



# Dangerous Goods Advisory Council

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## Appeal of HM-215F Final Rule (Docket No. PHMSA – 2005-23141)

The Dangerous Goods Advisory Council (DGAC) appeals HM-215F Final Rule in accordance with 49 CFR Part 106.

DGAC is a non-profit educational organization that promotes hazmat transportation safety by providing classroom training, seminars and conferences, and participation in domestic and international regulatory activities in its promotion of not only safe, but also efficient transportation of hazardous materials/dangerous goods in commerce.

DGAC appeals the final rule for the following reasons:

**1. The final rule imposes additional requirements on packages manufactured and filled in other countries in accordance with international packaging requirements. This action threatens the worldwide uniform acceptance of packages manufactured to international packaging standards. Other countries noting the US is taking exception to internationally agreed packaging requirements could consider reciprocal actions.**

The US has historically been a leader in accepting UN standard packagings, without reservation, from other countries to promote worldwide acceptance of UN packagings without their being burdened by unique packaging requirements imposed by individual countries that would frustrate the safe and efficient international movement of hazardous materials.

In the past, when other countries expressed an interest in unilaterally imposing additional requirements on US manufactured UN standard packagings, RSPA (now PHMSA) was able to preclude such unilateral actions. For example, at one time the Canadian regulatory authority threatened to require US UN standard packagings not tested by a third party laboratory (i.e., self certified packagings) to be tested separately by a Canadian test lab as a condition for use in Canada. RSPA responded by including a provision in its regulations (see §173.24(d)(2)(iii)) essentially stating that the US would accept foreign manufactured UN packagings provided the government of the country in which they were manufactured gave reciprocal treatment to US manufactured UN standard packagings. As a result, Canada never adopted the contemplated requirement. Since including this provision, when other governments have also threatened to impose additional requirements on US UN standard packagings, they were made aware of §173.24(d)(2)(iii) and were dissuaded from taking unilateral steps affecting UN packagings.

Unfortunately, the final rule (note that, as discussed in 2. below, this requirement was not in the NPRM) under HM-215F is inconsistent with this philosophy. It applies the vibration test capability requirement on foreign packagings entering the US in accordance with the IMDG Code or the ICAO TI. It also subjects UN standard packagings reconditioned or remanufactured outside the US to HMR requirements for reconditioning and remanufacturing.

In relation to vibration testing, the US has repeatedly been rebuffed at international meetings when it proposed the vibration test capability requirement for nonbulk UN standard packagings. Imposing this requirement through HM-215F is tantamount to baiting other governments to reciprocate with their own special requirements for UN standard packagings from the US.

**2. The final rule in at least one instance exceeds the HM-215F NPRM. The affected public was not given an opportunity to comment on the more severe requirement. We believe this action is contrary to the Administrative Procedures Act.**

In the NPRM, requirements in §173.24 and §173.24a were only proposed as applicable to export shipments (see §171.22(h)(5) of the NPRM). The final rule in §171.22(g)(5) makes the provisions applicable to import and export shipments. This is a substantial change, particularly considering the vibration test capability requirement (discussed above) in §173.24a(a)(5) which, up until now, has not been applicable to IMDG Code and ICAO TI shipments.

**3. Many of the HMR requirements applied by HM-215F correspond to similar requirements in the international regulations. Imposition of these HMR requirements is duplicative, unnecessary, and will be confusing in that international shipments must be in accordance with the same or similar requirements when they are transported in accordance with an international standard such as the IMDG Code or the ICAO Technical Instructions. Examples include:**

**A.** Under HM-215F, all international shipments, whether import or export shipments, are subject to the general packing requirements in §173.24 and §173.24a (see §171.22(g)(5)). The requirements in §173.24 are equivalent to similar requirements in the ICAO TI and the IMDG Code. There is no apparent reason for applying the §173.24 requirements to IMDG Code and ICAO TI shipments already packed in accordance with similar international requirements.

Similar arguments can be made in relation to §173.24a except that this section applies the vibration test capability requirement (discussed in 1. above) in §173.24a(a)(5) to packages transported in accordance with the IMDG Code and ICAO TI.

For air shipments, reference to §173.24 results in conflicting requirements. §173.24(i) references §173.27 which in §173.27 Tables 1 and 2 impose different quantity limits on the amount of hazardous material allowed per inner and outer package than do the ICAO TI. It is unclear which limit the user is to follow. Neither regulation is consistently more conservative. Hopefully PHMSA does not expect an overseas shipper to consider both limits in preparing an ICAO shipment? To add to the confusion, §171.24(b)(2) only requires the ICAO shipper to meet the ICAO quantity limits. Further PHMSA's work on packing instructions with the ICAO Dangerous Goods Panel suggests that it considers the ICAO quantity limits more appropriate than the §173.27 limits.

**B.** Under HM-215F, new §171.22(g)(6) applies the HMR reuse, reconditioning and remanufacturing requirements to shipments subject to international regulations. Save for the minimum thickness requirements in §173.28(b)(4)(i), the requirements referenced in §173.28 are in large part the same requirements found in the international regulations. Yet under HM-215F, the foreign package reconditioner will have to consider the IMDG Code or ICAO TI reconditioning requirements as well as the corresponding HMR requirements even though the

two sets of requirements are in most respects the same. Further, the rationale for imposing this requirement on foreign packaging manufacturers providing reconditioned packagings for transport under the ICAO TI and the IMDG Code must be seriously questioned in that UN standard packagings manufactured outside the US and imported for filling in the US are not subject to similar requirements under §173.24(d)(2) where only the reuse provisions apply.

This proposal represents a departure from the primary objective of international acceptance. Rules governing the reconditioning of packaging vary from nation to nation. For example, Canada and Japan have minimum thickness requirements that differ from those in the U.S. Australia deals with this issue by establishing an overall weight requirement for drums. In the interest of international acceptance of UN standard packagings and shipments made in accordance with international regulations, PHMSA has to date not applied its own reconditioning requirements on foreign reconditioners or on foreign shippers using reconditioned packagings. We encourage DOT to return to this sensible approach.

**C.** While DGAC supports the wider usage of Canadian bulk packagings, as a result of the changes introduced in §171.12(c)(3) for Canadian bulk packagings, such as rail tank cars and cargo tank motor vehicles, these bulk packagings, when filled in Canada will be subject to the many HMR requirements listed in §171.12(c)(3)(i) to (v) as well as comparable Canadian requirements. Duplicative requirements are confusing and the need for them is not apparent considering no deficiencies have been noted by PHMSA with respect to similar Canadian requirements that have been applied for many years in the case of bulk shipments transported from Canada into the US.

**4. The new regulation contains numerous references to other parts of the HMR that significantly complicate compliance with the US requirements for international shipments with no measurable safety benefit. In some instances, few or no relevant requirements appear in the referenced regulations.**

**A.** Heretofore shipments packaged, marked, labeled in accordance with the ICAO Technical Instructions on the Transport of Dangerous Goods (ICAO TI) were authorized for transport by motor carrier. Under the existing §171.11 requirements, the air carrier is subject to the Part 175 requirements. Provided the conditions in §171.11 were met (conditions the shipper or air carrier has primary responsibility for), the motor carrier was allowed to transport the shipment before or after an air shipment in accordance with the requirements of the HMR relevant to transport by motor carrier (e.g., registration, shipping paper retention, placarding and operational requirements in Part 177). Text similar to §171.24(c) applying Part 177 to the motor carrier was unnecessary because only the package and hazard communication requirements of ICAO were recognized (note, in the final rule under HM-215F, PHMSA failed to include similar text to cover rail transport even though rail transport of ICAO packages was authorized).

DGAC commented on the anticipated adverse impact of regulation reorganization in the NPRM. Under the new provisions in §171.24, a rail carrier or a motor carrier as “persons who transport a hazardous material in accordance with the ICAO TI” before or after an air shipment must consider compliance with the ICAO TI, §171.22 and §171.24 (see §171.24(a)), all the applicable requirements in Parts 171 and 175 (see §171.24(b)(1)), the quantity limits prescribed in ICAO (see §171.24(b)(2)), and the requirements in applicable US variations to ICAO (see §171.24(b)(3)). The new approach spreads the requirements over a number of sections, with some redundancy (e.g, the ICAO quantity limits are already part of the ICAO TI so that there is no need to restate compliance with the quantity limits separately; and references to all of Part 171, while in other places referring to certain specific Part 171 provisions), compared to the previous single section. In addition, HM-215F requirements call into consideration some parts of the regulations that are irrelevant for rail or motor carrier transport (e.g., Part 175, and ICAO

quantity limits). The effect is to complicate compliance for the rail or motor carrier operator who is bound to verify compliance with these provisions under the new §171.24.

In interest of “user friendliness”, DGAC in its comments to the NPRM asked PHMSA to identify specific requirements that individuals in the transport chain should be responsible for. PHMSA chose instead to retain its original approach of including broad regulatory references.

In addition, for an air carrier, the new approach introduces new regulatory redundancies. Previously an air carrier was only subject to the operator requirements in Part 175; but now appears to be subject to the operator requirements in the ICAO TI in order to transport the hazardous material in accordance with the ICAO TI as well as the Part 175 requirements.

**B.** §171.12(a)(3) provides, inter alia, conditions under which Canadian UN portable tanks may be transported into the US from Canada and refilled in the US. These provisions seem unnecessary given that §173.24(e)(2) already covers the use of portable tanks manufactured outside the US, albeit somewhat differently. A Canadian UN portable tank, as more than likely a tank manufactured outside the US, would be subject to both §171.12(a)(3) and §173.24(e)(2). No safety benefit is apparent for justifying this complication. In addition through §171.12(a)(3), UN portable tanks filled in Canada appear to be subject to more HMR requirements than UN portable tanks transported into the US under the IMDG Code under 171.25(c)(1). Again, it is not apparent why there is a difference in the case of portable tanks filled in Canada.

**C.** §171.12(a)(2) allows Canadian UN standard packagings and Canadian packagings equivalent to DOT specification packagings to be used under certain conditions and “subject to the limitations of this subpart [subpart A]”. The quoted text is confusing in that it is not clear what other limitations to which the text is referring. Subpart A, apart from §171.12, only includes administrative requirements such as incorporations by reference and definitions.

The affect of the rule will be to frustrate US foreign trade in hazardous materials. The degree of complication introduced is likely to have an adverse impact on safety and is contrary to US policy elaborated in 49 USC 5120 to harmonize to the greatest extent possible in the interest of improving safety through regulatory consistency.

DGAC notes that simple adjustments to the final rule will not solve the many problems anticipated with HM-215F. Therefore, DGAC requests a public hearing on this regulation to elaborate on its concerns and to permit full industry participation.

Sincerely,



Alan I. Roberts  
Vice President