



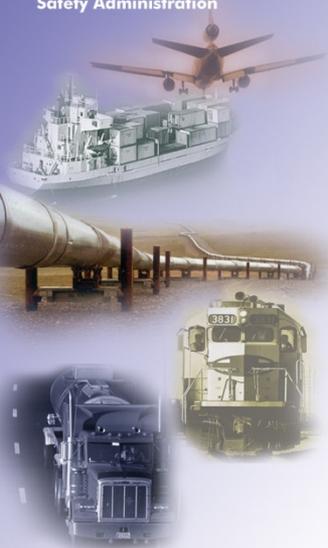
U.S. Department of Transportation
**Pipeline and Hazardous Materials
Safety Administration**



Legal Review and Update

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**Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
July 29 - 30, 2014**



Agenda

1. Organization and Role of Counsel's Office
2. Preemption
4. Enforcement
5. Recent Developments



History of Hazardous Materials Transportation Law

- 1866 1st Federal law passed
- 1877 Interstate Commerce Commission (ICC)
- 1908 The Explosives and Combustibles Act
- 1911 ICC adopted regulations
- 1930-40's ICC regulations extended to maritime, air, and highway transport
- 1966 Department of Transportation (DOT) formed
- 1975 Hazardous Materials Transportation Act
- 2005 SAFETEA-LU PHMSA created



PHMSA's Statutory Authority

Federal Hazardous Materials Transportation Safety Law

49 U.S.C. §§ 5101-5128

- Designate material as hazardous
- Issue regulations governing the safe transportation of hazardous materials in commerce
- Open outer packaging and issue emergency orders for imminent hazards



Title 49, Code of Federal Regulations

- Procedural Regulations
 - 49 C.F.R. Parts 105-107
- Hazardous Materials Regulations (HMR)
 - 49 C.F.R. Parts 171-180
- Regulations specific to modes
 - 49 C.F.R. Part 174 (*rail*); Part 175 (*air*);
Part 176 (*vessel*); Part 177 (*highway*)



Office of Chief Counsel

- Chief Counsel (Political Appointee)
- Deputy Chief Counsel
- Three Legal Divisions
 - Hazardous Materials Safety Law Division
 - Pipeline Safety Law Division
 - General Law Division



Office of Chief Counsel

- Advise the Administrator on legal matters
 - Congressional inquiries and testimony
 - Legislation
- Provide legal counsel to agency programs
 - Rulemaking
 - Enforcement
 - Special Permits and Approvals



Assist Agency Programs

- Counsel's role in assisting agency programs
 - Guidance documents
 - Pamphlets, brochures
 - Standard Operating Procedures
 - Safety Advisory Notices
 - Environmental Law
 - Memoranda of Understanding



Special Permits & Approvals

- Show Cause Letters
 - Modification
 - Suspension
 - Termination
- Denial Letters



Interagency Coordination

Memoranda of Understanding (MOU)

- Negotiations with federal agencies
- Coordination with Secretary's Office
- Draft provisions
- Training



U.S. Department of Transportation
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Preemption



Preemption

– Statute

- 49 U.S.C. 5125

– Regulations

- 49 C.F.R. 107.201-107.227



Preemption

Non-Federal governments are precluded from imposing requirements applicable to hazardous materials transportation if:

- Not possible to comply with both (dual compliance test)
- Non-Federal requirement is an obstacle (obstacle test)
- Non-Federal requirement not substantively the same as the Federal hazmat law (substantively the same as test)



Application for Preemption Determination

- Any person directly affected by the non-federal requirement
- Published in the Federal Register
- Served on non-federal government entity that is affected
- Chief Counsel issues decision and publishes
- Applicant appeal



Application for Waiver of Preemption

- Once there is a determination
- Non-federal government can apply for waiver
- Chief Counsel issues decision
 - provides the public with at least as much protection as federal requirements; and
 - is not an unreasonable burden on commerce
- Appeals



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Enforcement



Violations

- Warning letter
 - 49 C.F.R. § 107.309
- Ticket
 - 49 C.F.R. § 107.310
- Refer case to Office of Chief Counsel for civil penalty
 - 49 C.F.R. § 107.311



Notice of Probable Violation

49 C.F.R. § 107.311

Includes:

- A citation to HMR provisions
- A statement of the factual allegations
- List of response options
- A statement of the respondent's right to present written or oral explanations
- A statement of respondent's right to request a hearing
- Proposed Penalty



Enforcement — Civil Penalties

49 C.F.R. § 107.331

Assessment Considerations

- Nature and circumstances of the violation
- Extent and gravity
- Degree of Respondent's culpability
- Prior violations
- Ability to pay/continue business
- Such other matters as justice may require



Enforcement – Civil Penalties

49 C.F.R. § 107.329

- \$75,000 maximum per violation

Exceptions:

- \$175,000 maximum when a violation results in death, serious illness/severe injury, or substantial destruction of property
- \$450 minimum for a violation relating to training



Enforcement – Criminal Penalties

Referred for criminal prosecution

- Investigation by Inspector General and/or FBI
- Prosecution by Department of Justice

Criminal penalties

- Fine

and/or

- Imprisonment
 - 5 years max
 - 10 years max if release of hazmat results in death or bodily injury



Responses to NOPV

49 C.F.R. § 107.313

Within 30 days of receipt of the NOPV the Respondent must:

- Admit the violation and agree to pay
- Request informal conference
- Request formal hearing (ALJ), or
- Request extension of time to respond

OR

Default Order



Informal Conference

49 C.F.R. § 107.317

- Conference call or written submissions
- Opportunity for Respondent, regional attorney and the investigator to discuss
- Respondent's opportunity to present explanations, information, arguments, dispute facts
- Present mitigating factors
 - Corrective actions
 - Financial difficulties
- Attempt to reach settlement agreement



Administrative Law Judge (ALJ) Hearing

Request for ALJ hearing (49 C.F.R. § 107.319)

Must include:

- Name and address of the Respondent
- List admitted allegations
- General statement of issues to be raised



Pre-hearing Conference

- ALJ schedules pre-hearing conference
 - Timeline for discovery
 - Document requests
 - Request for admissions
 - Interrogatories
 - Depositions
 - Schedule hearing date



ALJ Hearing

49 C.F.R. § 107.321

- Witness testimony
 - Direct and cross examination
- Agency attorney and Respondent file briefs
- ALJ Decision
 - Respondent has 20 days to respond



Appeal

49 C.F.R. § 107.325

- After Chief Counsel's Order
 - Respondent may appeal
 - To the Administrator
- After ALJ Hearing
 - Either party may appeal
 - To the Administrator
- Administrator's decisions may be appealed to U.S. Court of Appeals



Recent Developments



Penalty Guidelines (HM-258C) 78 Fed. Reg. 60726

- Final Rule
- Took effect October 1, 2013
- Revised statement of policy to update baseline assessments for frequently-cited violations of the Hazardous Materials Regulations (HMR) and to clarify additional factors that affect penalty amounts.



Failure to Pay Civil Penalties (HM-258A) 78 Fed. Reg. 58501

- Notice of Proposed Rulemaking
- Comment period closed November 25, 2013
- Based on Statute 49 U.S.C. 5123(i)
- prohibit a person who fails to pay a civil penalty as ordered or agreed from performing activities regulated by the Hazardous Materials Regulations until payment is made



Emergency Order

- Rail transportation of crude oil
- Originally issued by DOT Secretary on February 25, 2014
- Amended March 6, 2014
- Another EO issued on May 7, 2014 for large quantity rail carriers
- Authority under 49 U.S.C. 5121(d)
- Applies to anyone that offers for transportation or transports crude oil to, from, or within the U.S. by rail



Rulemaking for Safe Transportation of Crude Oil, Flammable Materials

- Notice of Proposed Rulemaking – *Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*
- PHMSA Docket No. 2012-0082 (HM-251)
- Comment Period 60 days from publication
- Proposes enhanced tank car standards, a classification and testing program for mined gases and liquids and new operational requirements for high-hazard flammable trains



Rulemaking for Safe Transportation of Crude Oil, Flammable Materials



- Advanced Notice of Proposed Rulemaking - *Oil Spill Response Plans for High-Hazard Flammable Trains*
- Docket No. PHMSA-2014-0105 (HM-251B)
- Comment Period 60 days from publication
- Seeks further information on expanding comprehensive oil spill response planning requirements for shipments of flammable materials



Revisions to Fireworks Regulations

(HM-257)

78 Fed. Reg. 42457

- Final Rule
- Effective August 15, 2013
- Fireworks certification agencies (FCAs) as an alternative to the approval process for Division 1.4G consumer fireworks
- Revised procedural regulations for certification agencies





Information

- Hazardous Materials Safety Program Website

<http://www.phmsa.dot.gov/hazmat>

- Hazardous Materials Information Center

1-800-467-4922

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- Office of Chief Counsel

1-202-466-4400

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