



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

October 10, 2001

The Honorable Richard B. Cheney  
President of the Senate  
Washington, DC 20510

Dear Mr. President:

I am pleased to transmit to you for introduction and referral to the appropriate committee a bill

“To authorize appropriations for hazardous material transportation safety, and for other purposes.”

The proposed bill would reauthorize the Department of Transportation’s hazardous materials transportation safety program, enhance the Department’s inspection and enforcement authority, and make other needed amendments to achieve maximum safety in the transportation of hazardous materials in the 21<sup>st</sup> century.

The primary purpose of this proposed bill is enhance the safety, including the security, of hazardous materials transportation and to respond to the critical problem of undeclared or hidden shipments of hazardous materials, which pose great danger to transportation workers, emergency responders, and the general public. The proposed bill would clarify the authority of the Department’s inspectors to open and examine packages they have reason to believe contain hazardous materials and provide them with authority to issue emergency orders to stop unsafe practices that pose an immediate threat to life, property, or the environment. This enhanced compliance authority would enable Departmental inspectors to more effectively detect violations and ensure that appropriate remedial action is taken when violations or potential violations are discovered.

The proposed bill would address the problem of undeclared hazardous materials shipments in the mail. It would do so by authorizing the United States Postal Service to collect civil penalties and to recover costs and damages for violations of its hazardous materials regulations. This proposal would close a significant gap in the regulation of hazardous materials in the mail by providing USPS with civil penalty authority analogous to the Department’s civil penalty authority. Currently, USPS only has authority to seek criminal penalties for hazardous materials violations.

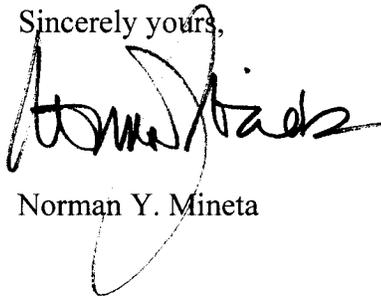
The bill would also strengthen enforcement by increasing penalties for violations of hazardous materials requirements. It would increase criminal penalty provisions for anyone who violates the hazardous materials transportation law or regulations and thereby causes a release of hazardous materials. It would also increase the maximum civil penalty from \$27,500 to \$100,000 per violation. An increase in the maximum civil penalty would give the Department flexibility to assess appropriately high civil penalties in egregious cases resulting in death, serious injury, or significant property damage.

The proposal would also reduce the area of overlap between hazardous materials transportation regulations of the Department and worker protection regulations of the Occupational Safety and Health Administration (OSHA). Instead of both agencies regulating the handling of hazardous materials in transportation, the area of dual jurisdiction in the hazardous materials statute would be limited to training. The proposal includes a provision stating that OSHA continues to have statutory authority to regulate the occupational safety or health protection of employees responding to a release of hazardous materials.

Finally, this bill would provide authority for continuation of the Research and Special Programs Administration's hazardous materials safety activities through 2007. For fiscal year 2002, it authorizes appropriations of \$21,217,000 for RSPA's hazardous materials safety programs, and \$12,800,000 for grants to States and Indian tribes for emergency planning and training.

The Office of Management and Budget has advised that there is no objection, from the standpoint of the Administration's program, to the submission of this proposed legislation to Congress, and that enactment would be in accord with the President's program.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Norman Y. Mineta", written over a large, light-colored circular scribble or stamp.

Norman Y. Mineta

Enclosures:

Draft Bill

Section-by-Section Analysis



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

October 10, 2001

The Honorable J. Dennis Hastert  
Speaker of the House of Representatives  
Washington, DC 20515

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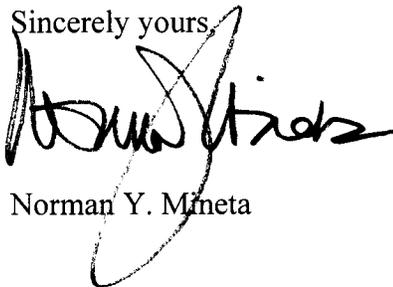
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Norman Y. Mineta

Enclosures:

Draft Bill

Section-by-Section Analysis

A Bill

To authorize appropriations for hazardous material transportation safety, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION. 1. SHORT TITLE; AMENDMENT OF TITLE 49, UNITED STATES CODE; TABLE OF CONTENTS.**

(a) SHORT TITLE.-- This Act may be cited as the "Hazardous Material Transportation Safety Reauthorization Act of 2001".

(b) AMENDMENT OF TITLE 49, UNITED STATES CODE.--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 49, United States Code.

(c) TABLE OF CONTENTS.--

Sec. 1. Short title; amendment of title 49, United States Code; table of contents.

Sec. 2. Purpose.

Sec. 3. Definitions.

Sec. 4. General regulatory authority.

Sec. 5. Representation and tampering.

Sec. 6. Highly radioactive material.

Sec. 7. Handling criteria.

Sec. 8. Hazmat employee training requirements and grants.

Sec. 9. Registration.

Sec. 10. Motor carrier safety.

Sec. 11. Shipping paper retention.

Sec. 12. Rail tank cars.

Sec. 13. Unsatisfactory safety rating.

Sec. 14. Public sector training curriculum.

Sec. 15. Planning and training grants.

Sec. 16. Special permits and exclusions.

Sec. 17. Inspectors.

Sec. 18. Uniform forms and procedures.

Sec. 19. Administrative.

Sec. 20. Enforcement.

Sec. 21. Penalties.

Sec. 22. Preemption.

Sec. 23. Relationship to other laws.

Sec. 24. Judicial review.

Sec. 25. Authorization of appropriations.

Sec. 26. Postal service civil penalty authority.

**SEC. 2. PURPOSE.** Section 5101 is revised to read as follows:

**“Sec. 5101. Purpose**

“The purpose of this chapter 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.”.

**SEC. 3. DEFINITIONS.**

Section 5102 is amended--

(1) by revising paragraph (1) to read as follows:

“(1) ‘commerce’ means trade or transportation in the jurisdiction of the United States –

“(A) between a place in a State and a place outside of the State;

“(B) that affects trade or transportation between a place in a State and a place outside of the State; or

“(C) on a United States-registered aircraft.”;

(2) by revising paragraphs (3) and (4) to read as follows:

“(3) ‘hazmat employee’ means an individual who --

“(A)(i) is employed or used by a hazmat employer; or

“(ii) is self-employed, including an owner-operator of a motor vehicle, vessel, or aircraft transporting hazardous material in commerce; and

“(B) performs a function regulated by the Secretary under section 5103(b)(1) of this chapter.”

“(4) ‘hazmat employer’ means a person that –

“(A)(i) has a least one hazmat employee; or

“(ii) is self-employed, including an owner-operator of a motor vehicle, vessel, or aircraft transporting hazardous material in commerce; and

“(B) performs, or employs or uses at least one hazmat employee to perform, a function regulated by the Secretary under section 5103(b)(1) of this chapter.”;

(3) in paragraph (5), by striking “condition that presents” and inserting “condition related to a hazardous material that presents”;

(4) in paragraph (7), by striking “title” and inserting “title, except a freight forwarder is included only if performing a function related to highway transportation”;

(5) in paragraph (8), by striking “national response team” each place it appears and inserting “National Response Team,” and by striking “national contingency plan” and inserting “National Contingency Plan”; and

(6) in paragraph (9), by revising subparagraph (A) to read as follows:

“(A) includes a government, Indian tribe, or authority of a government or tribe offering hazardous material for transportation in commerce, transporting hazardous material to further a commercial enterprise, or manufacturing, designing, inspecting, testing, reconditioning, marking, or repairing a packaging or packaging component represented as qualified for use in transporting hazardous material in commerce; but”.

#### **SEC. 4. GENERAL REGULATORY AUTHORITY.**

Section 5103 is amended--

(1) by revising subsection (a) to read as follows:

“(a) DESIGNATING MATERIAL AS HAZARDOUS.-- 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.”; and

(2) in subsection (b)(1), by revising subparagraph (A) to read as follows:

“(A) apply to a person that--

“(i) transports a hazardous material in commerce;

“(ii) causes a hazardous material to be transported in commerce;

“(iii) manufactures, designs, inspects, tests, reconditions, marks, or repairs a packaging or packaging component represented as qualified for use in transporting hazardous material in commerce;

“(iv) prepares, accepts, or rejects hazardous material for transportation in commerce;

“(v) is responsible for the safety of transporting hazardous material in commerce;

“(vi) certifies compliance with any requirement issued under this chapter; or

“(vii) misrepresents whether it is engaged in any of the above activities; and”.

#### **SEC. 5. REPRESENTATION AND TAMPERING.**

Section 5104 is amended--

(1) in subsection (a), by striking “A person” and inserting “No person”;

(2) by revising subsection (a)(1) to read as follows:

“(1) a package, component of a package, or packaging for transporting hazardous material is safe, certified, or complies with this chapter if it does not conform to each applicable regulation prescribed under this chapter; or”;

(3) in paragraph (a)(2), by striking “only if” and inserting “unless”; and

(4) by revising subsection (b) to read as follows:

“(b) TAMPERING.--No person may, without authorization from the owner or custodian, alter, remove, destroy, or tamper with--

“(1) a marking, label, placard, or description on a document required under this chapter or a regulation prescribed under this chapter; or

“(2) a package, container, motor vehicle, rail freight car, aircraft, or vessel used to transport hazardous material.”.

#### **SEC. 6. HIGHLY RADIOACTIVE MATERIAL.**

Section 5105 is amended by striking subsections (d) and (e).

**SEC. 7. HANDLING CRITERIA.**

Chapter 51 is amended by striking section 5106 and striking the corresponding item in the analysis of chapter 51.

**SEC. 8. HAZMAT EMPLOYEE TRAINING REQUIREMENTS AND GRANTS.**

(a) Section 5107 is amended by--

(1) striking "or duplicate" in subsection (d);

(2) striking "section 5127(c)(3)" in subsection (e) and inserting "section 5128"; and

(3) striking "and sections 5106, 5108(a)-(g)(1) and (h), and 5109 of this title" in subsection (f)(2).

(b) Notwithstanding section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1), an action of the Secretary of Transportation under chapter 51 of title 49, United States Code, does not preclude the Secretary of Labor from prescribing or enforcing standards, regulations or requirements regarding --

(1) hazardous materials employee training, or

(2) the occupational safety or health protection of employees responding to a release of hazardous materials.

**SEC. 9. REGISTRATION.**

Section 5108 is amended--

(1) by striking "class A or B explosive" in subsection (a)(1)(B) and inserting "Division 1.1, 1.2, or 1.3 explosive material";

(2) by revising subsection (a)(2)(B) to read as follows:

"(B) a person manufacturing, designing, inspecting, testing, reconditioning, marking, or repairing a packaging or packaging component represented as qualified for use in transporting a hazardous material in commerce.";

(3) by revising subsection (b)(1)(C) to read as follows:

"(C) each State in which the person carries out any of the activities.";

(4) by revising subsection (c) to read as follows:

"(c) FILING SCHEDULE.--Each person required to file a registration statement under subsection (a) of this section shall file that statement in accordance with regulations issued by the Secretary.";

(5) in subsection (g)(1), by striking "may" and inserting "shall"; and

(6) in subsection (i)(2)(B), by striking "State," and inserting "State, Indian tribe,".

**SEC. 10. MOTOR CARRIER SAFETY.**

Chapter 51 is amended by striking section 5109 and striking the corresponding item in the analysis of chapter 51.

**SEC. 11. SHIPPING PAPER RETENTION.**

Section 5110 is amended --

(1) in subsection (a), by striking “under subsection (b) of this section” and inserting “by regulation”;

(2) by striking subsection (b) and redesignating subsections (c)-(e) as subsections (b)-(d); and

(3) by revising the first sentence in subsection (d), as redesignated, to read as follows:

“The person that provided the shipping paper and the carrier required to keep it under this section shall retain the paper, or an electronic image of it, for a period of 3 years after the shipping paper was provided to the carrier, to be accessible through their respective principal places of business.”.

**SEC. 12. RAIL TANK CARS.**

Chapter 51 is amended by striking section 5111 and by striking the corresponding item in the analysis of chapter 51.

**SEC. 13. UNSATISFACTORY SAFETY RATING.**

(a) Section 5113 is amended by insertion of the following text:

“A violation of section 31144(c)(3) of this title shall be considered a violation of this chapter and shall be subject to the penalties in sections 5123 and 5124 of this chapter.”.

(b) Section 31144(c) is amended--

(1) in paragraph (1), by striking “sections 521(b)(5)(A) and 5113” and inserting “section 521(b)(5)(A)”;

(2) in paragraph (3), by striking “interstate commerce” and inserting “commerce”;

(3) by adding at the end of paragraph (3) the following:

“A violation of this paragraph by an owner or operator transporting hazardous material shall be considered a violation of chapter 51 of this title, and shall be subject to the penalties in sections 5123 and 5124 of this chapter.”.

(c) Section 31144 is amended by striking the subsection designation “(c)” at the beginning of the last subsection and inserting “(f)”.

**SEC. 14. PUBLIC SECTOR TRAINING CURRICULUM.**

Section 5115 is amended--

(1) in subsection (a), by--

(a) striking “DEVELOPMENT AND UPDATING.-- Not later than November 16, 1992, in” and inserting “GENERAL.-- In”;

(b) striking “national response team” and inserting “National Response Team” in the first sentence;

(c) striking “develop and update periodically a” in the first sentence and inserting “maintain a current; and

(d) striking the second sentence;

(2) in subsection (b), by--

(a) striking “developed” and inserting “maintained” in the first sentence; and

(b) in paragraph (i)(C), by striking “under other United States Government grant programs, including those developed with grants made under section 126(g) of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9660a)” and inserting “with Federal financial assistance”;

(3) in subsection (c)(3), by striking “the National Fire Protection Association” and inserting “the National Fire Protection Association and such other voluntary consensus standard-setting organizations as the Secretary deems appropriate”; and

(4) by revising subsection (d) to read as follows:

“(d) DISTRIBUTION AND PUBLICATION.--With the National Response Team, the Secretary of Transportation may publish and distribute a list of courses developed under this section and of programs using any of those courses.”.

## **SEC. 15. PLANNING AND TRAINING GRANTS.**

(a) Section 5116 is amended--

(1) in the second sentence of subsection (e), by striking “of the State or tribe under subsections (a)(2)(A) and (b)(2)(A)” and inserting “received by the State or tribe under subsections (a)(1) and (b)(1)”;

(2) revising subsection (f) to read as follows:

“(f) MONITORING AND TECHNICAL ASSISTANCE.--The Secretary of Transportation shall monitor public-sector emergency response planning and training for an accident or incident involving hazardous material. Considering the results of the monitoring, the Secretary shall provide technical assistance to a State, political subdivision of a State, or Indian tribe for carrying out emergency response training and planning for an accident or incident involving hazardous material and shall coordinate the assistance using the existing coordinating mechanisms of the National Response Team and, for radioactive material, the Federal Radiological Preparedness Coordinating Committee.”;

(3) in subsection (g), by striking “Government grant” and inserting “Federal financial assistance”;

(4) by revising subsection (i) to read as follows:

“(i) EMERGENCY PREPAREDNESS FUND.-- The Secretary of the Treasury shall establish an Emergency Preparedness Fund account in the Treasury into which the Secretary of the Treasury shall deposit amounts the Secretary of Transportation transfers to the Secretary of the Treasury under section 5108(g)(2)(C) of this title. Without further appropriation, amounts in the account are available--

“(1) to make grants under this section;

“(2) to monitor and provide technical assistance under subsection (f) of this section;

“(3) to publish and distribute the Emergency Response Guidebook; and

“(4) to pay administrative costs of carrying out this section and sections 5108(g)(2) and 5115 of this title, except that not more than 10 percent of the

amounts made available from the account in a fiscal year to carry out these sections may be used to pay those costs.”; and

(5) by striking subsection (k).

(b) Chapter 51 is amended by--

(1) revising the section heading for section 5116 to read “Planning and training grants; emergency preparedness fund”; and

(2) striking the item for section 5116 in the analysis of the chapter and inserting “5116. Planning and training grants; emergency preparedness fund.”.

## **SEC. 16. SPECIAL PERMITS AND EXCLUSIONS.**

(a) Section 5117 is amended--

(1) by revising the section heading to read as follows:

**“Sec. 5117. Special permits and exclusions”;**

(2) by striking “exemption” and “an exemption” each place they appear and inserting, respectively, “special permit” and “a special permit”;

(3) in subsection (a)(1), as revised by Section 16(a)(2) of this Act, by striking “issue a special permit” and inserting “issue, modify, or terminate a special permit authorizing variances”, and by striking “transporting, or causing to be transported, hazardous material” and inserting “performing a function regulated by the Secretary under section 5103(b)(1) of this title”; and

(4) in subsection (a)(2), by striking “2” and inserting “4”.

(b) The chapter analysis for chapter 51 is amended by striking the item related to section 5117 and inserting the following:

“5117. Special permits and exclusions.”.

## **SEC. 17. INSPECTORS.**

Chapter 51 is amended by striking section 5118 and striking the corresponding item in the analysis of chapter 51.

## **SEC. 18. UNIFORM FORMS AND PROCEDURES.**

Section 5119 is revised to read as follows:

**“Sec. 5119. Uniform forms and procedures**

**“(a) REGULATIONS.--(1) The Secretary of Transportation may prescribe regulations to establish uniform forms and procedures for a State--**

**“(i) to register and issue permits to persons that transport or cause to be transported hazardous material by motor vehicle in the State; and**

**“(ii) to allow the transportation of hazardous material in the State.**

**“(2) A regulation prescribed under this section may not define or limit the amount of a fee a State may impose or collect.**

**“(b) EFFECTIVE DATE.--A regulation prescribed under this section takes effect one year after it is prescribed. The Secretary may extend the one-year period for an additional year for good cause. After a regulation is effective, a State may establish, maintain, or enforce a requirement related to the same subject matter only if the requirement is the same as the regulation.**

“(c) UNIFORMITY.--The Secretary shall develop a procedure to eliminate differences in how States carry out a regulation prescribed under this section.

“(d) INTERIM STATE PROGRAMS.--Pending promulgation of regulations under this section, States may participate in a program of uniform forms and procedures recommended by the Alliance for Uniform Hazmat Transportation Procedures.”.

## **SEC. 19. ADMINISTRATIVE.**

Section 5121 is revised to read as follows:

### **“Sec. 5121. Administrative**

“(a) GENERAL AUTHORITY.--To carry out this chapter, the Secretary of Transportation 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. Except as provided in subsections (c) and (d) of this section, the Secretary shall provide notice and an opportunity for a hearing prior to issuing an order directing compliance with this chapter or a regulation, order, special permit, or approval issued under this chapter.

“(b) RECORDS, REPORTS, PROPERTY, AND INFORMATION.--A person subject to this chapter shall--

“(1) maintain records, make reports, and provide property and information that the Secretary by regulation or order requires; and

“(2) make the records, reports, property, and information available for inspection when the Secretary undertakes an investigation.

“(c) INSPECTIONS AND INVESTIGATIONS.--(1) A designated officer or employee of the Secretary may--

“(A) inspect and investigate, at a reasonable time and in a reasonable way, records and property related to a function described in section 5103(b)(1) of this chapter;

“(B) except for the packaging immediately adjacent to its hazardous material contents, gain access to, open, and examine a package offered for, or in, transportation when the officer or employee has an objectively reasonable and articulable belief that the package may contain a hazardous material;

“(C) remove from transportation a package or related packages in a shipment offered for or in transportation, and for which such officer or employee has an objectively reasonable and articulable belief that the package or packages may pose an imminent hazard, and for which the officer or employee contemporaneously documents that belief in accordance with procedures adopted under subsection (e) of this section;

“(D) gather information from the offeror, carrier, packaging manufacturer or retester, or other person responsible for the package or packages, to ascertain the nature and hazards of the contents of the package or packages;

“(E) as necessary, under terms and conditions specified by the Secretary, order the offeror, carrier, packaging manufacturer or retester, or other person responsible for the package or packages to have the package or packages transported to, opened and the contents examined and analyzed at a facility appropriate for the conduct of this activity; and

“(F) when safety might otherwise be compromised, authorize properly qualified personnel to assist in the activities conducted under this subsection.

“(2) An officer or employee acting under this subsection shall display proper credentials when requested.

“(3) For instances when, as a result of the inspection or investigation, an imminent hazard is not found to exist, the Secretary shall develop procedures to assist in the safe resumption of transportation of the package or transport unit.

“(d) EMERGENCY ORDERS.--(1) If, upon inspection, investigation, testing, or research, the Secretary determines that either a violation of a provision of this chapter or a regulation issued under this chapter, or an unsafe condition or practice, constitutes or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or the opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

“(2) The Secretary’s action under paragraph (1) of this subsection shall be in a written order describing the violation, condition or practice that is causing the imminent hazard, and stating the restrictions, prohibitions, recalls, or out-of-service orders issued or imposed. The order also shall describe the standards and procedures for obtaining relief from the emergency order.

“(3) After taking action under paragraph (1) of this subsection, the Secretary shall provide an opportunity for review of that action under section 554 of title 5, if a petition for review is filed within 20 calendar days after issuance of the order.

“(4) If a petition for review is filed and the review is not completed by the end of the 30-day period beginning on the date the petition was filed, the action will cease to be effective at the end of that period unless the Secretary determines in writing that the emergency situation still exists.

“(5) For purposes of this subsection, ‘out-of-service order’ means a mandate that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, transport vehicle, freight container, portable tank, or other package not be moved until specified conditions have been met.

“(e) REGULATIONS.--The Secretary shall issue regulations in accordance with section 553 of title 5, including an opportunity for informal oral presentation, to implement the authority in subsections (c) and (d) of this section.

“(f) FACILITY, STAFF, AND REPORTING SYSTEM ON RISKS, EMERGENCIES, AND ACTIONS.--(1) The Secretary shall--

“(A) maintain a facility and technical staff sufficient to provide, within the United States Government, the capability of evaluating a risk related to the transportation of hazardous material and material alleged to be hazardous;

“(B) maintain a central reporting system and information center capable of providing information and advice to law enforcement and firefighting personnel, other interested individuals, and officers and employees of the United States Government and State, local and tribal governments on meeting an emergency related to the transportation of hazardous material; and

“(C) conduct a continuous review on all aspects of transporting hazardous material to decide on and take appropriate actions to ensure safe transportation of hazardous material.

“(2) Paragraph (1) of this subsection does not prevent the Secretary from making a contract with a private entity for use of a supplemental reporting system and information center operated and maintained by the contractor.

“(g) **AUTHORITY FOR GRANTS, COOPERATIVE AGREEMENTS, AND OTHER TRANSACTIONS.**--To carry out this chapter, the Secretary may enter into grants, cooperative agreements, and other transactions with a person, agency or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other entity to further the objectives of this chapter. The objectives of this chapter include the conduct of research, development, demonstration, risk assessment, and emergency response planning and training activities.”.

## **SEC. 20. ENFORCEMENT.**

Section 5122 is amended--

(1) in subsection (a), by revising the last sentence to read as follows:

“The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Secretary in an administrative case under section 5123 of this chapter.”; and

(2) in subparagraph (b)(1)(B), by striking “or ameliorate the” and inserting “or mitigate the”.

## **SEC. 21. PENALTIES.**

(a) Section 5123 is amended--

(1) by revising subsection (a) to read as follows:

“(a) **PENALTY.**--(1) A person that knowingly violates this chapter, or a regulation, order, special permit, or approval issued under this chapter, is liable to the United States Government for a civil penalty of at least \$250 but not more than \$100,000 for each violation.

“(2) Knowledge by the person of the existence of a statutory provision, or a regulation or requirement prescribed by the Secretary is not an element of an offense under this section.

“(3) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues”; and

(2) by redesignating subsections (b)-(g) as subsections (c)-(h) and inserting a new subsection (b) to read as follows:

“(b) **KNOWING VIOLATIONS.**--In this section, a person acts knowingly when--

“(1) the person has actual knowledge of the facts giving rise to the violation; or

“(2) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.”;

(3) in subsection (c), as redesignated, by striking the first sentence and inserting the following:

“The Secretary of Transportation may find that a person has violated this chapter, or a regulation, order, special permit or approval issued under this chapter, only after notice and an opportunity for a hearing.”

(4) by revising subsection (e), as redesignated, to read as follows:

“(e) CIVIL ACTIONS TO COLLECT.--The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section and any accrued interest on that penalty calculated in the manner described under section 2705 of title 33. In such action, the validity, amount, and appropriateness of the civil penalty shall not be subject to review.”

(b) Section 5124 is revised to read as follows:

**"Sec. 5124. Criminal penalty**

“(a) GENERAL.--A person knowingly violating section 5104(b) of this title or willfully violating this chapter or a regulation, order, special permit, or approval issued under this chapter, shall be fined under title 18, imprisoned for not more than 5 years, or both.

“(b) AGGRAVATED VIOLATIONS.--A person knowingly violating section 5104(b) of this chapter or willfully violating this chapter or a regulation, order, special permit, or approval issued under this chapter, and thereby causing the release of a hazardous material, shall be fined under title 18, imprisoned for not more than 20 years, or both.

“(c) KNOWING VIOLATIONS.--In this section, a person acts knowingly when--

“(1) the person has actual knowledge of the facts giving rise to the violation; or

“(2) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

“(d) WILLFUL VIOLATIONS.--In this section, a person acts willfully when the person acts with intent.

“(e) KNOWLEDGE OF REQUIREMENTS.-- Knowledge by a person of the existence of a statutory provision, or a regulation or requirement prescribed by the Secretary, is not an element of an offense under this section.”

(c) Section 46312 is amended--

(1) in subparagraph (a), by striking “under this part” and inserting “under this part or under chapter 51 of this title”;

(2) in subparagraph (b), by striking “by the Secretary” and inserting “by the Secretary under this part or under chapter 51 of this title”.

**SEC. 22. PREEMPTION.**

Section 5125 is amended--

(1) by redesignating subsections (a), (b), and (c), as subsections (b), (c), and (d), and adding a new subsection (a) to read as follows:

“(a) PURPOSES.--The Secretary shall exercise the authority in this section to achieve uniform regulation of hazardous material transportation, eliminate inconsistent rules that apply differently than rules issued under this chapter, and promote the safe and efficient movement of hazardous material in commerce.”;

- (2) in subsection (b), as redesignated, by--
  - (a) striking “GENERAL.--Except as provided in subsections (b), (c), and (e)” and inserting “DUAL COMPLIANCE AND OBSTACLE TESTS.-- Except as provided in subsections (c), (d), and (g)”;
  - (b) in subparagraph (2), striking “carrying out this chapter or a regulation” and inserting “carrying out this chapter, the purposes of this chapter, or a regulation”;
  - (3) in subsection (c), by--
    - (a) in subparagraph (1), striking “(c)” and inserting “(d)”;
    - (b) revising subparagraph (1)(E) to read as follows:
      - “(E) the manufacturing, designing, inspecting, testing, reconditioning, marking, or repairing of a packaging or packaging component represented as qualified for use in transporting hazardous material in commerce.”; and
    - (c) in subparagraph (2), striking “after November 16, 1990”;
  - (4) by striking subsection (f) and redesignating subsections (g), (d), and (e) as subsections (e), (f), and (g);
  - (5) in subsection (f), as redesignated, by striking “subsection (a), (b)(1), or (c) of this section” and inserting “subsection (b), (c)(1), (d), or (e) of this section or subsection 5119(b) of this chapter.”, and by striking “in the Federal Register”;
  - (6) in subsection (g), as redesignated, by striking “subsection (a), (b)(1), or (c) of this section” and inserting “subsection (b), (c)(1), (d), or (e) of this section or subsection 5119(b) of this chapter.”;
  - (7) by adding new subsections (h) and (i) to read as follows:
    - “(h) INDEPENDENT APPLICATION OF EACH STANDARD.--Each preemption standard in subsections (b), (c)(1), (d), and (e) of this section and in section 5119(b) of this chapter is independent in its application to a requirement of any State, political subdivision of a State, or Indian tribe.
    - “(i) NONFEDERAL ENFORCEMENT STANDARDS.--This section does not apply to procedure, penalty, or required mental state or other standard used by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to transportation of a hazardous material.”.

**SEC. 23. RELATIONSHIP TO OTHER LAWS.**

Section 5126 is amended--

- (1) by revising subsection (a) to read as follows:
  - “(a) CONTRACTS.--A person under contract with a department, agency, or instrumentality of the United States Government that transports hazardous material or causes hazardous material to be transported, or manufactures, designs, inspects, tests, reconditions, marks, or repairs a packaging or packaging component represented as qualified for use in transporting hazardous material in commerce shall comply with this chapter, regulations prescribed and orders issued under this chapter, and all other requirements of the United States Government, State and local governments, and Indian tribes (except a requirement preempted by a law of the United States) in the same way and to the same extent that any person engaging in that transportation, manufacturing, designing, inspecting, testing, reconditioning, marking, or repairing that is in or affects commerce must comply with the provision, regulation, order, or requirement.”.

(2) in subsection (b), by--

(a) striking “title 18 or 39;” and inserting “title 18 or 39; or” in paragraph (2); and

(b) adding a new paragraph (3) to read as follows:

“(3) marine transportation of hazardous material subject to regulation under title 33 or 46.”.

#### **SEC. 24. JUDICIAL REVIEW.**

(a) Chapter 51 is amended by redesignating section 5127 as section 5128, and by inserting after section 5126 the following new section:

##### **"Sec. 5127. Judicial review**

“(a) FILING AND VENUE.--Except as provided in section 20114(c) of this title, a person suffering legal wrong or adversely affected or aggrieved by a final action of the Secretary of Transportation under this chapter may petition for review of the final action in the United States Court of Appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60 days after the Secretary’s action becomes final.

“(b) JUDICIAL PROCEDURES.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary. The Secretary shall file with the court a record of any proceeding in which the final action was issued, as provided in section 2112 of title 28.

“(c) AUTHORITY OF COURT.--The court has exclusive jurisdiction, as provided in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to affirm, amend, modify, or set aside any part of the Secretary’s final action and may order the Secretary to conduct further proceedings. Findings of fact by the Secretary, if supported by substantial evidence, are conclusive.

“(d) REQUIREMENT FOR PRIOR OBJECTION.--In reviewing a final action under this section, the court may consider an objection to a final action of the Secretary only if the objection was made in the course of a proceeding or review conducted by the Secretary or if there was a reasonable ground for not making the objection in the proceeding.”;

(b) CONFORMING AMENDMENT.--The chapter analysis for chapter 51 is amended by striking the item related to section 5127 and inserting the following:

"5127. Judicial review.

"5128. Authorization of appropriations.”.

#### **SEC. 25. AUTHORIZATION OF APPROPRIATIONS.**

Section 5128, as redesignated by section 24 of this Act, is amended to read as follows:

##### **"Sec. 5128. Authorization of appropriations**

“(a) GENERAL.--To carry out this chapter (except sections 5107(e), 5108(g), 5112, 5113, 5115, 5116 and 5119), not more than \$21,217,000 is authorized to be appropriated to the Secretary of Transportation for fiscal year 2002; and such sums as may

be necessary are authorized to be appropriated to the Secretary for fiscal years 2003 through 2007.

“(b) EMERGENCY PREPAREDNESS FUND.--There shall be available from the Emergency Preparedness Fund account the following:

“(1) To carry out section 5116(j) of this title, \$250,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(2) To carry out section 5115 of this title, \$200,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(3) To carry out section 5116(a) of this title, \$5,000,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(4) To carry out section 5116(b) of this title, \$7,800,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(5) To carry out section 5116(f) of this title, \$150,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(6) To publish and distribute the Emergency Response Guidebook, \$500,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(7) To carry out section 5107(e) of this title, such amounts as may be necessary are authorized to be appropriated to the Secretary for each of fiscal years 2002 through 2007.

“(8) To carry out section 5116(i)(4) of this title, \$400,000 shall be available to the Secretary for fiscal year 2002, and such amounts as may be necessary for fiscal years 2003 through 2007.

“(c) CREDITS TO APPROPRIATIONS.--The Secretary of Transportation may credit to any appropriation to carry out this chapter an amount received from a State, Indian tribe, or other public authority or private entity for expenses the Secretary incurs in providing training to the State, authority, or entity.

“(d) AVAILABILITY OF AMOUNTS.--Amounts available under this section remain available until expended.”.

## **SEC. 26. POSTAL SERVICE CIVIL PENALTY AUTHORITY.**

(a) Section 3001 of title 39, United States Code, is amended by adding a new subsection (o) as follows:

“(o)(1) Except as permitted by law and Postal Service regulation, hazardous material is nonmailable.

“(2) For purposes of this section, the term ‘hazardous material’ means a substance or material the Secretary of Transportation designates under section 5103(a) of title 49.”.

(b) Chapter 30 of title 39, United States Code, is amended by adding a new section 3018 at the end as follows:

### **“Sec. 3018. Hazardous material; civil penalty**

“(a) REGULATIONS.--The Postal Service shall prescribe regulations for the safe transportation of hazardous material in the mail.

“(b) HAZARDOUS MATERIAL IN THE MAIL.--No person may--

“(1) mail or cause to be mailed a hazardous material that has been declared by statute or Postal Service regulation to be nonmailable;

“(2) mail or cause to be mailed a hazardous material in violation of any statute or Postal Service regulation restricting the time, place, or manner in which a hazardous material may be mailed; or

“(3) manufacture, distribute, or sell any container, packaging kit, or similar device that--

“(i) is represented, marked, certified, or sold by such person for use in the mailing of a hazardous material; and

“(ii) fails to conform with any statute or Postal Service regulation setting forth standards for a container, packaging kit, or similar device used for the mailing of a hazardous material.

“(c) CIVIL PENALTY.--

“(1) A person that knowingly violates this section or a regulation issued under this section is liable to the Postal Service for a civil penalty of at least \$250 but not more than \$100,000 for each violation, and for any clean-up costs and damages. A person acts knowingly when--

“(A) the person has actual knowledge of the facts giving rise to the violation;

or

“(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

“(2) Knowledge by the person of the existence of a statutory provision, or a regulation or requirement prescribed by the Postal Service is not an element of an offense under this section.

“(3) A separate violation occurs for each day a hazardous material, mailed or caused to be mailed in noncompliance with this section or a regulation issued under this section, is in the mail.

“(4) A separate violation occurs for each item containing a hazardous material that is mailed or caused to be mailed in noncompliance with this section or a regulation issued under this section.

“(d) HEARING REQUIREMENT.--The Postal Service may find that a person has violated this section or a regulation issued under this section only after notice and an opportunity for a hearing. Under this section, the Postal Service shall impose a penalty and recover clean-up costs and damages by giving the person written notice of the amount of the penalty, clean-up costs, and damages.

“(e) PENALTY CONSIDERATIONS.--In determining the amount of a civil penalty under this section, the Postal Service shall consider--

“(1) the nature, circumstances, extent, and gravity of the violation;

“(2) with respect to the person who committed the violation, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue in business;

“(3) the impact on postal operations; and

“(4) other matters that justice requires.

“(f) CIVIL ACTIONS TO COLLECT.--(1) In accordance with section 409(d) of this title, the Department of Justice or the Postal Service may commence a civil action in an appropriate district court of the United States to collect a civil penalty, clean-up costs, or damages assessed under this section. In such action, the validity, amount, and appropriateness of the civil penalty, clean-up costs, or damages shall not be subject to review.

“(2) The Postal Service may compromise the amount of a civil penalty, clean-up costs, or damages assessed under this section before civil action is taken to collect the penalty, costs, or damages.

“(g) CIVIL JUDICIAL PENALTIES.--At the request of the Postal Service, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order issued under this chapter. The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Postal Service in an administrative case under this section.

“(h) DEPOSITING AMOUNTS COLLECTED.--Amounts collected under this section shall be paid into the Postal Service Fund established by section 2003 of this title.”.

(c) CONFORMING AMENDMENT.--The chapter analysis for chapter 30 of title 39, United States Code, is amended by adding the following:

“3018. Hazardous material; civil penalty.”.

#

## SECTION-BY-SECTION ANALYSIS

SECTION 1. This section contains the short title and table of contents.

SECTION 2. This section would update and clarify the purpose of chapter 51 of title 49. For example, it would clarify that commerce includes intrastate, interstate, and foreign commerce as set forth in existing section 5103. Also, in recent litigation, plaintiffs challenged a DOT hazardous materials safety rule alleging, among other things, that DOT had exceeded its authority by issuing a rule that provided more than "adequate" protection against the risks to life and property. This section would delete the word "adequate" to clarify that the Secretary has broad regulatory authority.

SECTION 3. This section would modify definitions in chapter 51 of title 49 as indicated below.

The definition of "commerce" would be amended to provide jurisdiction over hazardous materials activities being conducted on a U.S.-registered aircraft anywhere in the world. Currently, DOT does not have clear authority over U.S.-registered aircraft carrying hazardous materials between two foreign points. Such jurisdiction would parallel U.S. and DOT jurisdiction over other safety aspects of those same flights. Assertion and exercise of that jurisdiction over U.S.-registered aircraft is necessary for the United States to carry out its obligations under the Chicago Convention.

The definitions of "hazmat employee" and "hazmat employer" would be amended to clarify the applicability of the training requirements in section 5107. To eliminate ambiguity in the current training requirements, the two definitions would be amended to clearly require hazmat training for self-employed persons, including owner-operators of motor vehicles, vessels, or aircraft transporting hazardous materials in commerce. The two definitions also would be amended to clarify the applicability of the training requirements to persons "used" by a hazmat employer -- such as contractors -- to perform any of the hazardous materials functions listed in section 5103(b)(1).

The definition of "motor carrier" would be amended by clarifying that it includes a freight forwarder, as defined in section 13102 of title 49, only if the freight forwarder is performing a function related to highway transportation. Provisions applicable to motor carriers should not apply to freight forwarders performing functions not related to highway transportation.

Finally, the definition of "person" would be amended so that the requirements of chapter 51 apply to additional activities of government agencies and Indian tribes. They would be regulated not only when they offer hazardous materials in commerce or transport a hazardous material to further a commercial enterprise, but also when they manufacture, design, inspect, test, recondition, mark, or repair a packaging or packaging component represented as qualified for use in transporting hazardous materials in commerce. Those packaging-related activities, although rare, have the potential to affect the transportation of hazardous materials by other persons. Therefore, regulation of those activities is appropriate to ensure that they are conducted in a safe manner.

SECTION 4. This section would amend subsection 5103(a) to update the terminology used to describe materials the Secretary is required, under that subsection, to designate as hazardous.

This section would amend subsection 5103(b)(1)(A) to add that persons who prepare, accept, or reject hazardous materials for transportation in commerce, persons who are responsible for the safety of transporting hazardous materials in commerce, persons who certify compliance with any requirement issued under chapter 51, and persons who misrepresent whether they are engaged in a function listed under 5103(b)(1)(A), are subject to the Hazardous Materials Regulations.

The application to “rejection” situations is necessary to address training requirements for those carriers, especially air carriers, that do not carry hazardous material and should be required to train their employees on how to identify and reject hazardous materials for transportation in commerce. The current law does not require training for carriers that do not carry hazardous materials or cause the transportation of hazardous materials. However, if a carrier does not train its employees to reject hazardous materials, it unwittingly becomes a carrier of hazmat and subject to the training rules. Expansion of the law to cover rejection of hazardous materials is necessary to ensure compliance with the regulations by preventing the improper transportation of hazardous materials and, thus, enhance safety.

The application to persons who prepare or accept hazardous materials is necessary to clarify that non-shipper personnel who prepare hazardous materials for transportation on behalf of a shipper (e.g., freight forwarders) and non-carrier personnel who accept hazardous materials for transportation on behalf of a carrier (e.g., a broker, agent, or freight forwarder) are subject to the Hazardous Materials Regulations, including training requirements. The proposed amendment would also ensure that persons who are responsible for compliance with the Hazardous Materials Regulations are subject to the regulations. Including persons who certify compliance with any requirement issued under chapter 51 would ensure that the person has the knowledge necessary to accurately certify that the requirement has been met. Finally, this section would clarify that persons who misrepresent whether they are engaged in a regulated activity, such as transporting hazardous materials in commerce, are subject to the Hazardous Materials Regulations, including the civil penalty provisions.

SECTION 5. This section would make minor editorial changes to section 5104 for clarity.

SECTION 6. This section would amend section 5105 by deleting subsections (d) and (e). Subsection (d) requires the Secretary to conduct a study to decide which factors, if any, shippers and carriers should consider when selecting routes and modes that would enhance overall public safety related to the transportation of high-level radioactive waste and spent nuclear fuel. Subsection (d) would be deleted because the study was completed and submitted to Congress.

Subsection (e) states that the Secretary shall require, by regulation, that before each use of a motor vehicle to transport a highway-route-controlled quantity of

radioactive material in commerce, the vehicle must be inspected and certified as complying with chapter 51 and applicable U.S. motor carrier safety laws and regulations. The Department currently oversees the inspection of trucks transporting highway-route-controlled quantity (HRCQ) shipments of radioactive materials at their points of origin. Presently, there are three mechanisms in place to ensure that commercial motor vehicles (CMV) transporting HRCQ shipments are safe:

- (1) Contract language required by the Department of Energy (DOE) mandates point- of- origin inspection and certification of HRCQ shipments. DOE contracts cover most HRCQ shipments; the remaining shipments are made up of high-level, gamma- emitting radioactive materials used for medical purposes.
- (2) The Commercial Vehicle Safety Alliance (CVSA), which includes all 50 states, Canada, and Mexico, has adopted a set of standardized protocols that require a point-of- origin, zero-defect Level VI (most complete) inspection. CVSA inspectors in participating states affix a Level VI inspection decal to any vehicle transporting HRCQ radioactive material. This decal serves as a visible means of determining, during a roadside inspection, that the vehicle has passed a point-of-origin CVSA Level VI inspection. DOE also requires the Level VI inspection decal to be displayed on vehicles transporting HRCQ radioactive material.
- (3) Most states require carriers of radioactive materials to obtain a permit before beginning transportation. States typically issue permits only after arrangements for the Level VI inspection are made. The permitting process includes advising motor carriers of the requirement for a Level VI inspection at the point of origin of many radioactive materials shipments.

A recent study of HRCQ shipments conducted by CVSA determined that, of 124 shipments, 313 inspections were conducted at the point of origin, during transportation, or at the destination. These inspections resulted in a total of 17 violations discovered. This means that each shipment was inspected an average of 2.5 times during transportation. These numbers demonstrate that there is no need for further regulation of this activity. Consequently, this section proposes deleting section 5105(e).

SECTION 7. This section would repeal section 5106, which authorizes the Secretary to prescribe criteria for the handling of hazardous materials. Because of the broad authority of the Secretary of Transportation, under section 5103(b), to prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce, section 5106 is unnecessary. In addition, this section has generated some confusion about the respective responsibilities of the Department of Transportation, the Occupational Safety and Health Administration, and the Environmental Protection Agency. Therefore, it should be eliminated.

SECTION 8. This section would amend subsection 5107(d) by deleting the words "or duplicate." This deletion would enable the Secretary to prescribe hazmat employee training requirements that are more consistent with, or incorporate by

reference, certain Environmental Protection Agency and Department of Labor/Occupational Safety and Health Administration (OSHA) regulations specified in that section. It would also revise subsection (e) to reference proposed section 5128 rather than subsection 5127(c)(3), which does not exist.

This section also would amend subsection 5107(f)(2) by deleting reference to section 5106, which is proposed to be eliminated, and by deleting reference to section 5108(c)-(g) and (h), and section 5109. This deletion would clarify the extent of shared DOT/OSHA jurisdiction by eliminating dual jurisdiction over handling criteria, registration, and motor carrier safety.

Based on their respective statutory authorities, both DOT and OSHA regulate hazardous materials. However, section 4(b)(1) of the Occupational Safety and Health Act provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653(b)(1).

This provision means that where DOT exercises its authority to prescribe or enforce standards or regulations affecting occupational safety or health in a particular area, OSHA is precluded from regulating in that same area, without exception.

However, an apparent drafting error in the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law (Pub. L.) 101-615, gives OSHA shared jurisdiction with DOT for hazardous materials training, handling criteria, registration, and motor carrier safety. Specifically, HMTUSA amended section 1805 of the Hazardous Materials Transportation Act (HMTA) to read as follows:

For purposes of section 653(b)(1) of title 29, no action taken by the Secretary [of Transportation] pursuant to this section shall be deemed to be an exercise of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 49 U.S.C. App. 1805(b)(3)(1990) (emphasis added).

This is the so-called "reverse 4(b)(1)" provision. The words "pursuant to this section," found in section 1805(b)(3), referred to the entirety of section 1805, entitled "Handling," and not solely to subsection 1805(b)(3), which pertained to emergency response training. The reference to "this section" should have read "this subsection" to maintain OSHA's shared jurisdiction with DOT for hazardous materials worker training only. The 1994 codification of the law, without substantive change, highlighted and perpetuated the error. The "reverse 4(b)(1)" provision, which had been located in subsection 1805(b)(3) of the HMTA, was codified at 49 U.S.C. 5107(f)(2). The language was revised to read as follows:

An action of the Secretary of Transportation under subsections (a)-(d) of this section and sections 5106, 5108(a)(g)(1) and (h), and 5109 of this title is not an exercise, under section 4(b)(1) of the Occupational Safety and Health

Act of 1970 (28 U.S.C. 653(b)(1)), of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 49 U.S.C. 5107(f)(2).

Under subsection 5107(f)(2), an action of the Secretary in the areas of hazardous materials training, handling criteria, registration, and motor carrier safety no longer precludes OSHA from regulating in those same areas, but this 1990 amendment was in error. The amendment proposed in this section would correct the extent of shared DOT/OSHA jurisdiction by eliminating dual jurisdiction over handling criteria, registration, and motor carrier safety. They would retain shared jurisdiction over training.

DOT would also clarify, however, that its proposed amendment to subsection 5107(f)(2) is not intended to preclude OSHA from continuing to provide occupational safety or health protection to employees responding to a release of hazardous materials.

In 1986, Congress recognized the dangers facing hazmat transportation workers and enacted Section 126 of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499), which directed OSHA to issue standards to protect the health and safety of employees engaged in hazardous waste operations. Three years later, OSHA issued standards that require certain basic protections for emergency response workers, including training, respirators and other personal protective equipment, and provisions for written response plans and onsite coordination of emergency response operations. See 29 C.F.R. § 1910.120. Nonetheless, OSHA's authority to regulate occupational safety and health in hazmat transportation is limited by Section 4(b)(1) of the OSH Act, as discussed above. Other Federal agency regulations need not be as protective of employee safety and health as OSHA's requirements; even weak regulations preempt OSHA's authority. See Secretary of Labor v. Mushroom Transportation Co., 1 BNA OSHC 1390 (No. 1588, 1973).

Consequently, DOT's draft bill contains language clarifying that, notwithstanding section 4(b)(1) of the OSH Act, an action of the Secretary of Transportation under Federal hazmat law does not preclude the Secretary of Labor from prescribing or enforcing standards, regulations or requirements regarding hazardous materials employee training, or the occupational safety or health protection of employees responding to a release of hazardous materials.

SECTION 9. This section would make changes to the registration provisions in section 5108.

Section 5108(a)(1)(B) would be amended to update the terminology used to reference explosive materials.

Section 5108(a)(2)(B) would be amended to allow the Secretary to require a registration statement from persons who design and inspect a packaging or packaging component that is represented as qualified for use in transporting hazardous materials in commerce. This proposed change is consistent with the proposed changes to section 5103(b)(1) regarding persons subject to the hazardous materials regulations.

To reduce registrants' reporting requirements, section 5108(b)(1)(C) would be amended by changing the registration statement. Instead of requiring the registrant to separately identify each registration-requiring activity that it conducts in each State, the new paragraph would only require the registrant to list each State in which it transports or causes to be transported a hazardous material in a quantity and manner requiring registration.

Section 5108(c) would be amended by eliminating outdated deadlines and simply requiring persons to file registration statements in accordance with regulations issued by the Secretary.

Section 5108(g)(1) would be amended by replacing "may" with "shall" in order to establish explicitly that the Secretary must impose a registration fee sufficient to cover administrative processing costs. This proposal would implement the President's Budget Request for Fiscal Year 2002.

Finally, in section 5108(i)(2)(B), Indian tribes, in addition to States, would be excepted from the requirements to register and pay registration fees. It would be incongruous for beneficiaries of the grant program funded by the registration fees to be required to pay registration fees.

SECTION 10. This section would repeal section 5109. Section 5109 currently requires the Secretary to prescribe regulations establishing a safety permit program under which motor carriers of certain hazardous materials would be required to obtain a Federal permit. Because many States have different permit requirements for those carriers and in order to develop a coordinated Federal-State partnership in this area, the Federal Highway Administration (FHWA) conducted a study and a pilot project under section 5119 of title 49. The purpose of those activities was to determine the feasibility of developing a uniform permitting system that would enhance safety, meet the States' needs, and avoid unnecessary industry costs. These activities, however, revealed that a uniform safety permit program will not likely resolve different States' concerns that their needs be met, and raises additional concerns related to unnecessary preemption and the expense of a parallel Federal permitting system.

Under section 5109, a federal hazardous materials safety permit program would cover over 18,000 carriers in the four categories for which the permit is mandatory. DOT believes that the following actions are alternative means of enhancing safe hazardous materials transportation by motor carrier as envisioned under section 5109:

- The Federal Motor Carrier Safety Administration (FMCSA) is incorporating a risk factor into its carrier selection system that will place additional emphasis on unsafe carriers of hazardous materials. Unsafe motor carriers, including those carrying hazardous materials, will be readily identified by FMCSA through its carrier selection system and be subject to a compliance review.
- FMCSA is actively promoting the permit and registration program of the Alliance for Uniform Hazmat Transportation Procedures, which was

developed under 49 U.S.C. 5119. The implementation of this program would make a Federal hazardous materials safety permit redundant.

- FMCSA is also instituting a new entrant program that requires motor carriers who are granted new operating authority to undergo a safety review within eighteen months of commencing operations. This program, which is required by Section 210 of the Motor Carrier Safety Improvement Act of 1999, will check the safety of new motor carriers transporting hazardous materials.

Based on the above, this section proposes to repeal section 5109 as unnecessary.

SECTION 11. This section would amend subsection 5110(a) to reflect that each person who prepares a shipping paper must make the disclosures the Secretary prescribes by regulation. Subsection 5110(b) would be deleted as unnecessary because the informational elements set forth in that subsection are already required by the Secretary under the Hazardous Materials Regulations.

This section would also modify the requirement in current section 5110(e) that shippers and carriers retain shipping papers for one year. Section 5110(e) presently requires retention for one year after the hazardous material to which a shipping paper applies is no longer in transportation. Because many shippers do not know whether or when the transportation ends, they do not know how long they are required to retain the shipping papers. In addition, the one-year retention period is inadequate for law enforcement purposes; meaningful, but minimally costly (especially for electronic records), record retention should be for a three-year period. Therefore, that section is being modified to provide for shipping paper retention for three years after the shipping paper is provided to the carrier.

SECTION 12. This section would repeal section 5111, which permits a rail car built before January 1, 1971, to be used for hazardous materials transportation only if the air brake equipment support attachments of the car comply with the standard for attachments contained in 49 CFR 179.100-16 and 179.200-19. This statutory requirement is currently implemented through 49 CFR 173.31(a)(4), which provides that no railroad tank car, regardless of its construction date, may be used for the transportation in commerce of any hazardous material unless the air brake equipment support attachments of the tank car conform to the standards for attachments set forth in 49 CFR 179.100-16 and 179.200-19. Section 5111 deals only with air brake equipment support attachments and is based on older standards. Current industry standards are more stringent and DOT's regulations adopt those standards.

SECTION 13. This section would amend sections 5113 and 31144(c) of title 49 to provide that an unfit owner or operator transporting hazardous material in commerce more than 45 days after being found unfit is subject to the civil penalty in section 5123 and the criminal penalties in section 5124. It would also correct a typographical error in section 31144 by substituting "(f)" for "(c)" as the subsection designation of the last subsection in the section.

SECTION 14. Several technical amendments would be made to section 5115 to reflect that the public-sector training curriculum has already been developed and to focus the statutory provisions on maintaining, not developing, the curriculum.

Also, references to activities with agencies outside the Department of Transportation would be deleted because those activities have never been funded by Congress.

The training curriculum would be required to include appropriate emergency response training and planning programs for public-sector employees developed "with Federal financial assistance," not just those under other U.S. Government grant programs. This would expand the pool of eligible public-sector employees. In addition, the recommended basic training course would be required to include emergency response training prescribed by the National Fire Protection Association and "such other voluntary consensus standard-setting organizations as the Secretary deems appropriate." This would expand the sources for emergency response training modules.

SECTION 15. This section would clarify section 5116(e) by changing the phrase "Amounts of the State or tribe" to "Amounts received by the State or tribe" and by simplifying two related references. Subsection 5116(f) would be amended to consolidate the authority to monitor public-sector emergency response planning and training in the Secretary of Transportation because, historically, DOT has been the only agency funded to carry out this function. In subsection (g), the phrase "Government grant" programs would be broadened to "federal financial assistance" programs in order to provide for more complete coordination of funding sources.

Also, this section would amend section 5116 to provide a name for the account established under subsection 5116(i), calling it the "Emergency Preparedness Fund." Amounts collected by the Secretary under subsection 5108(g)(2)(C) would be deposited into the Emergency Preparedness Fund and could be used for emergency planning and training grants under subsection 5116(a) and (b), monitoring and technical assistance under subsection 5116(f), and administrative costs of carrying out sections 5116, 5108(g)(2), and section 5115. It also would clarify that these amounts may be used to develop, publish, and distribute the Emergency Response Guidebook, which RSPA has been doing under current law.

Current subsection 5116(k) would be deleted because the training grants report it mandates has been completed and submitted to Congress.

SECTION 16. This section would amend section 5117 by changing the term "exemption" to "special permit." The term "exemption" gives an erroneous impression that hazardous materials transportation under an exemption is being carried out without regulation, and the term "special permit" will appropriately convey that such transportation is required to be conducted in accordance with terms and conditions set by the Department of Transportation. Also, this section would be amended to clarify that, where appropriate, the Secretary may issue a special permit to any person who performs a function identified under section 5103(b)(1).

In addition, this section would amend section 5117(a)(2) by changing the maximum effective period of a special permit from two years to four years. This change would eliminate a great deal of unnecessary industry application time and Government processing time involved in the present two-year renewal process.

The increased maximum effective period of time will have a positive impact on safety. It will enable RSPA staff to avoid time-consuming processing of routine renewals and instead focus attention on more significant exemption (special permit) issues. In addition, RSPA has at least two means of dealing with related safety issues. First, the time period for each special permit can be restricted to whatever period of time less than four years is determined appropriate for safety purposes. Second, under its regulations (49 CFR 107.121), RSPA may modify a special permit (currently an exemption) if a related statute or regulation has been changed, and may modify, suspend, or terminate a special permit if the special permit no longer would provide the same level of safety as the regulations, the application was significantly or deliberately inaccurate or incomplete, or the special permit-holder has knowingly violated a regulation or the special permit in a manner demonstrating unfitness to conduct the activity authorized in the special permit.

SECTION 17. This section would repeal section 5118. Section 5118 currently requires the Secretary to maintain 30 hazardous materials safety inspectors more than the number of inspectors authorized at the end of fiscal year 1990. It also specifies how the Secretary is to allocate those inspector resources among three specific agencies – the Research and Special Programs Administration, the Federal Highway Administration, and the Federal Railroad Administration.

Last year, the Secretary delegated additional authority to the modal administrations with hazardous materials safety responsibilities in order to remove then-existing barriers to cross-modal enforcement by DOT's hazardous materials inspectors. (See 65 Federal Register 49763; Aug. 15, 2000). This flexibility allows the Secretary to target specific problem areas and focus inspector resources where needed most. Section 5118 is outdated and limits the Secretary's ability to manage inspector resources to maximize hazardous materials safety. Consequently, this section proposes to repeal section 5118.

SECTION 18. This section would amend section 5119 to reflect the fact that the working group established under subsection 5119(a) to formulate uniform registration and permitting forms and procedures has completed its task and submitted a report to Congress as required under subsection 5119(b). Thus, section 5119 would be revised to delete references to the working group and the report (except as indicated in the following paragraph).

Also, section 5119 would be reorganized for clarity, and a new subsection 5119(d) would be added to specifically authorize States, pending issuance of regulations under section 5119, to participate in the uniform forms and procedures program that has been recommended by the Alliance for Uniform Hazmat Transportation Procedures.

SECTION 19. This section would improve safety by clarifying and enhancing the inspection and enforcement authority of DOT officials and inspection personnel.

First, section 5121(a) would be amended to expressly state that the Secretary's enforcement authority includes the authority to conduct tests. This authority is implied by the existing language in current section 5121(a).

This section would amend current subsection 5121(b) to clarify that persons subject to chapter 51 must make property, as well as records, reports, and information, available to the Secretary for inspection upon the Secretary's request. The Secretary currently has the authority in 5121(a) to require the production of records and property.

This section also would amend subsection 5121(c) to clarify and expand DOT inspection authority to authorize a designated DOT officer or employee to:

- \_ access, open, and examine a package (except for the packaging immediately adjacent to the hazardous materials contents) offered for or in transportation when the officer or employee has an objectively reasonable and articulable belief that the package may contain a hazardous material;

- \_ remove from transportation a package or related packages in a shipment when the officer or employee has an objectively reasonable and articulable belief that the package or packages may pose an imminent hazard and contemporaneously documents that belief;

- \_ gather information from the shipper, packaging manufacturer or retester, or others responsible for the package to determine the nature and hazards of the contents of the package;

- \_ as necessary, order the shipper, packaging manufacturer or retester, or others responsible for the package to have the package transported to, opened, and the contents analyzed at an appropriate facility; and

- \_ authorize properly qualified personnel to assist in the package opening and examination when safety might otherwise be compromised.

The existing authority also would be amended to require the Secretary to develop procedures to assist in the safe resumption of transportation of the package and transport unit when an inspection or investigation does not result in discovery of an imminent hazard.

This improved inspection authority comports with Fourth Amendment principles on permissible searches by the Government. The landmark decision, New York v. Burger, 482 U.S. 691 (1987), and its progeny adopted the administrative search doctrine permitting a regulatory agency with a substantial governmental interest to conduct warrantless inspections of "closely regulated" or "pervasively regulated" industries, provided that the agency's inspection program is reasonable. One case, United States v. V-1 Oil Co., 63 F.3d 909 (9th Cir. 1995), cert. denied, 517 U.S. 1208, 116 S. Ct. 1824 (1996), ruled that the transportation of hazardous materials is a "closely regulated" industry in upholding the Federal Railroad Administration's hazardous materials inspection program. The hazardous materials law thus reduces the privacy expectation of those businesses engaging in activities regulated under that law. Therefore, persons offering or

transporting packages identified as hazardous materials possess limited privacy interests, authorizing DOT inspection personnel to inspect these shipments.

Likewise, this proposal respects the constitutional rights of persons offering or transporting other types of shipments suspected to contain a hazardous material. Momentary stopping and searching of these packages constitute minimally intrusive conduct necessary to carry out the purpose of the statute. See V-1 Oil Co. v. Means, 94 F.3d 1420 (10th Cir. 1996). A brief detention is valid provided that there is an objectively reasonable and articulable suspicion of a violation of the hazardous material transportation law. See United States v. McSwain, 29 F.3d 558 (10th Cir. 1994). DOT officers or inspectors would have to have a particularized and objective basis for suspecting a violation, such as a pattern of shipping or transporting undeclared or unreported hazardous materials, in order to open an unmarked package. See United States v. Cortez, 449 U.S. 411 (1981). In addition, this section would redesignate existing subsection 5121(d) as subsection 5121(f), and add a new subsection 5121(d) authorizing the Secretary of Transportation to issue emergency orders when it is determined, by inspection, investigation, testing, or research that a violation of this chapter or a regulation issued under it, or an unsafe condition or practice is causing an imminent hazard. In those situations, the Secretary would be authorized to issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or the opportunity for a hearing, but only to the extent necessary to abate the imminent hazard. The Secretary's action would have to be a written order describing the violation, condition or practice causing the imminent hazard; stating the restrictions, prohibitions, recalls, or out-of-service orders being issued or imposed; and prescribing standards and procedures for obtaining relief from the order. A person aggrieved by an action of the Secretary could petition for review of that action, with an opportunity for a hearing on the record under the Administrative Procedure Act, within 20 days after the order is issued. The term "out-of-service order" would be defined in subsection 5121(d) as a mandate that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, freight container, or package not be moved until specified conditions have been met.

A new subsection 5121(e) would require the Secretary to issue regulations, after notice and comment and an opportunity for an informal hearing, implementing the new package inspection and opening and emergency orders provisions of section 5121.

The authority provided to DOT officials and inspection personnel under these new subsections is necessary to ensure the safe transportation of hazardous materials. The National Transportation Safety Board (NTSB) found that improperly packaged and undeclared hazardous materials caused the loss of 110 lives on ValuJet flight 592 in the Florida Everglades on May 11, 1996. The shipping and transportation of undeclared or hidden hazardous materials is the most dangerous practice involved in hazardous materials transportation. Without notice of the existence and nature of hazardous materials, carriers are unable to verify that the materials are being transported in accordance with the Hazardous Materials Regulations and to take appropriate emergency response actions when a problem develops.

The ValuJet incident does not stand alone. In other cases, airplanes could have been lost and people killed as a result of hidden hazardous materials in packagings. In 1998, a Federal Express employee was loading a box when the inner contents shifted, causing 200 rounds of cartridges to explode and char the box. Another serious incident involving a package shipped via Federal Express occurred in 1996, when ramp handlers encountered strong fumes while unloading an aircraft. Six ramp crew personnel were affected by the fumes and sent to a health clinic for observation. The package contained methyl acrylate, a flammable liquid, and was not marked, labeled, or documented as a hazardous material shipment.

In 1999, eleven 38-pound batteries containing acid were offered for transportation by air. Four of the batteries leaked their entire contents into the aircraft's cargo compartment. The undeclared hazmat was discovered by ground handling employees who noticed a strong smell coming from the cargo compartment. Also in 1999, Airborne Express was offered a package containing liquid phenol -- a poison -- in unmarked packages. The package leaked at the Airborne Express facility prior to transportation, causing the facility to be evacuated.

In 1998, an undeclared shipment of non-spillable wet electric storage batteries was offered to Southwest Airlines for transportation. The shipment burst into flames while en route to the airport via truck. In 1999, an undeclared shipment of liquefied petroleum gas was offered for transportation by air to Federal Express. The shipment was transported to New York from Portland, Oregon, on a regularly scheduled cargo flight. One day after its arrival in New York, the package burst into flames at Federal Express's sort facility.

In a 1997 incident aboard a Continental Airlines plane, drums inside a wooden crate leaked, four crew members were affected by the fumes, and two crew members sought medical attention. The leaking drums were discovered after passengers had disembarked. The shipment originated in Italy and was destined for Brazil. It had been offered to UPS in Germany, flown on a cargo aircraft to Newark, offered by UPS to Continental Airlines in Newark, and flown to Miami, where the leaking drums were discovered. The inner drums had been marked and labeled, but there were no hazardous material markings on the outer crate and no hazardous material shipping papers.

In 1996, UPS employees unloading an aircraft discovered a leaking package. Eight employees inhaled fumes and were sent to a hospital for observation. The leaking commodity was benzaldehyde, a class 9 material recently regulated as a hazardous material both domestically and internationally because of its anesthetic or noxious effects on flight crews. Also in 1996, a box containing undeclared hazardous material -- calcium hypochlorite and liquid bleach -- was transported on a regularly scheduled American Airlines passenger-carrying flight from California to Montego Bay, Jamaica. Upon arrival, airport personnel observed smoke coming from the aircraft's cargo compartment. Both smoke and toxic fumes were emitted when the cargo doors were opened. The box, which was leaking, burst into flames shortly after being removed from the cargo hold.

In addition, the Federal Aviation Administration's (FAA) enforcement statistics demonstrate that undeclared hazardous materials shipments are a frequent and

increasing problem. The following data show FAA's 1993-2000 hazardous materials enforcement cases and the percentage of them that involved undeclared hazardous materials:

YEAR	HAZMAT CASES	CASES INVOLVING UNDECLARED HAZMAT	% CASES INVOLVING UNDECLARED HAZMAT
1993	895	420	47%
1994	1,029	656	64%
1995	726	516	71%
1996	888	664	75%
1997	1,231	1,008	82%
1998	1,890	1,320	70%
1999	2,268	1,597	70%
2000	2,767	1,716	62%

These statistics reflect an increasing number of cases based on initiatives undertaken by FAA's expanded hazardous material workforce and an increasing number of cases involving the discovery of undeclared hazardous materials shipments.

Furthermore, the problem of undeclared hazardous materials shipments is not limited to air transportation; it has been experienced in virtually every mode of transportation. These major incidents are merely representative of a more widespread problem. The following data from the Research and Special Program Administration's Hazardous Materials Information System (HMIS) indicate that there were hundreds of carrier-reported incidents (usually releases of hazardous materials) involving undeclared or hidden hazardous materials. Specifically, from January 1990 through December 2000, there were approximately 3,300 carrier-reported incidents involving a release of undeclared hazardous materials, resulting in 110 deaths and 197 injuries. Because many incidents are unreported, including those in intrastate highway transportation not required to be reported until recently, these statistics understate the severity of problems caused by shipments of undeclared hazardous materials. In addition, these statistics cover only those shipments in which an incident occurred -- most likely only a small percentage of the total number of undeclared or hidden hazardous materials shipments.

The authorities being set forth for DOT officials and inspection personnel would clarify and expand their existing authority to deal with this problem by opening certain packagings, inspecting their contents, identifying likely hazardous materials, taking and analyzing samples of those materials, and taking or directing effective mitigating or prohibitory actions to reduce, eliminate or prevent hazards and their serious potential consequences. For example, a hazardous materials inspector who directly observes a hazardous materials shipment that does not comply with the law currently has no authority under the law to prevent movement of that shipment until it is brought into compliance. This proposal would provide such authority.

Finally, this section would add a new subsection (g) to section 5121, authorizing the Secretary of Transportation to enter into grants, cooperative agreements, and other transactions to further the objectives of chapter 51 of title 49. Those objectives include the conduct of research, development, demonstration, risk assessment, emergency response planning, program support, and training activities. Under the new provision, the Secretary would have express authority to enter into grants, agreements and transactions with a person, agency or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other entity.

SECTION 20. This section would amend section 5122 for clarity. Specifically, subsection (a) would be amended to clarify the types of judicial relief, including civil penalties, that may be granted in an action brought by the Attorney General. Subsection (b) would be amended for clarity by changing the word "ameliorate" to "mitigate." "Ameliorate" means "to make better," which is inappropriate with regard to addressing a hazard.

SECTION 21. This section would amend the civil and criminal penalty provisions in sections 5123 and 5124. It would extend those sections to cover violations of special permits or approvals issued by the Department, to ensure that appropriate enforcement action can be taken against persons violating those special authorities. Section 5123 also would be amended to increase the maximum civil penalty from \$27,500 to \$100,000 for each violation. An increase in the maximum civil penalty would give the Department flexibility to assess appropriately high civil penalties in cases involving significant noncompliance with the hazardous materials regulations and especially those resulting in death, serious injury, or significant property damage. Finally, section 5123 would be amended to specify that a violator is liable for interest that accrues on a civil penalty and to state that, in a civil action to collect a civil penalty, the validity, amount, and appropriateness of the civil penalty is not subject to review.

In addition, the criminal penalty provision in section 5124 would be amended by adding a new subsection (b), to increase the criminal penalties for a person knowingly violating 49 U.S.C. 5104(b) or willfully violating chapter 51 or a regulation issued under that chapter, and thereby causing a release of hazardous material. Section 5104(b) concerns tampering with a package, vehicle, vessel, aircraft, or rail freight car used to transport hazardous materials. The penalty would be a fine under title 18, not more than twenty years imprisonment, or both, representing a 15-year increase in possible imprisonment from current law. The need to deter intentional releases of hazardous materials is self-evident. Hazardous materials can have disastrous consequences for the environment and to members of the public exposed to those materials.

Also, the criminal penalty provision would be amended to include definitions of the terms "knowingly" and "willfully." Furthermore, the criminal penalty provision would be amended to provide that knowledge of the existence of a regulation or requirement prescribed by the Secretary is not an element of the criminal provision. This change is essential to federal prosecutors' ability to pursue criminal cases against terrorists, parties who are likely to ignore civil penalty proceedings, or others concerning whom it may be difficult to prove

actual knowledge of the regulatory requirements. Nevertheless, prosecutors still would be required to prove that a person intentionally committed the act or omission charged and knew that a hazardous material was involved.

Finally, this section would amend section 46312 of title 49 (criminal penalty for violations in transporting hazardous materials by air) to clarify that the regulations referred to in that section include the hazardous materials regulations issued by the Secretary under chapter 51.

SECTION 22. This section would amend section 5125 by adding a new subsection (a) outlining the purposes of the Secretary's current preemption authority. Also, current subsection (a), now redesignated as subsection (b), would be amended by adding a reference to "the purposes of this chapter" in order to clarify the scope of the "obstacle" test for preemption. This section would also delete an obsolete reference in current subsection (b)(2), now redesignated as subsection (c)(2), to "November 16, 1990."

Also, this section would clarify in current subsection 5125(d), now redesignated as subsection 5125(f), that a person may apply to the Secretary for a decision on whether a fee imposed by a state, political subdivision of a state, or an Indian tribe is preempted. Also, that subsection would be amended by deleting the requirement that the Secretary publish the reason for delay in issuing a preemption determination in the Federal Register. RSPA presently maintains current information on its website about the status of preemption decisions. (See "<http://rspa-atty.dot.gov>.") RSPA frequently updates this document and it is widely accessible by the general public.

Current subsection 5125(f) would be deleted. It is unnecessary under the proposed bill because, as discussed below, Section 24 would revise section 5127 to include judicial review provisions for all final actions of the Secretary, including final actions taken under section 5125. This proposal would also redesignate current subsections (d), (e), and (g) as subsections (f), (g), and (e) so that the preemption standard for fees in current subsection (g) follows the other preemption standards set forth in subsections (b), (c), and (d), as redesignated.

Also, this section would add a new subsection 5125(h) to indicate that each preemption standard is to be applied independently to each non-federal requirement in order to determine whether it is preempted. The latter change would clarify that simply because a non-federal requirement passes one preemption standard (e.g., the "dual compliance" test) does not mean that it need not pass other section 5125 preemption standards (e.g., the "obstacle" test).

Finally, this section would add a new subsection 5125(i) to clarify that the Secretary's preemption authority does not apply to a procedure, penalty, required mental state, or other standard used by a State, political subdivision of a State, or Indian tribe to enforce hazardous material transportation requirements.

However, states may not be as free to regulate in the rail area as they are in other modes of transportation. Section 20106 of title 49, "National uniformity of regulation," provides as follows:

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

See also CSX Transportation, Inc. v. Public Utilities Commission of Ohio, 901 F.2d 497 (6th Cir. 1990), cert. denied, 111 U.S. 781 (1991), holding that an Ohio statute regulating hazardous materials transportation by rail is subject to the preemption provisions of Section 20106, rather than the more permissive preemption provisions of 49 U.S.C. 5125. Furthermore, the plain language of section 20106 allows regulation by a "State." In the interest of national uniformity, this language has been interpreted narrowly, and has been held to permit regulation only by a State, and not by political subdivisions of a State. See, e.g., Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1973).

SECTION 23. This section would amend subsection 5126(a) to clarify that a person under contract with the United States government that designs or inspects a packaging or packaging component represented as qualified for use in transporting hazardous materials in commerce must comply with chapter 51 and the hazardous materials regulations. Subsection 5126(b) would be amended to provide that chapter 51 does not apply to marine transportation of hazardous materials subject to regulation under title 33 or title 46, United States Code.

SECTION 24. This section would add a new section 5127 providing for judicial review of final actions taken by the Secretary under chapter 51. This provision establishes the appropriate judicial forum for review of final agency actions in the areas of compliance, enforcement, civil penalties, rulemaking, and preemption. The present law is silent on this issue with the exception of judicial review of final preemption determinations, which are currently subject to review by an appropriate U.S. district court. The proposed new section covers final actions taken by the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrators of the Research and Special Programs Administration, the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, and the Federal Highway Administration. The Federal Railroad Administration would be excluded because it already has a judicial review provision (49 U.S.C. 20114(c)) applicable to its hazardous materials cases.

Under the proposal, the United States Court of Appeals for the District of Columbia or for the circuit in which a person seeking review resides or has its principal place of business would review the final action. The petition for review must be filed within 60 days after issuance of the order. The section describes judicial procedures, the authority of the court, and a requirement for prior objection -- all provisions modeled on the statute providing for judicial review of Department of Transportation and Federal Aviation Administration aviation

orders (section 46110 of title 49). The national transportation issues under chapter 51 similarly require the type of uniform decision making that the Courts of Appeals can provide.

SECTION 25. This section would amend the outdated authorizations in the redesignated section 5128 (current section 5127) to cover Fiscal Years 2002-2007. Consistent with the President's budget and to carry out chapter 51 (except sections 5107(e), 5108(g), 5112, 5113, 5115, 5116 and 5119), subsection (a) would authorize (1) \$21,217,000 to be appropriated to the Secretary of Transportation for fiscal year 2002, and (2) such sums as may be necessary for fiscal years 2003 through 2007.

A new subsection (b) would authorize appropriations from the Emergency Preparedness Fund account to carry out certain activities under the law. Specifically, current subsection (b), redesignated as subsection (b)(1), would authorize use of \$250,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007, from the Emergency Preparedness Fund account, to carry out section 5116(j) (supplemental training grants).

Current subsection (c), redesignated as subsection (b)(2), would authorize use of \$200,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007, from Emergency Preparedness Fund account, to carry out section 5115 (training curriculum).

Current subsections (d)(1), (d)(2), and (d)(3), redesignated as subsections (b)(3), (b)(4), and (b)(5), would authorize, from the Emergency Preparedness Fund account, use of \$5,000,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007 to carry out section 5116(a) (planning grants), and \$7,800,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007 to carry out section 5116(b) (training grants), and \$150,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007 to carry out section 5116(f) (monitoring and technical assistance).

Also, current subsection (d)(3), redesignated as subsection (b)(5), would be amended to delete, as unnecessary, the authorization of funds to the Director of the National Institute of Environmental Health Sciences, the Secretary of Energy, the Administrator of the Environmental Protection Agency, and the Director of the Federal Emergency Management Agency.

In addition, this section would eliminate current subsection (e) and make ancillary editorial changes. Current subsection (e) concerns an authorization to the Secretary for fiscal year 1993 to carry out section 5119 and is no longer needed.

Furthermore, a new subsection (e) would be added to authorize the use of \$500,000 in fiscal year 2002 and such amounts as are necessary in fiscal years 2003 through 2007, from the Emergency Preparedness Fund account, for publication and distribution of the Emergency Response Guidebook. This change would confirm the practice of funding the Guidebook from the section 5116(i) account.

A new subsection (b)(7) would authorize the appropriation of such amounts as may be necessary, from the Emergency Preparedness Fund account, in each of

fiscal years 2002 through 2007 to carry out section 5107(e) (training of hazmat employee instructors). This new subsection would enable RSPA to provide for training needs that it finds necessary in future years. A new subsection (b)(8) would be added to authorize the appropriation of \$400,000 from the Emergency Preparedness Fund account for fiscal year 2002 to pay the administrative costs of carrying out sections 5116 (planning and training grants), 5108(g)(2) (registration), and 5115 (public-sector training curriculum). Current subsections (f) and (g) would become new subsections (c) and (d).

SEC. 26. This section would amend chapter 30 of title 39, United States Code, to prohibit hazardous materials in the mail unless specifically authorized by law or Postal Service regulation. It also would allow the United States Postal Service to collect civil penalties, and to recover clean-up costs and damages, for violations of this statutory provision and regulations issued under it. This language would provide the Postal Service with civil penalty authority analogous to the Department of Transportation's civil penalty authority under chapter 51. It would enhance the Postal Service's authority to regulate hazardous materials in the mail and would institute a civil penalty process that would serve as a deterrent to those who unlawfully place hazardous material in the mails.

This section would require the Postal Service to demonstrate that a "knowing" violation has occurred, to give written notice of the amount of the penalty, cost or damages assessed, and to provide an opportunity for a hearing before making a finding of violation. The Postal Service would have to take into account certain penalty assessment criteria -- such as prior violation history, gravity of the violation, and ability to remain in business -- in determining the amount of a civil penalty. Those accused of a violation would have the right to file an administrative appeal with the Postal Service, and the Postal Service would be able to bring a civil action to collect penalties, damages, and costs. Costs, damages, and penalties under this section would be paid into the Postal Service Fund under 39 U.S.C. 2003.

Most hazardous materials are nonmailable. The Postal Service regulations generally limit the mailing of hazardous materials to ORM-D materials (defined as "consumer commodities.") The postal mailing standards for hazardous materials closely adhere to DOT's Hazardous Materials Regulations and often include additional limitations and prohibitions.

Currently, anyone who mails or causes to be mailed a nonmailable or improperly packaged hazardous material can be subject to criminal penalties including, but not limited to, those specified in 18 U.S.C. 1716. The Postal Service initiates hazardous materials investigations and works cooperatively with other agencies to conduct inspections. However, it can be difficult to enforce the postal service regulations using this criminal penalty authority because "intent" must be demonstrated. Moreover, U.S. Attorneys' offices may lack the resources or time to devote to prosecuting these violations.

Between January 1, 1998, and November 15, 2000, Postal Service personnel reported over 500 hazardous materials incidents involving the mail. None of these incidents resulted in death or serious injury. However, in 68 of these incidents, medical attention was needed for one or more Postal Service

employees. Of these, 38 required medical follow-up due to potential exposure to biological materials (e.g., blood or urine). Also, 64 of these incidents resulted in property damage of approximately \$110,690. This amount does not include costs associated with emergency response, evacuation, hospitalization, and lost productivity.

Several incidents in the last two years demonstrate the serious potential safety hazards posed by hazardous materials in the mail. Civil penalty authority would have given the Postal Service a mechanism for better enforcing its postal regulations and for recovering clean-up costs and damages.

For example, in 1998 a priority mail parcel containing four glass quart bottles of mercury was mailed from Baltimore, Maryland to San Francisco, California. During the offloading of luggage at an intermediate location, a ground handler reported that it was "raining silver." The ground supervisor instructed the ground employee to remove the damaged parcel, and to resume the reloading operations to maintain an on-time departure. The fire department responded after the aircraft had departed and found that the damaged parcel contained mercury. The aircraft was told to return to the airport. Three pounds of mercury were found in the fuselage of the aircraft. The Postal Service paid \$87,000 to Southwest Airlines in aircraft clean-up costs. The airline did not press for reimbursement of other costs, which were estimated at \$1.4 million.

In 1998, a priority mail parcel containing two one-quart cans of Sodium Bisulfate was mailed from San Francisco, California to Seattle, Washington. The parcel leaked while at a Postal Service bulk mailing center. The fire department was called and the mailing center was evacuated for approximately 4 hours during which all mail operations ceased. An outside company was called to perform the clean-up operation. Sodium Bisulfate is mailable but is transportable by "Surface Only." The mailer did not properly package or label this parcel or disclose the contents to the postal clerk. The clean-up cost associated with this incident was \$2,500. This does not include the cost of the mail center being closed.

In November 2000, a parcel containing methyl limino ethanol and hydrogen sulfide was mailed from Woodlawn, Texas to a testing laboratory in Texas. The package was damaged and leaked during handling at the post office. The fire department responded to the incident. Twenty-two employees were hospitalized for exposure to noxious fumes. Costs and damages to the Postal Service were approximately \$11,000.

In November 2000, a motorcycle gas tank was mailed from a repair shop in Arizona to a customer outside Portland, Oregon. The gas tank contained an estimated three gallons of gasoline, which is prohibited in the mail. The package was damaged and leaked during the flight into Los Angeles International Airport. The aircraft landed safely. Fumes were noticed during off-loading of the lower cargo compartment. The fire department responded and the aircraft was taken out of service and cleaned. The parcel was turned over to the Postal Inspection Service.

Last year, a priority mail parcel containing one gallon of auto paint was mailed from San Francisco, California to Macon, Georgia. The package leaked in the

lower compartment of an aircraft. The mailer had first tried to check the package as luggage but was told that he could not take auto paint on the aircraft. He then mailed the article. This type of paint is mailable, but is transportable by "Surface Only." The customer did not properly package or label this parcel or disclose the contents to the postal clerk.

Last year, a mailer packed mercury in a vial and soup can, sealed it with duct tape, and placed it in a parcel along with books and tools. This parcel was packed inside another parcel. The mercury leaked while at a Postal Service bulk mailing center. Clean-up costs were estimated at \$1,500.

This section would provide the Postal Service with the necessary authority to effectively regulate hazardous materials in the mail through meaningful enforcement of its regulations.

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