

# Dangerous Goods Advisory Council

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December 1, 2008

Docket Operations M-30  
US Department of Transportation  
Ground Floor, Room W12-140  
1200 New Jersey Ave. SE  
Washington, DC 20590-0001

**Re: RIN 2137-AE13 (PHMSA – 2005 -22356)  
Hazardous Materials: Enhanced Enforcement Authority Procedures**

The Dangerous Goods Advisory Council (DGAC) appreciates this opportunity to present comments on the subject proposal. At the outset, we acknowledge the Department of Transportation's (DOT) statutory authority to perform some of the functions addressed in the NPRM relative to undeclared shipments of hazardous materials. However, Congress did not expand DOT's authority to authorize its inspectors to open packages declared to contain hazardous materials in accordance with the Department's Hazardous Materials Regulations (HMRs).

**The Joint Operations Manual** – DGAC supports the production of a joint operations manual that will be available for review by interested persons prior to the effective date of a rule – preferably in conjunction with a revised NPRM.

We assume a substantial portion of the manual will be devoted to promoting “safe and healthful” working conditions for DOT's inspection personnel (agents) as required by 29 CFR, Part 1960 (along with Executive Order 12196) that applies to all Federal employees (with certain military exceptions). Carriers and other entities in the transportation stream are concerned about their being held accountable for the potentially unacceptable safety performance of inspecting “agents” that may result in imminent threats to their health and safety, e.g., potential lethal exposure to toxic materials, due to their failure to wear and use proper protective clothing and equipment.

Government agencies are subject to DOT's hazmat transportation regulations. Therefore, the manual should include training criteria and guidance to meet the requirements of Subpart H to 49 CFR, Part 172, since your inspector “agents” will likely be performing hazmat functions e.g., as specified in proposed 109.3(b)(5).

The manual would be useful in explaining the program at issue is a Federal program and not intended for implementation by the States and their political subdivisions, i.e., there will be no amendment to 49 CFR 350.201(a) adding new Part 109 to the listing for the MCSAP program.

**Responsibility** – DGAC believes DOT should unambiguously identify who the responsible person is at each stage of the inspection process, and for repacking, storage (when necessary)

and the further transportation of packages away from inspection locations. For example, when an agent removes a package and related packages from a shipment, may we assume he or she is responsible for its safe handling? Moreover, may we assume the forwarding DOT agent who directs its movement to another location will be responsible for compliance with the HMRs rather than the carrier from whom it has been taken?

**Closing packages** – DGAC notes PHMSA acknowledges its sensitivity to concerns related to closing of “shipments” (packages). Some of our concerns relate to prompt access to a packaging manufacturer’s closure instructions, a need for alternative means of compliance, such as use of salvage packagings and special overpacks, and past PHMSA interpretations on reclosing, such as the letter issued under your reference number 06-0019 on March 21, 2006. In addition, we believe the agent who opens, or directs the opening of, a package must sign a receipt acknowledging his possession of the package. The agent must mark the package with the date and time along with “Opened by” or “Opened at the direction of” with the agent’s name on the package and the name of the agent’s agency and contact information. These recommended requirements must be fulfilled before the package is again placed into commerce, including transportation to a facility for examination and analysis. As a minimum, the agent must ascertain whether the package meets or exceeds minimum packaging requirements before it is reintroduced into commerce. Most of the inspections of the type discussed in the notice will be very difficult, if not impossible, to accomplish at other than consignor/consignee facilities, and we strongly recommend they not be attempted during roadside or other intermediate inspection activities.

**Facilities capable of conducting examination and analysis** – PHMSA expresses confidence that its agents (“inspectors”) will be proficient in applying the enhanced inspection and enforcement regulations to inspections to be conducted “...at offeror or carrier facilities.” DGAC has a serious concern in regard to the manner in which determinations of correct classifications will be conducted. Will PHMSA be compiling a directory of qualified laboratories (“appropriate facilities”), including those of government agencies, capable of determining if materials are flammable, toxic, corrosive, flammable solids, oxidizers, explosives etc? Put simply, will such information be made available to regulated entities in a manner similar to State highway routing designations published at least annually by the Federal Motor Carrier Safety Administration (see 49 CFR 397.93)? Will the facilities designated for classification and packaging testing be certified as PHMSA agents for these purposes?

### **Specific Comments on Proposed Text of Rules**

Section 109.1 – The definition of “Emergency order” does not include “written” consistent with the text in Section 109.5. The definition of “Packaging” is not fully consistent with the definition in Section 171.8, and while illustrative, it may cause more confusion than clarity. For example, Special Provision B115 addresses packagings covered by the definition in Section 171.8. The definition of “Trailer” is inconsistent with 49 CFR 390.5 which does not mention “locomotive.” In regard to “Properly qualified personnel,” DGAC suggests “Person” be used consistent with the definition in Section 171.8, i.e., “...means a person who is technically qualified...”

Section 109.3 – Paragraph (b) (4) and subs would authorize an “agent” to stop movement and open packages for a stated reason, and also “related” packages. It is not clear how this paragraph would apply to a package that is marked and labeled to indicate it contains a hazardous material,

and also its relationship to paragraph (5) that discusses the absence of an imminent hazard. Also, this provision is so broad that an entire load could be ordered removed because the freight in the transport vehicle is destined to the same terminal or ultimate destination. DGAC recommends that, at a minimum, the term “related packages” be connected to the consignor (offeror) of the package at issue and that the “articulable belief” standard be applicable to each package that is being removed. Additionally, the reference to removal from “...in a shipment or freight container...” creates a conflict in terminology we suggest could be resolved by deleting those words in subparagraph (iii). DGAC notes that there are two subparagraphs (iv) under (4). In regard to the first, it is not clear what is intended by “Order the person in possession...” in regard to its applicability to common carrier responsibilities as bailees under the provisions of the Uniform Commercial Code and related contracts for carriage. Subparagraph (b) (6) correctly cites “Movement” early in the text, and later cites “transportation” which, if retained, would create an impossibility. (See the definitions of each word in Section 171.8.) Subparagraph (b)(6)(i) contains a notification (rather than approval) proviso for “Out of Service” packages to be moved without stating that such a notification can be provided on a 24 hour basis. It should be noted that non-offending carriers may suffer consequences due to the manner in which these procedures are executed. For example, there may be extended delays in addressing next steps that make it necessary for packages to be held in their facilities in safe storage locations thereby precluding an affected business from using such facilities for viable business purposes. The rule as proposed, the DGAC concludes, will not associate the burden it imposes with culpability and strongly urges that PHMSA give serious consideration to this concern. We should add that, while there is limited mention of “Out of Service” in the proposed text of the regulations, each instance where an agent/inspector removes or stops goods in transit, the package, in effect, is placed out of service.

Section 109.5 – DGAC assumes PHMSA intends that any emergency orders arising from the inspection of a package, or related packages, in transportation will be issued by the cognizant Administrator (or designee) from headquarters rather than by agents in the field. We are concerned that three agencies of the Department may have differing views on the meaning and application of imminent hazard criteria and inspection procedures. Therefore, we appreciate the concept of one place to appeal an emergency order. In addition, we believe there should be a contact immediately available at all times for delay of effectiveness for safety reasons or other appropriate causes as dictated by common sense.

**Rulemaking Analyses** – DGAC realizes that most of the data in regulatory analyses is based on estimates. But for PHMSA to state it estimates there will be a reduction of 40,299,701 undeclared shipments over a ten-year period resulting from the procedures proposed in the NPRM appears rather questionable. In addition, the \$45,997 total cost to industry estimate over the same period is grossly understated. DGAC has one member company that ships high valued/ timed delivery shipments of specialty chemicals who has indicated that, if one of its packages is opened or even delayed, the resulting cost to the his company could be well in excess of \$100,000. This could be the case when no violation of the HMRs is discovered because the opening of sealed packages by agents would devalue a number of their products, in particular those for use in producing pharmaceuticals and for other technical grade applications.

**Recommendation** – Before a final rule is published, DGAC urges DOT to issue a supplemental NPRM that would, inter alia, take our comments into consideration along with other excellent comments, such as those of the American Trucking Associations. Again, DGAC recommends

that package opening procedures be limited to consignor/consignee facilities and not while they are in transit including terminal facilities. DGAC recommends that DOT conduct demonstration trials with a representative group of its inspector/agents to ascertain if they can be expected to know, understand, and carry out the inspection procedures to be followed and actions to be taken. This should be accomplished following the production of an acceptable Joint Operations Manual

DGAC appreciates this opportunity to provide our views on this important proceeding.

Yours truly,

A handwritten signature in black ink, appearing to read "Alan I. Roberts", written in a cursive style.

Alan I. Roberts  
Vice President