessens the requirements placed upon a carrier in the May 9, 1996 final rule, imposes no new regulatory burden on any person, and does not adversely impact emergency response, additional public notice and comment are unnecessary. Because the requirement was to go into effect on October 1, 1996, and to ensure publication of this amendment in the 1996 Code of Federal Regulations, there is ''good cause,'' under the Administrative Procedure Act, to make the amendment effective on the same effective date as the May 9, 1996 final rule, i.e., October 1, 1996, without the usual 30-day delay following publication.

Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

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

This final rule will not result in any additional costs to persons subject to the HMR. Therefore, preparation of a regulatory impact analysis or regulatory evaluation is not warranted.

B. Executive Order 12612

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