

March 23, 2015

Via Regulations.gov

Associate Administrator Magdy El-Sibaie
Pipeline & Hazardous Materials Safety Administration
1200 New Jersey Avenue., SE
Washington, DC 20590

Dear Associate Administrator El-Sibaie:

Re: Docket PHMSA-2013-0225 (HM-218H): Hazardous Materials: Miscellaneous Amendments (RRR)

In the January 23, 2015 issue of the *Federal Register*, the Pipeline & Hazardous Materials Safety Administration (PHMSA) noticed miscellaneous changes to the Hazardous Materials Regulations (HMRs).¹ American Trucking Associations (ATA), the national trade association representing the motor carrier industry, has many members that transport hazardous materials.² Accordingly, as the representative of our members, ATA has a vital interest in ensuring the safe transportation of hazardous materials. ATA supports PHMSA's efforts to update and clarify the HMRs' requirements but has concerns regarding the implementability of one proposed change. In response to this notice, ATA:

- Supports PHMSA's proposed changes to the shipping paper and emergency response information requirements that would allow only numeric characters for emergency response telephone number entries;
- Supports PHMSA's proposal to allow up to 100 pounds of black powder to be carried in each trailer of a tractor trailer;
- Opposes PHMSA's proposal to expand the ban on placing certain materials in the same transport vehicles without giving carriers a method to ensure which cargoes must be kept separate;
- Supports PHMSA's proposal to require that shipments of nitric acid with wooden or fiberboard outer packaging and glass inner packaging be packed in tightly-closed, non-reactive intermediate packagings and cushioned with a non-reactive absorbent material; and

¹ 80 Federal Register 15, *Hazardous Materials: Miscellaneous Amendments (RRR)*, 3787-838 (January 23, 2015).

² ATA is the national trade association of the U.S. trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,500 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 31,000 companies and every size, type and class of motor carrier operation.

- Supports the proposed changes regulating the transportation of damaged, wet batteries so long as they are drained of fluid and are packaged so that leakage of any other fluid cannot occur under conditions incident to normal transportation.

Only Numbers in Emergency Response Phone Numbers (§§ 172.201 & 172.604)³

On March 19, 2012, the Dangerous Goods Advisory Council (DGAC) petitioned PHMSA to amend the requirements for emergency response phone numbers to “prohibit the use of alphanumeric numbers” in shipping papers “so that only numeric telephone numbers [could] be used.”⁴ DGAC filed this petition because “telephones historically associated letters with integers on the telephone face, [but] many no longer do so.”⁵ This technological development has the potential to cause undesirable delays in responding to hazardous materials transportation incidents while responders work to relate letters to corresponding numbers.⁶

ATA is pleased that PHMSA has recognized the risks related to retaining alphanumeric phone numbers.⁷ Accordingly, we support the agency’s proposal to allow only numeric integers for emergency response telephone numbers. In response to PHMSA’s request for cost information on this proposed change, ATA believes that being able to reach the party with knowledge of the shipment’s risks decrease chances of death or injury to transporters and to emergency responders. We believe that any minimal costs associated with transposing a number from its corresponding letter will be more than outweighed by benefits to transporter and responder health. ATA further notes that non-English speakers or those unfamiliar with the traditional correspondence between numbers and letters on a telephone keypad will avoid confusion that might be the difference between saving a life or failing to do so in a hazardous materials release response.

Black Powder Considered by Trailer Rather than by Tractor (§ 173.170)

Presently, the HMRs allow the transport of up to 45.4 kg (100 pounds) net weight mass of black powder that has been reclassified as a Division 4.1 material in a motor vehicle, on a train, or in a cargo vessel.⁸ In an effort to update the HMRs “to account for modern highway transportation,” PHMSA has proposed to change this requirement so that “[e]ach cargo-carrying body (a trailer...) is a separate transport vehicle.”⁹ This change would allow commercial motor vehicles pulling multiple trailers to place up to 100 pounds of black powder into each trailer. ATA agrees with PHMSA that this change will not decrease the level of safety in transportation and supports the proposal.

³ All references in this comment listed without a title refer to Title 49 of the *Code of Federal Regulations* (“The Notice”).

⁴ Vaughn Arthur, Petition of the Dangerous Goods Advisory Council, 1. P-1597, Federal Docket ID PHMSA-2012-0204-0001.

⁵ *Id.*

⁶ *Id.*

⁷ The Notice at 3791.

⁸ 49 C.F.R. § 173.170 (2014).

⁹ The Notice at 3798.

Materials in Different Packages on the Same Transport Vehicle (§ 173.21)

Presently, the HMRs forbid the transport of “a material in the same packaging, freight container, or overpack with another material, the mixing of which is likely to cause a dangerous evolution of heat, or flammable or poisonous gases or vapors, or to produce corrosive materials.”¹⁰ PHMSA proposes to add “transport vehicle” to the list of containers where such materials may not travel together.¹¹

While ATA shares PHMSA’s goal, the proposal as drafted is completely unworkable in the highway mode. The present text of 173.21(e) works in the railroad and vessel modes because the freight containers regulated contain materials all tendered by a single shipper or a broker. The current provisions related to overpacks and outer packaging work in all modes because, again, the shipper is responsible for placing the items together. However, this is not the case in the less-than-truckload (LTL) highway mode. An LTL carrier simply cannot distinguish between which packages poses these risks when loaded onto the same trailer and which do not.

PHMSA proposes to amend this section of the HMRs in light of a letter of interpretation that highlighted the possibility of two materials not subject to segregation requirements and in different outer packagings might mix and react while in the same transport vehicle.¹² However, that same interpretation letter stated, “we believe that the packaging requirements for these materials mitigates the potential for comingling and subsequent dangerous evolution of gas.”¹³ PHMSA has provided no rationale for its change in position, rendering this proposal premature.¹⁴

As drafted, this responsibility would fall both on the shipper, for causing the incompatible materials to be transported together, and the carrier, for doing so. The two materials cited in the Notice’s rationale for the change both had UN numbers and were regulated as hazardous materials.¹⁵ However, carriers and drivers cannot be expected to understand the risks inherent to transporting any individual substance that carries a UN number. The carrier’s inability to determine the risks of transporting certain materials in the same transport vehicle is the reason PHMSA has promulgated hazardous materials requiring shippers to properly determine the hazardous class and division (if any) of the hazardous materials being transported.¹⁶ As PHMSA

¹⁰ 49 C.F.R. § 173.21(e) (2014).

¹¹ Proposed § 173.21(e). The Notice at 3833.

¹² The Notice at 3797.

¹³ Robert Benedict, Interpretation Letter to Aubrey R. Campbell, PHMSA DMS ID# 13-0111 (accessed online on March 3, 2015 at

<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=49e8b967ea650410VgnVCM100000d2c97898RCRD&vgnnextchannel=aa8cd3c1af814110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>) (July 31, 2013).

¹⁴ *Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

¹⁵ *Id.* (The materials in question were UN1908, Chlorite Solution, Class 8, PGII and UN1789, Hydrochloric Acid Solution, Class 8, PGII traveling in the same vehicle but in different intermediate bulk containers. ATA concedes that, if mixed, these two materials create chlorine dioxide gas, which is forbidden in transportation per se by the HMRs.)

¹⁶ 49 C.F.R. § 171.1(b) (2014).

notes, it could more easily implement this requirement by updating the segregation requirements in § 177.848 or the loading and unloading requirements for Class 8 materials in § 177.839.¹⁷

Carriers and drivers are expected to know segregation requirements for hazard classes and divisions.¹⁸ Those few exceptions from strict hazard class or division-based segregation rules that exist are incorporated into the highway mode segregation table.¹⁹ Carrier responsibility is appropriate for segregation requirements because drivers can compare the declared hazard classes and divisions on shipping papers, package markings, and placards against the table in § 177.848. Lacking the knowledge required to properly classify hazardous materials, drivers and carriers cannot be held responsible for the co-mingling of hazardous materials packages without a designation on the segregation table in § 177.848.

While it would be functionally impossible for carriers and drivers to differentiate between all substances with UN numbers that, when combined, might cause risks § 171.21 is designed to mitigate, the proposal goes further. PHMSA has proposed to forbid the transportation of *any material* which is likely to present these dangers.²⁰ As written, carriers and drivers would not merely be required to cross reference the Safety Data Sheets for each type of UN number-bearing hazmat being transported. Carriers and drivers will now need chemists or materials scientists on staff to consider *all* packages being shipped to investigate whether *any* two or more of them pose risks of elevated temperature, dangerous vapors, or producing corrosive materials.

Such a requirement might be possible for all packages with a UN Number. But, there are materials in transportation that are not classified as hazardous materials that when combined present the risks 173.21(e) is designed to mitigate. For instance, non-spillable lead batteries are not a fully regulated hazardous materials²¹. Neither is mineral water. But, when combined the two can produce significant heat through short circuit, as well as hydrogen-sulfide, a colorless, poisonous, and flammable gas.²² Of course, no driver could be expected to know this or to understand the interactions between every possible substance transported by truck with every other substance it might share a trailer with.

By extending the proposed requirements to all materials, any item on a bill of lading becomes suspect. Consider the number of packages that travel in a single less-than-truckload tractor-trailer (not to mention a tractor-trailer for a small package delivery company). Each of these packages would have to be cross-referenced against every other package *even if they were not hazardous materials packages*.

The costs of cross-referencing every single package that might be loaded into a trailer with another for any possible hazard are significant. According to the Bureau of Labor Statistics, the mean hourly wage for a chemist with the necessary skill set to make these comparisons is

¹⁷ The Notice at 3797.

¹⁸ 49 C.F.R. § 177.848 (2014).

¹⁹ 49 C.F.R. § 177.848(c) (2014).

²⁰ Proposed 49 C.F.R. § 173.21(e). The Notice at 3833.

²¹ 49 C.F.R. § 173.159a (2014).

²² Health Concerns with Batteries – Battery University, http://batteryuniversity.com/learn/article/health_concerns (last accessed February 25, 2015).

\$37.37.²³ The number of packages on a pickup and delivery truck easily exceeds one hundred. That means all these packages must be compared against each other, for 4950 comparisons.²⁴ Assuming generously that a chemist can make one comparison between packages a minute, that is 82.5 hours of labor, which will cost the company 3,083 dollars *per truck*. Of course, one comparison per minute is a generous number. More realistically, if it takes a chemist five minutes per set of packages, it will cost the company 15,514 dollars per truck.

PHMSA has chosen a standard so overly broad that no carrier would be able to meet it. The regulation as proposed would cover all 593,033 motor carriers regulated in interstate commerce.²⁵ Even if each motor carrier needed to hire only one chemist at an annual salary of \$77,740, it would still cost the trucking and motorcoach industries more than 46 billion dollars.²⁶ If the agency interprets its proposed § 173.21(e) as applying only to hazardous materials shipments subject to placarding, the roughly 75,000 hazardous materials carriers would still have to pay 5.8 billion dollars to hire someone to compare packages for the dangers presumed in the proposed 173.21(e).

ATA doubts that HM-218H as a whole will create benefits in excess of the costs imposed only by the proposed § 173.21(e). ATA further notes that this proposed change brings HM-218H's costs above \$150 million, making it economically significant and requiring economic review by the Office of Information & Regulatory Affairs within the Office of Management and Budget.²⁷ Accordingly, ATA recommends that PHMSA remove this provision from the proposal.

Packaging for Nitric Acid Shipments (§ 173.158)

ATA supports PHMSA's proposal to strengthen the packaging requirements for shipments of nitric acid. Currently, nitric acid shipments can occur with glass inner packagings and fiberboard outer packaging.²⁸ But, one carrier petitioned PHMSA to strengthen this requirement after fires broke out due to leaks from four different nitric acid shipments in under six months.²⁹ Requiring that the glass bottles inside the fiberboard be packed in "intermediate packagings and cushioned with a non-reactive, absorbent material" should ensure that these fires do not continue.³⁰

²³ Bureau of Labor Statistics, Occupational Employment & Wages, May 2013: 19-2031 Chemists. <http://www.bls.gov/oes/current/oes192031.htm> (last accessed February 25, 2015).

²⁴ This example posits only sets of two materials that meet the criteria for the proposed 173.21(e), if the hypothetical chemist had to search for dangerous combinations that only arose when three or more substances were mixed, the costs would grow accordingly.

²⁵ Federal Motor Carrier Safety Administration, 2014 Pocket Guide to Large Truck and Bus Statistics (October version), 7 <http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA%20Pocket%20Guide%20to%20Large%20Truck%20and%20Bus%20Statistics%20-%20October%202014%20Update%20%282%29.pdf> (last accessed February 25, 2015).

²⁶ See n.24, *supra*.

²⁷ Executive Order 12866.

²⁸ 49 C.F.R. § 173.158 (2014).

²⁹ Leo Diaz and Samuel Elkind, Petition of UPS, PHMSA Petition P-1601, 1 (last accessed online on March 3, 2015 at <http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0236-0001>) (September 5, 2012).

³⁰ The Notice at 3792.

Transportation of Wet Batteries (§ 173.159)

ATA supports PHMSA's proposal to incorporate a new provision that allows for the transportation of damaged, wet, or leaking batteries. We agree that a battery that has been drained of fluid, repaired or packaged to prevent leaking in transportation, or has been placed in a compliant salvage drum is safe for transportation.³¹ Additionally, PHMSA's proposal to also allow transportation when placed in an "intermediate packaging that conforms to the general packaging requirements of" Subpart B of Part 173 provides an additional safe method for transporting wet or damaged batteries.

Conclusion

Thank you for reviewing ATA's concerns related to the proposed changes in HM-218H. ATA generally approves of the changes proposed in the Notice. However, specifically ATA:

- Supports PHMSA's proposed changes to the shipping paper and emergency response information requirements that would allow only numeric characters for emergency response telephone number entries;
- Supports PHMSA's proposal to allow up to 100 pounds of black powder to be carried in each trailer of a tractor trailer;
- Opposes PHMSA's proposal to expand the ban on placing certain materials together on transport vehicles without providing carriers methods to ensure compliance with these new requirements;
- Supports PHMSA's proposal to require that shipments of nitric acid with wooden or fiberboard outer packaging and glass inner packaging be packed in tightly-closed, non-reactive intermediate packagings and cushioned with a non-reactive absorbent material;
- Supports the proposed changes regulating the transportation of damaged, wet batteries so long as they are drained of fluid and are packaged so that leakage of any other fluid cannot occur under conditions incident to normal transportation.

Should you wish to discuss this matter in greater detail, please contact the undersigned at bstephen@trucking.org or at (703) 838-7982.

Best,



Boyd Stephenson
Director, Hazardous Materials Policy
American Trucking Associations

³¹ *Id.* at 3797.