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Dockets Management System
U.S. Department of Transportation
Dockets Operations
M-30, Ground Floor, Room W12-140
1200 New Jersey Avenue, S.E.
Washington, DC 20590

via: www.regulations.gov

Re: Docket No. PHMSA-2013-0225 (HM-218H), Hazardous Materials: Miscellaneous Amendments (RRR)

The National Association of Chemical Distributors (NACD) submits the following comments in response to the January 23, 2015, *Federal Register* Notice of Proposed Rulemaking regarding Docket No. PHMSA-2013-0225 (HM-218H).

About NACD

The National Association of Chemical Distributors is an international association of more than 440 chemical distributors and supply-chain partners. NACD's membership comprises businesses representing in total more than 85% of the chemical distribution capacity in the nation and generating 93% of the industry's gross revenue. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs. NACD members are predominantly small regional businesses, many of which are multigenerational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous improvement in every phase of handling, transportation, storage, and disposal of chemical products. Hazardous materials transportation is an integral part of the chemical distribution business. In 2013, NACD members made over 4 million shipments, were responsible for 26.3 million tons of product, and drove more than 140 million miles while making deliveries to customers every 7.3 seconds.

Statement of Concern on Proposed Change to Section 173.21

NACD has grave concerns about one particular element in HM-218H, the proposed change to Section 173.21 to prohibit transportation or offering for transportation materials in the same transport vehicle (e.g., a trailer, a rail car) with another material that could cause a dangerous evolution of heat or flammable or poisonous gases or vapors or produce corrosive materials if mixed.

In the proposed rule, PHMSA fails to provide evidence that this prohibition is necessary to improve safety, fails to recognize the potential enormous scope of the change, and fails to consider the substantial costs and increased congestion that would result from the revision.

The revision to Section 173.21 is unnecessary.

The proposed change to Section 173.21 is unnecessary. PHMSA already provides discretion on the handling of “incompatible” materials by use of the segregation table and the rules therein at 49CFR 177.848. Modifying 173.21(e) essentially does away with 177.848 and is actually more restrictive. Adding “transport vehicle” to the forbidden materials provision does away with the well-established, effective, and risk-based practice of material segregation.

The U.S. Department of Transportation (DOT) currently forbids “incompatibles” in the same package, overpacks (same package) and freight containers, which all present unique hazards in transportation. Freight containers especially are used in ocean-going transport, where the g-forces placed on the cargo are far in excess of what is considered normal transportation by truck or van. Load securement in a van is defined as “Secured in a manner that precludes their movement within the transport vehicle, and between the packages themselves, under conditions normally incident to transportation. These conditions most often include vehicle starting, stopping, cornering, accident avoidance, and varied road conditions.” The g-forces are not the same, and current segregation and securement rules are adequate to prevent incidents.

PHMSA has allowed “incompatible materials” through the use of special permits, such as DOT-SP 12412 and previous incarnations of that special permit. NACD is not aware of any issues of concern PHMSA has raised with the performance of this permit, which is no different than the “concern” expressed in the letter of interpretation mentioned in the HM-218H preamble (13-0111). One complaint or concern should not overturn hundreds of thousands of successful shipments each year that are completed under the current rule.

In fact, PHMSA stated in its interpretation letter (13-0111) that the agency believes “the packaging requirements for these materials mitigates the potential for comingling and subsequent dangerous evolution of gas.” NACD strongly agrees with PHMSA’s statement, which confirms the current Hazardous Materials Regulations (HMR) packaging requirements are sufficient to prevent dangerous comingling of products.

DOT has conducted extensive work and analysis over the years to develop the current packaging and handling requirements appropriately designed to avoid comingling of products while in transport. NACD strongly believes these requirements are effective, and our members strive to comply with these requirements to ensure safe transportation of hazardous materials. DOT’s current packaging, securement, and segregation requirements are effective in preventing any comingling of materials under normal conditions, including truck transportation.

There is a lack of evidence supporting the case for changing Section 173.21.

PHMSA has failed to make the case that the proposed change to Section 173.21 is necessary to improve safety. The agency appears to have based the proposal solely on a concern raised by

only one company in a request for interpretation. This company only raised the concern about one product; however, the proposed change could impact thousands of materials and many more shipments. In addition, beyond the general statement of concern, the company did not provide any concrete evidence supporting a change in the regulations.

PHMSA does not present evidence of conducting its own independent scientific analysis of the specific products referenced in the interpretation request, let alone the vast array of materials that are potentially impacted by the proposed change. Hundreds of chemical distributors that transport a variety of hazardous materials will be adversely impacted by this proposal. It is inappropriate to propose such a far-reaching amendment based on one concern raised by one company when the change has the potential to impact nearly the entire hazardous materials distribution industry.

In addition, PHMSA did not reference a history of incidents from its incident database to support the need for the proposed change. This suggests the incident data does not indicate a trend in incidents involving a combination of materials in transport vehicles. Before prohibiting this practice, PHMSA must provide sufficient evidence that the change to Section 173.21 is needed to improve safety. To date, the agency has not presented this evidence.

The scope of the proposed change is undefined and could be extremely far-reaching.

The proposed change to Section 173.21 provides an extremely general definition of the conditions of concern and no clear definition of impacted materials. By expanding the provision to include “transport vehicle,” PHMSA would prohibit what is potentially an infinite number of combination shipments. The agency must more clearly define the provision in terms of specific packaging types and specific forbidden materials.

PHMSA only referenced intermediate bulk containers (IBCs) in the background materials. With the lack of additional analysis and information, it is unclear whether PHMSA intended to include only materials transported in IBCs or in all packaging types.

With the lack of definition, the proposed change would prohibit single shipments having multiple materials in any combination of container types, including drums, IBCs, cylinders, multi-unit tank car tanks and railcars. When all of these container types are multiplied by the number of materials they transport, that when comingled could create a “dangerous evolution of heat, produce flammable or poisonous gases or vapors, or produce corrosive materials,” the result is a potentially infinite number of impacted shipments.

Similarly, the only reaction product PHMSA describes in the background is chlorine dioxide. PHMSA appears to be primarily concerned with this specific material because it is forbidden from transport as its own packaged material per Section 172.101. However, the vague proposed wording could have much more far-reaching results. For example, strong acids and strong bases can evolve significant heat if accidentally mixed; sulfuric acid evolves heat if it comes into contact with water; concentrated oxidizers (i.e. hydrogen peroxide) and any organic chemical would make organic peroxides, which are shock and explosion sensitive; flammable liquids and any kind of metal container in a truck could cause metal on metal sparking and, in the presence of flammable organic liquids, could ignite if above the flash

point. The point is, chemicals are reactive, particularly with each other. This is precisely the reason for DOT's longstanding and effective segregation and separation rules regarding truck loading and transportation. If PHMSA's intention is to replace these rules with new ones that require transporters and offerors to have separate trucks for each hazard class and ship only those hazard classes together, the economic and supply chain consequences would be severe.

A related concern is that the word "dangerous" is subjective. For example, some materials generate heat when mixed; but the question is, How dangerous is that heat? The same scenario applies to gas. Again, the implications of including "transport vehicle" in the Section 173.21 are limitless.

The proposed change would result in severe financial, supply chain, and safety consequences.

Under the current system, NACD members commonly ship a combination of materials in the same transport vehicle to reduce the number of trips in a given geographic area. Also, many of NACD members' customers purchase more than one product at a time, so these materials are often delivered at the same time in the same truck. If Section 173.21 is revised to include transport vehicles, many of NACD's members' shipments will more than double. This will result in increased costs, increased highway traffic, and an increased probability of highway accidents.

Some examples of increased chemical distributor costs include the expense of purchasing more trucks to increase their fleets in order to maintain the current status of their businesses, the cost of hiring more employees to cover all the necessary deliveries, and higher costs for the use of third-party carriers because of an increase in the number of contracted shipments. A third-party carrier might also charge more per shipment to cover the costs they incurred in complying with the new rule.

Another major concern if more trucks and drivers are needed is the lack of qualified hazardous materials drivers. There is already a significant driver shortage and, now that the driver training process may become more complicated/expensive as well because of a forthcoming Federal Motor Carrier Safety Administration rulemaking, there will likely be a significant impact to on-time delivery throughout the supply chain. In addition to drivers, other cost factors include power equipment, trailers, fuel, maintenance costs, additional training, lowered capacity utilization of equipment, lost manufacturing productivity, and potential late delivery charge-backs.

The issue of less than truckload (LTL) shipments presents an additional supply chain and compliance challenge under the proposed rule. For example, it would be difficult for the person on the loading dock and the LTL driver to know whether materials offered are compatible with the products already on a truck. Additional challenges would involve situations in which LTL shipments are subsequently reloaded for movement in transit and shipments that are interlined. The proposed rule would become enforceable only upon the carrier, who would not have the information necessary to make these compatibility determinations beyond the established rules under Section 177.848.

In addition to higher costs and supply chain complications, another consequence of the proposed rule will be more congestion on the roads with the need for more trucks. This higher volume would increase the probability of hazardous materials incidents, which is counter to improving safety.

In the proposed rule, PHMSA provides no evidence of a cost-benefit analysis of this far-reaching amendment. In fact, PHMSA states the HM-218H proposed rule “is not expected to have an impact on a substantial number of small entities.” For the reasons stated above, NACD strongly disagrees with this statement.

Conclusion

NACD respectfully urges PHMSA to withdraw the proposal to expand the prohibitions in Section 173.21 to include transport vehicles. The amendment is unnecessary, given the effectiveness of the current segregation regulations in Section 177.848 in preventing incidents and the lack of evidence that the current regulations present a legitimate safety concern. In addition, the proposal as presented is poorly defined and will have far-reaching financial, supply chain, and adverse safety consequences.

If PHMSA continues to have concerns about the adequacy of the current HMR in this area, NACD urges the agency to address these concerns in a separate rulemaking that more narrowly defines the materials and packagings of concern and that includes a thorough cost-benefit analysis of any proposed changes.

NACD appreciates the opportunity to submit comments on this important issue. If you have questions or require additional information, please do not hesitate to contact me.

Sincerely,



Jennifer C. Gibson
Vice President, Regulatory Affairs