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FEDERAL HAZMAT LAW



FEDERAL HAZARDOUS MATERIALS TRANSPORTATION LAW
AN OVERVIEW



U.S. Department of Transportation
Pipeline and Hazardous Materials
Safety Administration

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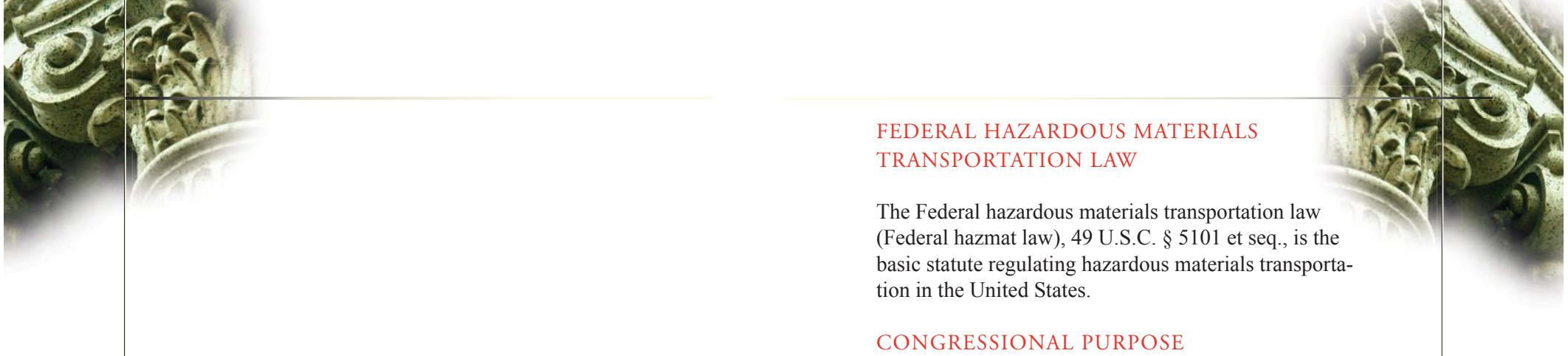
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U.S. Department of Transportation
**Pipeline and Hazardous Materials
Safety Administration**

PHH50-0097-0607



FEDERAL HAZARDOUS MATERIALS TRANSPORTATION LAW

The Federal hazardous materials transportation law (Federal hazmat law), 49 U.S.C. § 5101 et seq., is the basic statute regulating hazardous materials transportation in the United States.

CONGRESSIONAL PURPOSE

Section 5101 states that the purpose of the Federal hazmat law is to “protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.”

REGULATORY AUTHORITY

Section 5103 provides that the Secretary of Transportation shall:

- Designate material (including an explosive, radioactive material, infectious substance, flammable or combustible liquid, solid or gas, toxic, oxidizing, or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.
- Issue regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.

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- Packaging requirements (Parts 173, 178, 179, and 180);
- Operational rules (Parts 171, 173, 174, 175, 176 and 177);
- Training and Security (Part 172, Subparts H and I); and
- Registration (Part 171; see also Part 107, Subpart G).

Applicability

The HMR apply to the transportation of hazardous materials in interstate, intrastate and foreign commerce by aircraft, railcar, vessel, and motor vehicle.

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Hazardous materials include:

- Those items identified in 49 CFR § 172.101;
- Hazardous wastes and hazardous substances (as determined under statutes administered by and regulations issued by the Environmental Protection Agency); and
- Marine Pollutants.

The HMR apply to persons who:

- Transport hazardous materials in commerce (common, contract, and private carriers);
- Offer hazardous materials for interstate, foreign, and intrastate transportation in commerce (offerors, sometimes called shippers);
- Design, manufacture, fabricate, inspect, mark, maintain, recondition, repair or test a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce;

- Prepare or accept hazardous materials for transportation in commerce;
- Are responsible for the safety of transporting hazardous materials in commerce;
- Certify compliance with any requirement under the Federal hazmat law; and
- Misrepresent whether he or she is engaged in any activity listed above.

REGULATORY FUNCTIONS

Pipeline and Hazardous Materials Safety Administration (PHMSA)

PHMSA issues the HMR. PHMSA also has issued procedural regulations, including provisions on registration and public sector training and planning grants (49 CFR Parts 105, 106, 107, and 110).

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PHMSA's regulatory functions include:

- Issuing rules and regulations governing the safe transportation of hazardous materials;
- Issuing, renewing, modifying, and terminating special permits;
- Issuing, modifying, and terminating approvals for specific activities;
- Receiving, reviewing, and maintaining important records (e.g., incident reports); and
- Making (or issuing) administrative determinations whether State, local, or Indian tribe requirements:
 - (1) are preempted by the Federal hazmat law, or
 - (2) may remain in effect, under a waiver of preemption.

- Representing DOT in international organizations and working to assure the compatibility of domestic regulations with the regulations of bodies such as:
 - International Maritime Organization (IMO),
 - International Civil Aviation Organization (ICAO),
 - United Nations Subcommittee of Experts on the Transport of Dangerous Goods and on the Globally Harmonized System of Classification and Labelling of Chemicals; and
 - International Atomic Energy Agency (IAEA).

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The Federal Motor Carrier Safety Administration (FMCSA)

FMCSA issues regulations concerning highway routing of hazardous materials, the hazardous materials endorsement for a commercial driver's license, highway hazardous material safety permits, and financial responsibility requirements for motor carriers of hazardous materials.

The Federal Aviation Administration (FAA)

FAA issues regulations covering hazardous materials which are part of the required aircraft equipment. FAA also regulates the transportation of radioactive materials on passenger-carrying aircraft when the material is intended for use in, or incident to, research or medical diagnosis or treatment.

The United States Coast Guard (USCG)

USCG regulates the bulk transportation of hazardous materials that are loaded or carried on board a vessel without benefit of containers or labels and received and handled by the vessel without mark or count. USCG also regulates ships' stores and supplies.

ENFORCEMENT

Under delegations from the Secretary (49 CFR Part 1), enforcement authority under the Federal hazmat law is shared by PHMSA, FMCSA, FRA, FAA, and USCG. Each of these agencies has authority to enforce the HMR against any person subject to the HMR, but each has a particular emphasis to its enforcement activities:

PHMSA - *the shipment of hazardous materials and the manufacture, fabrication, marking, maintenance, reconditioning, repair or testing of multi-modal containers that are represented, marked, certified, or sold for use in the transportation of hazardous materials.*

FMCSA - *the transportation or shipment of hazardous materials by highway.* FMCSA also enforces the Federal Motor Carrier Safety Regulations (49 CFR Parts 350-399), issued under various motor carrier safety acts codified at 49 U.S.C. § 501 et seq., § 30101 et seq., § 30301 et seq., and § 31501 et seq.

FRA - *the transportation or shipment of hazardous materials by railroad.* FRA also enforces the safety regulations (49 CFR 200-268) issued under the Federal Rail Safety Act (49 U.S.C. § 20101 et seq.).

FAA - *the transportation or shipment of hazardous materials by air.* FAA also enforces all regulations applicable to air carriers and shippers by air issued under the Federal Aviation Act (49 U.S.C. § 40101 et seq.).

USCG - *the transportation or shipment of hazardous materials by water.* USCG also enforces its own regulations governing the bulk transportation of hazardous materials by vessel and ships' stores and supplies, and regulations issued under other laws, such as the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) (response to discharges of oil into United States waters) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 960 et seq.) (response to the release of hazardous substances into the environment within the United States coastal zone, as the designated On-Scene Coordinator).

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ENHANCED ENFORCEMENT AND INVESTIGATION AUTHORITY

The enhanced enforcement and investigation authority provided by 49 U.S.C. § 5121 allows the Administrator, or his designee, to issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard. (PHMSA currently is drafting a rulemaking to address this authority.) In addition, DOT personnel may open the outer packaging of a package believed to contain hazardous material. If a package is believed to pose an imminent hazard, the package may be removed from transportation in commerce.

ENFORCEMENT SANCTIONS

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The Federal hazmat law provides the following enforcement sanctions:

Administrative Actions

The Secretary may investigate, conduct tests, make reports, issue subpoenas, conduct hearings, require the production of records and property, take depositions and conduct research, development, demonstration, and training activities. In addition, the Secretary may initiate the following types of actions:

Notice and Opportunity for a Hearing

DOT may find that a person has violated the Federal hazmat law, or a regulation, order, special permit or approval issued under the Federal hazmat law, only after notice and an opportunity for a hearing.

Civil Penalties

For knowingly violating regulations:

- A minimum penalty of \$250 per violation, except training violations are subject to a \$450 minimum penalty;
- A maximum assessment of \$50,000 per violation per day, except \$100,000 if violation results in death, serious illness or severe injury to any person, or substantial destruction of property.

Compliance Orders

The Secretary may issue an order requiring compliance with the Federal hazmat law, or an order, special permit or approval issued under law.

Penalty Assessment Criteria:

- (1) Nature and circumstances of violation,
- (2) Extent and gravity of violation,
- (3) Degree of respondent's culpability,
- (4) Respondent's history of prior violations,
- (5) Respondent's ability to pay,
- (6) Effect of penalty on respondent's ability to stay in business; and
- (7) Such other matters as justice may require (especially corrective actions).

Criminal Penalties

For willful or reckless violations:

- For an individual up to \$250,000 and five years imprisonment,
- For a corporation up to \$500,000 and five years imprisonment,
- Criminal penalty of up to 10 years imprisonment for willful violation resulting in the release of a hazardous material that results in death or bodily injury. (49 U.S.C. § 5124).

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Civil Action in Federal Court

U.S. Attorney General may bring civil penalty action in U.S. District Court, which may result in an injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed in an administrative case. (49 U.S.C. § 5122)

PREEMPTION

The Federal hazmat law at 49 U.S.C. § 5125, and the HMR at 49 CFR Part 107 Subpart C provides that, unless authorized by another Federal law, a requirement of a State, local, or Indian tribe is preempted if:

- Compliance with both (1) the State, local, or Indian tribe requirement, and (2) any requirement of the Federal hazmat law (or a regulation issued under the Federal hazmat law) is not possible; or
- The State, local, or Indian tribe requirement as applied or enforced is an obstacle to accomplishing and carrying out the Federal hazmat law (or a regulation issued under it); or
- The State, local, or Indian tribe requirement concerns a covered subject, and is NOT “substantively the same” as any provision of, or a regulation under, the Federal hazmat law concerning that subject.

Covered subjects are:

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- Designation, description, and classification of hazardous materials;
- Packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- Preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements related to the number, content, and placement of such documents;
- Written notification, recording and reporting of the unintentional release in transportation of hazardous materials; and
- Designing, manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

Note: “Substantively the same” means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar changes are permitted.

Section 5125(c) of 49 U.S.C. provides that, beginning two years after issuance of Federal highway

routing standards, State and Indian tribe highway routing designations, limitations and requirements relating to hazardous materials will be preempted unless they meet Federal procedural and substantive requirements. FMCSA has issued regulations and issues preemption determinations on highway routing of hazardous materials.

Waiver of Preemption. Notwithstanding the preemption of a State or local requirement, 49 U.S.C. § 5125(e) provides that the DOT may waive preemption upon a showing by the jurisdiction that its requirement:

- Affords an equal or greater level of protection to the public as is afforded by the Federal requirement; and
- Does not unreasonably burden commerce.

FMCSA has authority to issue preemption determinations and waivers of preemption concerning highway routing requirements. PHMSA has authority to issue preemption determinations and waivers of preemption with regard to all other requirements. There is a right to petition a U.S. Court of Appeals for review of a preemption determination or waiver of preemption.

PUBLIC SECTOR TRAINING AND PLANNING GRANTS

Grants Program

PHMSA manages a reimbursable grant program to enhance existing State and local programs for planning and training for responding to hazardous materials incidents.

This program, authorized by 49 U.S.C. § 5116:

- Enhances implementation of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA); and
- Provides funds (75 percent pass-through to local governments) to States and Indian tribes for planning and training for emergency response to hazardous materials accidents and incidents.

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Under 49 U.S.C. § 5108, PHMSA funds the grant program with registration fees collected from certain transporters and shippers of hazardous materials in commerce.

SECURITY PLANS

The Federal hazmat law mandates that the Secretary issue regulations which require employers to develop and implement plans to address security risks related to the transportation of hazardous materials in commerce. (49 CFR, Subpart I). A security plan must be in writing and contain:

- an assessment of possible transportation security risks for shipments of hazardous materials listed in § 172.800,
- appropriate measures to address the assessed risks, including measures on (1) personnel security, (2) unauthorized access, and (3) en route security.

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EMERGENCY RESPONSE

Incident Reporting

Carriers must report immediately by telephone certain more serious transportation incidents (49 CFR § 171.15). For those and other less serious incidents, a written report must be submitted to DOT (49 CFR § 171.16).

The carrier must notify the USCG National Response Center (NRC), (800) 424-8802 or (202) 267-2675. The NRC contacts departmental personnel and the National Transportation Safety Board (NTSB), if the situation warrants (49 CFR § 171.16).

Notice involving an infectious substance (etiologic agent) may be given to the Director, Centers for Disease Control (CDC) and Prevention, U.S. Public Health Service, Atlanta, GA, (800) 232-0124 (toll free), in place of notice to the NRC. The NRC is linked to CHEMTREC, a service operated by the American Chemistry Council (ACC), which can provide detailed information on the nature and action of most chemicals transported in the United States.

EMERGENCY RESPONSE PARTNERSHIPS

DOT supports State and local emergency response. The Department encourages the growth of industry mutual assistance programs with local government personnel responsible for emergency response.

To enhance the effectiveness of emergency response along the border, PHMSA and sister agencies in Canada and Mexico periodically issue a Emergency Response Guidebook (ERG) in three languages (English, French, and Spanish). The ERG cross-references commodities listed in the Hazardous Materials Table by proper shipping name and by identification number. The guidebook contains specific guides which:

- Alert first responders to potential dangers arising from the threat of fire, explosion or health hazards; and
- Recommend initial emergency actions regarding evacuation isolation of the affected area, firefighting, leaking containers, spill containment and first aid.

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The success of the ERG is dependent on shipper and carrier compliance with all hazard communication requirements (i.e., shipping papers, labels, marking, placards, and emergency response information). DOT has distributed over 5 million copies of the ERG to first responders such as firefighters and police.

The ACC in collaboration with DOT has developed several programs which address emergency response:

1. Emergency response training through emergency response team workshops;
2. A first responder videotape training program; and
3. CHEMNET, a mutual aid network of shippers and for-hire contractors providing direct on-site assistance during chemical emergencies. DOT has also funded demonstration projects in various communities designed to increase State and local involvement in planning and managing hazardous materials emergency preparedness programs.