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UNITED STATES DEPARTMENT OF TRANSPORTATION

BEFORE THE
GOVERNMENT ACTIVITIES AND TRANSPORTATION SUBCOMMITTEE
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER 3, 1991

Madam Chairperson and members of the Subcommittee, I am Alan I. Roberts, Associate Administrator for Hazardous Materials Safety in the Research and Special Programs Administration (RSPA) at the Department of Transportation (DOT). Accompanying me is Judith Kaleta, Chief Counsel. We are pleased to respond to your questions concerning our safety programs to prevent the discharge of toxic chemicals. Our response to your first letter was just about out the door when we received your second letter. Hopefully, our combined response and this testimony will address all your questions.

We appreciate and share your concern about the consequence of the two July derailments resulting in the spills of metam sodium and hydrazine solution. Actually, our concern goes to very broad questions about the best means of reducing and mitigating hazardous releases, particularly whether improvements to hazard communication and packaging can and should be made.

To fully illustrate our perspective, I must point out that our concern did not originate with these accidents, but actually stems from our work with the Coast Guard beginning more than three years ago. Following a series of meetings at the International Maritime Organization (IMO) in London, we met with

the Coast Guard and the Environmental Protection Agency (EPA) to discuss U.S. implementation of the so-called MARPOL (Marine Pollution) Convention, which lists materials as marine pollutants. At that time, RSPA officials took the position that the best means for implementing MARPOL requirements for packaged (non-bulk) pollutants would be the Hazardous Materials Transportation Act (HMTA). The other agencies agreed with RSPA that this would be the best approach, and we have been working toward that purpose ever since, in anticipation of the ratification of Annex III. The HMTA will serve as the implementing authority for the Notice of Proposed Rulemaking we are developing. We are making every effort to issue a Notice before the end of the calendar year 1991.

I would like to respond to your question regarding the use of emergency power to override the normal administrative process involved in a rulemaking on metam sodium. I must emphasize the importance of the word "system" in describing how the Department approaches the classification and designation of hazardous materials and the specification of hazard communication, packaging, handling and reporting requirements.

First, the only authority available to the Department for taking individual action to list a material as hazardous, upon determining unreasonable risk to health, safety or property, is the HMTA. The HMTA requires the Secretary to issue regulations in accordance with provisions of the Administrative Procedure Act. While there are provisions for dispensing with notice and comment in the rulemaking process, there must be justification.

The requirements for notice and comment do not apply when the agency finds that those procedures are impracticable, unnecessary or contrary to the public interest. Based on the unique facts of the metam sodium spill, we have not be able to conclude that the harm from the spill could have been prevented even if metam sodium were regulated as a hazardous material. Therefore, we have determined that notice and comment is appropriate.

Second, our regulatory system is based on classification according to known criteria and a hierarchy of hazard classes. All communication, packaging, stowage and segregation requirements are based on this hierarchy. Further, the international system with which we are increasingly harmonizing is also based on a system of groupings. To isolate a single substance, like metam sodium, from many other substances with a very similar potential to cause harm, would be a very significant deviation from this system, and we cannot support or recommend such an action on any logical, scientific or economic basis. Such an isolation could be subject to a legal challenge of arbitrary or capricious decisionmaking.

To help you evaluate the adequacy of our safety program, I draw your attention to several current and future program activities. We believe that hazardous materials transportation has an overall good safety record. Through recent major regulatory and legislative changes, RSPA is making improvements to make that record even better. I want to call your attention to actions resulting from HM-181 which bear on the quality of our regulatory system in preventing releases of hazardous materials.

1) Our mission to improve safety in transport of acutely hazardous materials is exemplified in the final rules issued under Docket in HM-181, published on December 21, 1990.
Among the many improvements made in HM-181, bulk and non-bulk packagings authorized for explosives, gases, flammables, corrosive and poisonous materials, and oxidizers and organic peroxides were methodically and extensively upgraded.
2) Hazard classification, communication, packaging, stowage and segregation requirements for high hazard liquid and gas materials have been significantly improved.
3) The scope of criteria for determining the classification of all other acutely poisonous materials has been substantially expanded, resulting in much more extensive regulation of poisonous gases, liquids and solids.
4) While RSPA has looked to EPA to take the lead in evaluating the chronic hazards of environmentally hazardous substances that present lower acute hazards during transportation, RSPA has enhanced non-bulk packaging requirements for a number of materials that present lower acute hazards, including hazardous substances and wastes that meet no other hazard class criteria.

These improvements are relevant to the subject of metam sodium. As a result of HM-181, solutions of 35% or more of metam sodium will be regulated as a poison. To address concentrations of less than 35% and many other similar substances, I would like to turn to our work on two concurrent initiatives recently initiated: 1) our action to move expeditiously to propose incorporation into our regulations of

Annex III of the MARPOL Convention, which lists over 500 substances as marine pollutants; and 2) the work of the newly configured Hazardous Materials Task Force of the National Response Team.

MARPOL Annex III

On June 10, 1991, President Bush signed Annex III of the MARPOL convention on marine pollutants. Annex III becomes mandatory for international transport by vessel after July 1, 1992. Up to 500 chemicals have been identified under Annex III as marine pollutants. Since I last appeared before you, we have progressed in our review of the substances on the list. I can now advise you that, excluding dilute solutions, the majority of these marine pollutants are already identified as hazardous materials. The provisions of Annex III will result in the added benefit of marine pollutant markings.

You have asked about the status of RSPA consideration of an expedited rulemaking in FY 1992 to implement Annex III provisions. We are addressing this as a top priority. Based on a review of numerous factors that would affect the rulemaking process, I can be optimistic about an expedited rulemaking. As I stated earlier, we are making every effort to publish a Notice by the end of this year. There is widespread support for this initiative within the Administration. Industry and public interest groups also seem to have a common view of the benefits of such a proposal. This rulemaking would be considerably less complex than HM-181, because it would not initiate far reaching changes in packaging, marking, classification, labeling and

placards that were adopted in HM-181. In the mean time, U.S. shippers may continue to use provisions for marine pollutants under Annex III on an optional basis, and we would certainly encourage them to do so.

The rulemaking process involves many stages. As with any rulemaking, we must assure that the safety standards imposed on the chemical industry to protect the public and the environment result from a complete rulemaking process, with full consideration of benefits, costs and the merits of public comments. Our letter to you addresses this in more detail. I have an additional copy for the record.

Under Annex III, there are two risk categories of pollutants identified, marine pollutants and severe marine pollutants. Metam sodium is considered in the category of lesser hazard, a marine pollutant, and only solutions of 10% or greater meet the definition of a marine pollutant.

As to our classification of metam sodium in liquid concentrations below 35%, we have not yet identified the class to which metam sodium would be assigned. The IMO places this material at concentrations of 10% to 35% in Class 9. Chemicals in Class 9 under our regulations would require shipping papers, marking, emergency response communication, incident reporting and packaging standards. This would be similar to how we treat hazardous substances listed by EPA that meet no other hazard class criteria.

We have previously provided testimony on the implementation of Section 306(a) of the Comprehensive Environmental Response,

Compensation and Liability Act of 1980 (CERCLA), and the regulation of hazardous substances as hazardous materials under the HMTA. As we have previously stated, DOT implements this requirement by listing CERCLA hazardous substances and their respective Reportable Quantities in an appendix to the Hazardous Materials Table of the Hazardous Materials Regulations (HMR).

Our primary responsibility is defining medium and high acute hazards to the public and the environment which may occur during transportation. We look to EPA to take the lead in evaluating chronic health and environmental hazards.

With regard to a second effort in this area, we are very pleased with the results of several meetings of the interagency task force of the National Response Team which is evaluating the Federal role in controlling substances that pose a significant threat to health, welfare or the environment from a single, accidental release. We plan to identify deficiencies, if any, in the recognition, classification and control of such materials by Federal agencies and identify opportunities for improvement. We are currently surveying Federal agencies as to the types of materials they control, the rationale for their programs, their criteria, the impact of their control on the regulated community, and the interrelationships between agencies.

NTSB TANK CAR RELATED ACTIVITIES

As we testified in July, RSPA and the Federal Railroad Administration (FRA) are responding to two National Transportation Safety Board (NTSB) recommendations that focus on packaging of hazardous materials in tank cars: R-91-11 which

recommends a Federal/industry working group to develop a near-term, interim solution to tank car packaging problems; and R-89-80, a longer term approach which requires an in-depth safety analysis of various hazardous material and tank car risk factors to be applied to future rulemaking activities.

As to the first recommendation, we are reviewing the requirements for establishing and participating in such a working group because we have already opened a rulemaking proceeding, Docket HM-175A, which addresses safety improvements for new and existing tank cars.

On the second recommendation, the joint RSPA/FRA research project to evaluate present safety standards for tank cars is proceeding on schedule. A risk analysis is being performed to identify the unacceptable levels of risk and degrees of risk from the release of hazardous materials. Materials poisonous by inhalation are being addressed first, and the next, in order of priority, are flammable gases, flammable liquids, poison liquids, and corrosives. Each product and tank car combination is being reviewed to assure an acceptable level of safety.

Docket 175A- On-going Rulemaking Activity for Existing and New Tank Cars

As to the development of regulations that would improve the level of safety of tank car tanks, this effort, originally part of HM-181, was made a separate rulemaking activity last year under Docket HM-175A due to the magnitude of the safety requirements proposed. On May 15, 1990, RSPA published an advance notice of proposed rulemaking (ANPRM) addressing the safety of existing and new tank cars by reducing the risk of

violent rupture and release of hazardous materials when tank cars are involved in accidents. HM-175A addresses such tank car safety issues as the need for protective head shields, roll-over protection, elimination of bottom outlets, and prohibiting the carriage of materials poisonous by inhalation in "non-pressure" tank cars.

Concluding Remarks

We all share a common vision of the need to prevent severe consequences to people and the environment as a result of accidents involving the inadvertent release of hazardous materials. Clearly, improving identification and communication of a material's hazard and appropriate packaging are critical to reducing the probability and consequences of accidents involving materials acutely hazardous to the public and the environment. RSPA believes that, in partnership with the FRA, EPA and other Federal agencies, and with constructive input from the public and industry, we will take expeditious and appropriate actions to see that these improvements in hazard communication and packaging are achieved.

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