

DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

FINAL STATEMENT OF REASONS

JULY 1997

TITLE 13, CALIFORNIA CODE OF REGULATIONS
MODIFY SECTIONS 1158, 1158.3, 1160.2, 1161.2,
1163, 1165, 1165.1, 1167, AND REPEAL SECTION 1168
**ROUTES AND CARRIER REQUIREMENTS FOR THROUGH TRANSPORTATION
OF HIGHWAY ROUTE CONTROLLED QUANTITY SHIPMENTS
OF RADIOACTIVE MATERIALS
AND
GENERAL HAZARDOUS MATERIALS REGULATIONS
(97-01)
(OAL NOTICE FILE NUMBER Z97-0506-05)**

PURPOSE OF REGULATORY ACTION

In response to Governor Wilson's Executive Order W-127-95 directing all state regulatory agencies to effect comprehensive regulatory reform, the California Highway Patrol proposes to amend the General Hazardous Materials Regulations to be consistent with national transportation requirements as required by federal law. California's regulations for the transportation of hazardous materials incorporate by reference the federal standards contained in Title 49 Code of Federal Regulation (49 CFR). In 1996, the United States Department of Transportation, Research and Special Programs Administration made several amendments to 49 CFR in response to a similar federal mandate to eliminate duplicative, unnecessary and/or excessively burdensome regulations.

As a result of the federal changes, several of the 49 CFR regulations incorporated by reference in Title 13, California Code of Regulations (13 CCR) no longer exist, are incorporated into other sections, or have undergone significant modification. This rulemaking action updates the 13 CCR sections including the incorporation by reference to take full advantage of the federal regulatory review changes. This rulemaking action meets the goal of the Governor's Executive Order to enhance the competitiveness of California by eliminating or modifying, to the extent possible, regulations that represent a negative impact on businesses and the economy. These regulations will enhance public safety and environmental protection, delete duplicative requirements, and make the regulations more user friendly by adding clarifying language and deleting unnecessary language.

EXISTING REGULATIONS

Title 13, California Code of Regulations, Division 2, Chapter 6 contains California Highway Patrol regulations governing the highway transportation of hazardous materials. Article 2.7, Sections 1158 and 1158.3 contain the Applicability, and the Time of Day and Day of Week Considerations for the through transportation of highway route controlled quantity shipments of radioactive materials. Article 3, Sections 1160 through 1168, contain the California Highway Patrol's General Hazardous Materials Regulations, e.g., packaging, hazard communication, training, spill reporting and emergency action requirements.

HISTORY/BACKGROUND

On November 16, 1990, then President George Bush signed into law the Hazardous Materials Transportation Uniform Safety Act of 1990 in which Congress emphasized its intent to establish national uniformity with respect to federal, state and local hazardous materials regulations. The Act mandated the Secretary of Transportation to expand the application of federal Hazardous Materials Regulations contained in 49 CFR to include transportation in intrastate commerce. Congress believed that this action (the establishment of national and international uniformity in hazardous materials transportation requirements) was necessary to ensure the protection of people, their property and the environment of the United States, and to facilitate commerce. This Act has now been recodified in Title 49 U. S. Code (49 USC) Chapter 51, Transportation of Hazardous Materials. Title 49 USC 5125 grants the Secretary of Transportation preemption authority over any state requirement, if complying with both the federal requirement and the state or local requirement is not possible; or if the state or local requirement is an obstacle to accomplishing and carrying out the federal requirements.

Title 49 USC 5125 (b) further clarifies the scope of the Secretary's authority by declaring that the Secretary's ruling would specifically preempt:

*" . . . a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not **substantively the same** [emphasis added] as a provision in this chapter [49 USC] or a regulation prescribed under this chapter [49 CFR], is preempted:*

- (A) the designation, description, and classification of hazardous material.*
- (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.*
- (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.*
- (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.*

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material."

Title 49 USC 5125(b) also establishes effective dates for the federal preemption of state laws, etc., that are not "*substantively the same as*" the current federal regulations. The effective dates (for federal preemption) "*may not be earlier than 90 days . . . nor later than the last day of the 2-year period*" after the issuance of the federal regulations. In essence, this section mandates states to adopt any changes to the federal Hazardous Materials Regulations, if the state wants to maintain, adopt and/or enforce any hazardous materials regulation concerning a "*covered subject*," within a maximum of two years from the date of issuance of any change.

California Vehicle Code (CVC) Section 34501(b) requires that the California Highway Patrol "*shall adopt regulations for the transportation of hazardous materials in this State.*" Additionally, 34501(b) CVC mandates that the regulations are those that the California Highway Patrol "*determines are reasonably necessary to ensure the safety of persons and property using the highway.*" The California Highway Patrol's regulations adopted pursuant to this authority are contained in 13 CCR, Division 2, Chapter 6, Article 3, Sections 1160 through 1178, General Hazardous Materials Regulations. These regulations currently incorporate, by reference (13 CCR 1160.2(a)), specific portions of the 1995 edition of 49 CFR and essentially address all of the "*covered subjects*" found in 49 USC 5125.

Section 33000 CVC also mandates that the California Highway Patrol, after consulting with the Department of Health Services, "*shall adopt regulations specifying the time at which shipments may occur and the routes which are to be used in the transportation of cargoes of hazardous radioactive materials . . .*" The California Highway Patrol's regulations adopted pursuant to this authority are contained in 13 CCR, Division 2, Chapter 6, Article 2.7 (Sections 1158 through 1159), titled Routes for the Through Transportation of Highway Route Controlled Quantities of Radioactive Materials. 13 CCR 1158 adopts the federal definition of highway route controlled quantity shipments and 13 CCR 1158.3 adopts the time of day and day of week standards listed in 49 CFR 177.825.

On March 4, 1995, President Clinton issued a memorandum to heads of departments and agencies calling for a review of all agency regulations to eliminate or revise those regulations that are outdated or in need of reform. In addition, the President directed front line regulators to create a "grassroots partnership" with people affected by agency regulations. In response to the President's directive, the Research and Special Programs Administration performed an extensive review of the Hazardous Materials Regulations (HMR, 49 CFR Parts 171-180) and associated procedural rules (49 CFR Parts 106, 107 and 110). One of the results of this review was the consolidation of provisions of the HMR. The Research and Special Programs Administration accomplished this by removing sections that were duplicative or referred the reader to sections of general application. In doing this the Research and Special Programs Administration believes that there is no substantive regulatory change, but results in a smaller and less burdensome set of

regulations. The federal preemption date for several of the final rules issued by the Research and Special Programs Administration in 1996 and incorporated in this rulemaking is October 1, 1997.

Title 49 CFR 171.1(a)(3) establishes application of federal regulation for intrastate carriers of hazardous materials when transporting certain materials. Included in intrastate commerce are hazardous materials meeting the definition of hazardous substance which includes highway route controlled quantities of radioactive materials.

PROBLEM

The California Highway Patrol's Regulations for Routes for the Through Transportation of Highway Route Controlled Quantities of Radioactive Materials are currently contained in 13 CCR 1158 through 1159. 13 CCR 1158(b) adopts the federal definition of highway route controlled quantity (HRCQ) shipments contained in 49 CFR 173.403(l) [Note: The existing reference is 173.403(l), {lower case of the letter "L" in parentheses, not the numeral "1" in parentheses}]. Under a federal rulemaking this section was reformatted and the proper reference should simply be 49 CFR 173.403. Without the amendment, a significant portion, if not a majority, of the HRCQ shipments could be mis-interpreted as not being subject to 13 CCR, Division 2, Chapter 6, Article 2.7.

Section 1158.3 references 49 CFR 177.825 for the time of day and day of week consideration. 49 CFR 177.825 was eliminated by the Research and Special Programs Administration as being duplicative of other requirements contained in 49 CFR 397.101. Currently, the California Highway Patrol cannot meet its statutory mandate for ensuring the safety of highway route controlled quantities of radioactive material without amending 13 CCR 1158.3 to adopt the federal requirement contained in 49 CFR 397.101.

Without the amendments to 13 CCR 1158 and 1158.3, only a portion of the carriers of highway route controlled quantities of radioactive materials would be subject to state regulations for traveling on established routes, and none of them would be subject to additional consideration previously covered under 49 CFR 177.825. These carriers are currently regulated under federal law to ensure that their drivers are properly trained, that they have a map and route plan for each trip, that time of day and day of week considerations are taken, and that proper security measures are used for spent nuclear fuel shipments. Adoption of 49 CFR 397.101 will simply allow the California Highway Patrol to enforce the federal regulations that cover the requirement for carriers to ensure that their drivers are properly trained, that they have a map and route plan for each trip, reporting requirements, that time of day and day of week considerations are taken, and that proper security measures are used for spent nuclear fuel shipments.

The California Highway Patrol's General Hazardous Materials Regulations contained in 13 CCR 1160 through 1168 are currently in jeopardy of federal preemption on October 1, 1997, pursuant to 49 USC 5125 because they currently apply to "any person," including carriers subject to federal jurisdiction, address "covered subjects," and do not incorporate (are not "substantively

the same as") the current federal Hazardous Materials Regulations. In order for the California Highway Patrol to fulfill the mandate established in 34501(b) CVC, and be in compliance with federal law, it must align its General Hazardous Materials Regulations to reflect adoption of the current (October 1, 1996) printed edition of the federal Hazardous Materials Regulations.

Currently, carriers and shippers may be subject to two different publishing dates of the federal Hazardous Materials Regulations.

- *1995 edition of 49 CFR:* Per 13 CCR 1160.2, carriers and shippers are subject to the transportation requirements contained in the 1995 edition of 49 CFR.
- *1996 edition of 49 CFR:* Carriers and shippers that are presently subject to federal jurisdiction are also subject to the current (1996) edition of 49 CFR.

The California Highway Patrol firmly believes that the current application of two different editions of the federal hazardous materials transportation requirements serves to confuse both the regulated community and enforcement personnel. Such confusion can result in significant regulatory noncompliance and inhibit enforcement. Therefore, the California Highway Patrol believes that alignment of the state's requirements with the federal Hazardous Materials Regulations is necessary and allows the state to:

- 1) comply with federal law;
- 2) enhance public safety and environmental protection;
- 3) facilitate commerce by allowing the regulated community to comply with state, federal and international regulations simultaneously;
- 4) effectively enforce hazardous materials transportation requirements; and
- 5) reduce confusion within the regulated and enforcement communities.

Because federal Hazardous Materials Regulations were primarily promulgated with interstate and international transport issues in mind, some aspects of the current federal Hazardous Materials Regulations may be perceived as being overly burdensome on private intrastate carriers. In those instances, where the California Highway Patrol has determined that noncompliance and/or alternative measures would not result in a significant adverse effect on public safety or environmental protection, the California Highway Patrol has adopted exceptions to the federal Hazardous Materials Regulations.

The Research and Special Programs Administration recently issued a final rule on "*Hazardous Materials in Intrastate Commerce*" (Docket HM-200). Under Docket HM-200, carriers operating in intrastate commerce will be directly subject to federal jurisdiction effective October 1, 1997, and any state exceptions (e.g., California Highway Patrol regulations contained in 13 CCR) to the federal Hazardous Materials Regulations (not recognized specifically in the federal regulations) will be in conflict and preempted by federal law. Note: Intrastate shippers and carriers of hazardous substances, hazardous wastes, marine pollutants and flammable

cryogenics are already directly under federal jurisdiction and cannot benefit from California Highway Patrol regulatory exceptions.

Although generally supporting the concept of uniform state, federal and international regulatory uniformity, the California Highway Patrol expressed concerns with respect to the full application of present federal Hazardous Materials Regulations to intrastate private carriers, particularly small intrastate carriers often having only one employee. The California Highway Patrol recommended, in its comments on Docket HM-200, that the Research and Special Programs Administration adopt exceptions to some elements of the federal Hazardous Materials Regulations based on existing or proposed state exceptions, or simply recognize in the federal regulations existing and formally proposed state exceptions to the federal regulations. On January 8, 1997, the Research and Special Programs Administration issued a final rule on HM-200 which becomes effective October 1, 1997. The California Highway Patrol is delaying adoption of this final rule based on anticipated changes/modifications the Research and Special Programs Administration may issue prior to the October 1, 1997, effective date. The provisions of HM-200 will be adopted in a subsequent rulemaking adopting by reference the October 1, 1997, edition of 49 CFR. In the interim, any relaxation of the federal requirements pertaining to intrastate transportation authorized pursuant to the April 8, 1997, federal permissive date, may be utilized prior to specific incorporation by reference into 13 CCR, pursuant to 13 CCR 1160.2(b). This section authorizes "*compliance with a later promulgated RSPA [Research and Special Programs Administration] requirement, exemption or exception than that adopted by reference in this article*" in lieu of the requirements contained in the article.

CHANGES

Specific Section by Section Changes

(1) Section 1158

Title 13 CCR 1158 references 49 CFR 173.403(l) for the definition of highway route controlled quantity shipments of radioactive materials. However, 49 CFR 173.403 was reformatted by the Research and Special Programs Administration as a result of other actions and eliminated the first level of outlining. This elimination could cause confusion between the reference "l" (lower case of the letter "L") and the numeral "1."

This action is consistent with the mandate in 2402.7 CVC that requires the California Highway Patrol to adopt the same definitions of hazardous materials as contained in 49 CFR.

Title 49 CFR 171.1(a)(3) establishes application of federal regulation for intrastate carries of hazardous materials when transporting certain materials. Included in intrastate commerce are hazardous materials meeting the definition of "hazardous substance" which includes highway route controlled quantities of radioactive materials. As such, this action is a non-substantive change.

(2) Section 1158.3:

The title of 13 CCR 1158.3 is being changed from "Time of Day and Day of Week Considerations" to "Carrier, Driver, Training and Reporting Requirements" to better reflect the actual requirements that were contained in 49 CFR 177.825. The reference to 49 CFR 177.825 in 13 CCR 1158 is changed to 49 CFR 397.101. Title 49 CFR 177.825 was removed by the Research and Special Programs Administration as being duplicative to the requirements in 49 CFR 397.101 (e.g., for carriers to ensure that their drivers are properly trained, that they have a map and route plan for each trip, reporting requirements, that time of day and day of week considerations are taken, and that proper security measures are used for spent nuclear fuel shipments). Adoption of 49 CFR 397.101 would simply allow the California Highway Patrol to continue to enforce federal regulations that the carrier is already subject to under federal law.

(3) Section 1160.2, Subsection (a):

This section incorporates by reference specified portions of 49 CFR. The reference in Subsection (a) to the publishing date is being updated to the October 1, 1996, current edition of 49 CFR. By adopting the current federal publishing date, intrastate and interstate hazardous material shippers and carriers will be subject to the same requirements enforced by federal authorities. The uniformity provided by application of the same requirements reduces confusion experienced by the regulated community and enforcement personnel, thereby enhancing commerce, public safety and environmental protection. Alignment of federal and state regulations also makes it easier for the regulated community to obtain the referenced regulations, due to the fact that the Research and Special Programs Administration has various compliance dates contained within any specific published edition of 49 CFR. October 1 is the federally mandated annual publishing date for 49 CFR. Reproductions are readily available from the Government Printing Office and various other companies.

As previously discussed, provisions of 49 USC require state hazardous materials regulations involving "*covered subjects*," such as those addressed in this article, be "*substantively the same*" as the corresponding federal Hazardous Materials Regulations. Federal regulations contained in 49 CFR 107.202(d), implementing this provision of 49 USC, define "*substantively the same*" as meaning ". . . *that the non-Federal requirement conforms in every significant respect to the Federal requirement.*" It is for this reason, and the fact that the federal publishing is so readily available, the California Highway Patrol has elected to incorporate the federal requirements by reference rather than by incorporating the full text into 13 CCR. This reduces confusion and reduces costs on both the regulated community and enforcement agencies.

Furthermore, updating the publishing date will eliminate a carrier or shipper from applying outdated regulations which could result in additional costs to their operations for complying with sections that have been repealed. Subsections (b), (c), (d) and (e) remain unchanged.

(4) Section 1161.2, Subsections (d) and (e):

The last sentence in paragraph (d) and all of paragraph (e) are repealed as the corresponding requirements in 49 CFR were removed as a result of federal rulemakings.

(5) Section 1163, Subsections (c)(2) and (e):

Subsections (c)(2) and (e) of 13 CCR 1163 are being revised to eliminate reference to 49 CFR 177.814 and 177.824, which were removed from 49 CFR as being duplicative. The corresponding requirements are contained in 49 CFR 173.33 and 180.405, which are already adopted by reference in 13 CCR.

(6) Section 1165:

The title for 13 CCR 1165 is being amended to read “[Reserved]” since this section was repealed November 16, 1994. Maintenance of the section title only leads to confusion and unnecessary questions.

(7) Section 1165.1:

The title for 13 CCR 1165.1 is being amended to read “[Reserved]” since this section was repealed February 22, 1982. Maintenance of the section title only leads to confusion and unnecessary questions.

(8) Section 1167:

The reference to 49 CFR 177.853 is amended to read 177.854, since 49 CFR 177.853 was removed from 49 CFR as being duplicative. 49 CFR, Part 177, Subpart D now starts with 49 CFR 177.854.

(9) Section 1168

This section is being repealed since referenced 49 CFR 177.818 was removed by the Research and Special Programs Administration in a final rule issued on May 30, 1996, as this requirement is already addressed in 49 CFR Part 172, Subparts G and H. Subparts G and H of 49 CFR, Part 172 are already adopted by reference in 13 CCR 1161.6 and 1161.7.

PUBLIC HEARING

No public hearing was conducted since the California Highway Patrol did not schedule and did not receive any requests for a public hearing on this regulatory action as specified in the original May 16, 1997, Notice of Proposed Regulatory Action (Office of Administrative Law, Notice File Number Z97-0506-05).

WRITTEN COMMENTS

The California Highway Patrol did not received any written response to the May 16, 1997, Notice of Proposed Regulatory Action.

STUDIES/RELATED FACTS

The following documents are referred to in this Initial Statement of Reasons and a copy of each is contained in Annex 1..

- 49 US Code Chapter 51, Transportation of Hazardous Materials.
- The final rule on Docket HM-200 (Hazardous Material in Intrastate Commerce).

LOCAL MANDATE

These regulations do not impose any new mandate on local agencies or school districts.

IMPACT ON BUSINESSES

The California Highway Patrol has not identified any significant adverse impact on businesses since these changes either maintain reasonable exceptions for intrastate shippers and carriers not directly subject to federal jurisdiction (to minimize the impact on business) or they simply adopt federal regulations that already apply to the majority of the regulated community.

ALTERNATIVES

The California Highway Patrol has not identified any alternative, including the no action alternative, that would be more effective and less burdensome for the purpose for which this action is proposed. Additionally, the California Highway Patrol has not identified any alternative which would be as effective and less burdensome to affected persons other than the action being proposed.

Alternatives Identified And Reviewed

1. Amend the existing regulations to comply with federal mandates and Governor Wilson's Executive Order W-127-95.
2. Change statutes to directly require compliance with federal Hazardous Materials Regulations as these regulations now exist or are hereafter amended, in lieu of the existing delegation of rulemaking prescribed in 34501(b) CVC. This alternative would eliminate the present state regulatory mechanism which provides for the adoption of exceptions to the federal Hazardous Materials Regulations presently adopted by reference in 13 CCR. As previously discussed, the Research and Special Programs Administration final rule on Docket HM-200 does, for all practical purposes, usurp state authority for intrastate commerce regulatory authority with respect to hazardous materials transportation. Although a final rule has been issued on Docket HM-200 that incorporates provisions addressing intrastate commerce activities it is still subject to Congressional approval and subsequent change. Subsequent to the Congressional review of the final rule on Docket HM-200 the California Highway Patrol may again give consideration to this alternative.
3. Make no changes to the existing regulations. This would result in federal preemption of California's General Hazardous Materials Regulations. If preempted, the state could not enforce any of these regulations, thus jeopardizing public safety and environmental protection. Failure to maintain consistency with the federal hazardous material regulations would also jeopardize federal Motor Carrier Safety Assistance Program grants used for commercial vehicle enforcement and training, which total approximately three million dollars. The loss of all or a portion of this funding, would in itself, represent a negative impact on public safety.

ECONOMIC IMPACT

The Department has determined these regulations amendments will result in:

- No increased costs for hazardous materials shippers or carriers directly subject to federal jurisdiction as previously discussed. This rulemaking action will simply allow the state to enforce federal regulations that already apply.
- No significant compliance cost for persons or businesses directly affected.
- No discernible adverse impact on the quantity and distribution of goods and services to large and small businesses or the public. This largely results from the fact that most of the suppliers and distributors of hazardous materials already comply with the new federal requirements.
- No impact on the level of employment in the state.
- No impact on the competitiveness of this state to retain businesses, as the majority of other states, including the bordering states of Oregon, Nevada, and Arizona, have already adopted these or similar requirements.