

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Virginia, is amended by adding Channel 229A at Lynchburg. Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration****49 CFR Parts 107, 171, 176, and 177**

[Docket No. RSPA-03-14982 (HM-232C)]

RIN 2137-AD79

**Hazardous Materials: Enhancing Hazardous Materials Transportation Security**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the procedures for applying for an exemption from the Hazardous Materials Regulations, adopted in an interim final rule published May 5, 2003, to require certain applicants to certify compliance with provisions of the Safe Explosives Act. In addition, this final rule adopts without change provisions in the interim final rule that require motor carriers and vessel operators to comply with applicable licensing requirements for drivers and crewmen, respectively.

**EFFECTIVE DATE:** This final rule is effective March 11, 2004.

**FOR FURTHER INFORMATION CONTACT:** Susan Gorsky, (202) 366-8553, Office of Hazardous Materials Standards, Research and Special Programs Administration.

**SUPPLEMENTARY INFORMATION:****I. Background**

On May 5, 2003, the Research and Special Programs Administration (RSPA, we) published an interim final rule (IFR) to enhance hazardous materials transportation security (68 FR 23832). The IFR described the current system of regulations applicable to the transportation of hazardous materials in commerce, and reviewed Department of Transportation (DOT) activities to enhance the security of hazardous materials shipments. In addition, the rule summarized the requirements of the Uniting and Strengthening America

by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act; Pub. L. 107-56, October 25, 2001, 115 Stat. 272) and regulations adopted by the Transportation Security Administration (TSA) and the Federal Motor Carrier Safety Administration (FMCSA) to implement the background check provisions of the Act. Further, the IFR described actions taken by the Federal Aviation Administration (FAA), TSA, and the U.S. Coast Guard to address security issues associated with the transportation of hazardous materials by air and vessel. The IFR also incorporated into the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) a requirement that shippers and transporters of hazardous materials comply with applicable Federal security regulations and revised the procedures for applying for an exemption from the HMR to require applicants to certify compliance with applicable Federal transportation security laws and regulations. Finally, DOT, in consultation with TSA, determined that these regulations adequately address the security risks posed by persons engaged in the transportation of explosives in commerce, and, accordingly, the provisions of 18 U.S.C. 842(i), which address categories of persons who are prohibited from possessing explosives, do not apply to persons while they are engaged in the transportation of explosives in commerce by motor carrier, aircraft, or vessel.

**II. Response to Comments Received on IFR**

We received six comments on the IFR—from the Institute of Makers of Explosives (IME), the Dangerous Goods Advisory Council (DGAC), the Pennsylvania Department of Transportation (Pennsylvania DOT), the Texas Department of Public Safety (Texas), Transportation Trades Department (TTD), and a joint comment from the Wisconsin Federation of Cooperatives and the Minnesota Association of Cooperatives (Wisconsin-Minnesota Cooperatives). These comments are summarized below.

In response to the comments submitted, we are revising the procedures adopted in the IFR for persons applying for an exemption to transport certain explosives in commerce by aircraft. The revisions are minor and do not affect the security risks posed by such transportation. Therefore, the determinations made in the IFR concerning the applicability of 18 U.S.C. 842(i) to the transportation of

explosives in commerce continue in effect.

**A. Comments Beyond the Scope of the HM-232C Rulemaking**

The May 5, 2003 IFR amended Part 177 of the HMR to require motor carriers who transport hazardous materials in commerce to comply with Part 383 of the Federal Motor Carrier Safety Regulations (FMCSRs). Part 383 establishes commercial driver license requirements. On May 5, 2003, TSA published regulations to establish procedures for making determinations as to whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a commercial driver's license (interim final rule; 68 FR 23851). Also on May 5, 2003, FMCSA amended Part 383 to prohibit states from issuing a commercial driver's license with a hazardous materials endorsement unless the Attorney General has conducted a background records check of the applicant and TSA has determined that the applicant does not pose a security threat warranting denial of the hazardous materials endorsement (interim final rule; 68 FR 23843).

Wisconsin-Minnesota Cooperatives, Texas, and TTD express concern about various aspects of the background check requirements in the TSA and FMCSA regulations. These comments are beyond the scope of this rulemaking. We have placed the comments in the appropriate TSA and FMCSA dockets to be addressed as those agencies finalize the interim final rules they adopted on May 5, 2003.

The FMCSA IFR amended Part 383 of the FMCSRs to require commercial drivers of motor vehicles used to transport select agents regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 to obtain a commercial driver's license with a hazardous materials endorsement. Pennsylvania DOT suggests that motor vehicles used to transport select agents should be placarded. Again, this comment is beyond the scope of this rulemaking. We considered whether placarding for certain infectious substances should be required under Docket HM-226 (ANPRM published September 2, 1998, 63 FR 46843; NPRM published January 22, 2001, 66 FR 6941; final rule published August 14, 2002, 67 FR 53118). For the reasons outlined in the HM-226 NPRM (66 FR 6946), we determined that current hazard communication requirements for infectious substances shipments are sufficient to enable transportation workers and emergency response

personnel to identify and address any potential hazards and, thus, decided against a placarding requirement.

IME offers a number of comments concerning the application of regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to the transportation of explosives. These comments are beyond the scope of this rulemaking and are appropriately addressed by ATF.

#### *B. Procedures for Adopting IFRs*

DGAC suggests that RSPA has no procedures for adopting interim final rules and asks if the requirements adopted in the IFR are intended to be temporary. DGAC is not correct that there are no procedures for adopting IFRs. Section 553(b) of the Administrative Procedure Act (5 U.S.C. 500 *et seq.*) permits an agency to issue a rule without prior notice and comment when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. Section 106.35 of 49 CFR part 106 sets forth the procedures for issuing an interim final rule that were adopted by RSPA in a final rule published July 25, 2002 (67 FR 42947). Section 106.35 explains that, consistent with section 553(b) of the Administrative Procedure Act, RSPA may issue an IFR without first publishing a notice of proposed rulemaking and accepting public comments if the agency finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest. After considering comments received on an IFR, § 106.35 provides that the agency may revise the interim final rule and issue a final rule. In this rulemaking, we are doing precisely that.

#### *C. Determinations Made in the IFR*

IME is the only commenter that addressed the determinations made in the preamble to the May 5 IFR and is generally supportive of those determinations. The IFR provides an exception, pursuant to 18 U.S.C. 845(a)(1), to the prohibited persons provisions in 18 U.S.C. 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air, which are regulated by the United States Department of Transportation (DOT) and agencies thereof, and which pertain to safety."

IME requests that we clarify the effect of the transportation exception in 18 U.S.C. 842(i) on motor private carriers and their personnel. The TSA and FMCSA regulations implementing the USA PATRIOT Act and incorporated into the HMR in the May 5, 2003 IFR

apply to the transport of placarded and non-placarded amounts of explosives by common, contract, or private motor carriers within the meaning of 18 U.S.C. 845(a)(1), and the provisions of 18 U.S.C. 842(i), accordingly, do not apply to persons engaged in such transportation in commerce.

IME also requests that we clarify the effect of the transportation exception in 18 U.S.C. 842(i) on non-driver/crew employees of companies that offer for transportation or transport explosives in commerce. As explained in the preamble to the May 5, 2003 IFR, DOT has determined that non-placarded shipments of explosives do not present a sufficient security risk to justify detailed background check or other security requirements at this time; in light of this determination, the provisions of 18 U.S.C. 842(i) do not apply to persons engaged in such transportation in commerce. For placarded shipments of explosives, the determinations explained in the preamble to the May 5, 2003 IFR with regard to the transportation by common/contract motor carriers, vessel, and air and the determinations concerning rail transportation of explosives explained in a notice published jointly by FRA, RSPA, and TSA on June 9, 2003 (68 FR 34470) apply to drivers employed by motor carriers and crews employed by vessel, air, and rail carriers.

Non-driver employees of motor carriers were not specifically addressed in the May 5, 2003 IFR. DOT and TSA have assessed the security risks posed by these individuals and have determined that no further regulation is needed at this time. Accordingly, the provisions of 18 U.S.C. 842(i) do not apply to non-driver employees of motor carriers when they are performing transportation functions regulated under the HMR. As defined in a final rule published October 30, 2003 (68 FR 61906)), transportation functions are functions performed as part of the actual movement of a hazardous material in commerce and include certain loading, unloading, and storage operations. (See the October 30, 2003 final rule for a complete discussion of the applicability of the HMR to specific transportation functions.)

The exemption under 18 U.S.C. 845(a)(1) does not apply to non-driver employees of Federal explosives licensees and permittees regulated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). In fact, all persons who are employed by Federal explosives licensees and permittees and who possess explosives in the course of their employment are subject to 18 U.S.C. 842(i) prohibitions

(with the limited exception of employee drivers).

#### *D. Procedures for Applying for an Exemption*

The May 5, 2003 IFR adopted two new requirements for applicants seeking an exemption from the HMR. First, the IFR requires an applicant for an exemption to certify compliance with transportation security laws and regulations. Second, the IFR requires an applicant for an exemption to transport otherwise prohibited explosives on passenger or cargo-only aircraft to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material.

In their comments, DGAC and IME express concern about the first requirement. DGAC notes that the text in § 107.105(c)(10) is inconsistent with the summary and preamble of the IFR in that it does not limit the certification requirement to Federal transportation security laws and regulations. Both DGAC and IME note that the requirement is quite broad and could be read to include state or local transportation security laws and regulations; DGAC makes the additional point that the IFR could be interpreted to apply to packaging manufacturers in addition to persons who offer or transport hazardous materials for transportation.

Our intention in adopting the general certification requirement for exemption applicants was to assure that they were aware of and in compliance with applicable Federal security requirements, including security requirements promulgated by agencies outside DOT. We agree with commenters that the requirement in the IFR is not clear as to its applicability. Upon further consideration, moreover, we have determined that the requirement is not necessary to assure that exemption holders comply with applicable security regulations. Instead of requiring applicants to certify compliance with applicable Federal security laws and regulations, we will include in the actual exemption document, where applicable, an indication that the exemption does not exempt the holder from compliance with the security plan requirements in Subpart I of Part 172 of the HMR, the security training requirements in § 172.704 of the HMR, and other specific Federal requirements that may apply to the exemption holder's operations. Therefore, in this final rule, the requirement for an applicant for an exemption to certify compliance with

transportation security laws and regulations is deleted.

IME also expresses concern that the IFR requires applicants seeking an exemption for the transportation of explosives that are otherwise prohibited for air transportation to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material. IME notes that exemption applicants must demonstrate an equivalent level of safety, including security, and suggests that this should be sufficient to assure the security of explosives shipped under exemption.

As explained in the May 5 IFR, we have issued a limited number of exemptions that permit the transportation of explosives that would be placarded if transported by highway or rail, including Division 1.1 and 1.2 explosives. All but one of these exemptions were issued to operators that are subject to TSA security requirements, including finger-print based background checks for all flightcrew members. The exception is an exemption that was issued for the transportation of explosives on aircraft with a maximum certificated takeoff weight of less than 12,500 pounds; aircraft with a certificated takeoff weight under 12,500 pounds are not subject to the TSA security requirements. IME is correct that exemption applicants who are subject to TSA security requirements should not also need to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material. However, for applicants for exemptions to transport explosives who are not subject to TSA security requirements, the certification requirement will help to assure that prohibited persons under 18 U.S.C. 842(i) are not involved in the transportation of the explosives. In this final rule, we are modifying the certification requirement to clarify that it applies only to applicants for exemptions to transport explosives in amounts that would otherwise be prohibited for air transportation using aircraft with a maximum certificated weight of less than 12,500 pounds. The certification requirement is not necessary for flight crews on aircraft with a maximum certificated takeoff of 12,500 pounds or more because all such individuals are subject to the TSA security requirements.

The May 5, 2003 IFR inadvertently omitted adding the new certification requirement for applicants for party status to existing exemptions. Therefore, in this final rule we are amending 49 CFR 107.107 to require applicants

seeking to be parties to existing exemptions to transport explosives in amounts that would otherwise be prohibited for air transportation using aircraft with a maximum certificated weight of less than 12,500 pounds to certify that no person within the prohibited persons categories listed in 18 U.S.C. 842(i) will participate in the transportation of the material.

### III. IFR Provisions Adopted Without Change

The May 5, 2003 IFR adopted several provisions designed to assure that shippers and carriers comply with security requirements promulgated by other Federal agencies, as appropriate. First, the IFR amended § 171.12a to require rail and motor carriers transporting Class 1 materials from Canada into the United States to comply with TSA regulations applicable to such transportation. Second, the IFR added a new § 176.7 to require vessel owners and operators to assure that vessel personnel are licensed or documented as required under U.S. Coast Guard regulations. Third, the IFR amended § 177.804 to require motor carriers to comply with driver licensing requirements in the Federal Motor Carrier Safety Regulations. No persons commented on these provisions. They are adopted without change in this final rule.

### IV. Regulatory Analyses and Notices

#### A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not a significant regulatory action under Executive Order 12866 and the regulatory policies or procedures of the Department of Transportation (44 FR 11034). This final rule imposes minimal new compliance costs on the regulated industry. The self-certification requirement for certain applicants for exemptions from the HMR will apply to one or two applicants each year.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This final rule imposes minimal new compliance costs on the regulated industry. I hereby certify that the requirements of this final rule will not have a significant impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272

(“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

#### C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This final rule preempts State, local, and Indian tribe requirements but does not impose any regulation with substantial direct effects on the States, the relationship between the National government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

#### D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this final rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply and a tribal summary impact statement is not required.

#### E. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in annual costs of \$100 million or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector.

#### F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. RSPA has a current information collection approval under OMB No. 2137-0051, “Rulemaking, Exemption, and Preemption Requirements” with 4,219 burden hours, which includes information collection estimates for the exemptions application process. The Office of Management and Budget approved the extension of this information collection on May 16, 2003, with an expiration date of May 31, 2006.

We estimate that an application for an exemption requires 5 hours to complete. An application to renew an exemption requires one hour to complete. The addition of a security certification as part of an exemption application will not add any appreciable time to this process.

Requests for a copy of the information collection should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (DHM-10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW., Washington, DC 20590-0001, telephone (202) 366-8553.

G. Regulation Identifier Number (RIN)

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

H. Environmental Assessment

There are no significant environmental impacts associated with this final rule. It imposes a self-certification requirement for certain applicants for exemptions from the HMR.

I. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or you may visit http://dms.dot.gov.

List of Subjects

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials,

Reporting and recordkeeping requirements.

49 CFR Part 177

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

Accordingly, the interim final rule amending 49 CFR parts 107, 171, 176, and 177 that was published at 68 FR 23832 on May 5, 2003, is adopted as a final rule with the following changes:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for part 107 continues to read as follows:

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

2. In § 107.105, revise paragraph (c)(10) to read as follows:

§ 107.105 Application for exemption.

\* \* \* \* \*

(c) \* \* \*

(10) When a Class 1 material is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant for an exemption to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

\* \* \* \* \*

3. In § 107.107, revise paragraphs (b)(3) and (b)(4) and add paragraph (b)(5), to read as follows:

§ 107.107 Application for party status.

\* \* \* \* \*

(b) \* \* \*

(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; (4) If the applicant is not a resident of the United States, provide a designation of agent for service in accordance with § 105.40 of this subchapter; and (5) For a Class 1 material that is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant for party status to an exemption to transport such Class 1 material on passenger-carrying

or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

\* \* \* \* \*

4. In § 107.109, revise paragraph (a)(6) to read as follows:

§ 107.109 Application for renewal.

(a) \* \* \*

(6) When a Class 1 material is forbidden for transportation by aircraft except under an exemption (see Columns 9A and 9B in the table in 49 CFR 172.101), an applicant to renew an exemption to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

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Issued in Washington DC on February 3, 2004, under authority delegated in 49 CFR Part 1.

Samuel G. Bonasso,

Deputy Administrator, Research and Special Programs Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 030808196-4036-03; I. D. 062403C]

RIN 0648-AR13

Fisheries of the Exclusive Economic Zone (EEZ) Off Alaska; Provisions of the American Fisheries Act (AFA)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; removal of expiration date.

SUMMARY: NMFS issues a final rule to remove the expiration date of regulations published in the Federal Register on December 30, 2002, implementing the AFA. The AFA final rule inadvertently specified a period of effectiveness that will expire December 31, 2007. This rule will make the amendments to the AFA rule permanent, as originally intended. This