



COUNCIL ON SAFE TRANSPORTATION  
OF HAZARDOUS ARTICLES, INC.

February 10, 2012

Associate Administrator for Hazardous Materials Safety  
Pipeline and Hazardous Materials Safety  
U.S. Department of Transportation  
Washington, D.C. 20590

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Novartis Pharmaceuticals  
Robert.Heinrich@novartis.com

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Diversey, Inc.  
donald.bossow@diversey.com

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john.d'aloia@mkcorp.com

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JEANNEZ@alc-net.com

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Les.Adolph@aa.com

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Broderick.sp@pg.com

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devans2@purolator.com

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Sun Chemical Corporation  
amy.fischesser@na.sunchem.com

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Abbott Laboratories  
alicia.gaines@abbott.com

**James Jahnke**  
Merck and Co  
james.jahnke@merck.com

**Dave Madsen**  
Autoliv, Inc.  
Dave.Madsen@autoliv.com

**Christopher Palabrica, CPM, CHMM**  
Mays Chemical Co.  
chrisp@mayschem.com

**Dan Wieten**  
Toyota Motor Sales, USA, Inc.  
dan\_wieten@toyota.com

**General Counsel**  
Richard Schweitzer, PLLC

**Re: Petition to Modify DOT Special Permit 9275**

Dear Dr. El-Sibaie:

The Council on Safe Transportation of Hazardous Articles, Inc. (“COSTHA”),<sup>1</sup> on behalf of the holders of DOT Special Permit 9275 listed below, hereby petitions the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to modify DOT-SP 9275 pursuant to 49 CFR § 107.121.

Specifically, COSTHA requests that PHMSA restore DOT-SP 9275 to its pre-August 18, 2011 terms and conditions, as those terms and conditions provide a level of safety that is at least equivalent with the level of safety provided by compliance with the Hazardous Materials Regulations, is consistent with the public interest, and will adequately protect against the risks to life and property inherent in the transportation of the products subject to DOT-SP 9275. 49 CFR § 107.113(f)(2).

**Background**

DOT-SP 9275 was initially granted in 1986 to authorize the transportation in commerce of certain limited quantities of liquids and solids containing ethyl alcohol, primarily consumer products such as cosmetics, beverages, foods, medicines, medical screening solutions, and concentrates used therein. The transportation was exempt from the HMR except as specified in the special permit (including

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<sup>1</sup> COSTHA is a not-for-profit organization representing manufacturers, shippers, distributors, carriers, freight forwarders, trainers, packaging manufacturers and others associated with the hazardous materials transportation industry. In addition to promoting regulatory compliance and safety in hazardous materials transportation, COSTHA assists its members and the public in evaluating the practicality and efficacy of laws, rules and regulations for the safe transportation and distribution of hazardous materials.

packaging requirements), and the SP was reissued by the agency several times over the ensuing 25 years.

The SP was granted to place shipments of products containing of limited quantities of ethyl alcohol on the same regulatory footing as potable distilled spirits, which are exempt from the HMR under 49 CFR § 173.150(d). In fact, potable distilled spirits in packages up to 5 liters (1.3 gallons) are not subject to any of the HMR for ground transportation. *Id.* For passenger aircraft, passengers may carry up to 5 liters of potable alcoholic beverages in checked or carry-on baggage without complying with the HMR.

The quantity limitations in DOT-SP 9275 are much more restrictive than the requirements for potable distilled spirits. For example, under DOT-SP 9275 liquids with more than 70% ethanol are restricted to 8 fluid ounces, and the outer packaging for all products is limited to 192 fluid ounces. Nor does DOT-SP 9275 allow transportation in personal baggage aboard aircraft. In addition, DOT-SP 9275 requires hazmat employee training and standard incident reporting.

Since 1986, over 350 companies have become parties to DOT-SP 9275. Literally millions of packages have been shipped by those companies in the ensuing years without any major incidents.<sup>2</sup> Thousands of these products move every day without incident, and the limited amount of ethyl alcohol and the packaging requirements in DOT-SP 9275 ensure that any risk in transport is minimal and well within the bounds of a “reasonable risk.”<sup>3</sup>

Because of this longstanding history of safe transportation under DOT-SP 9275, COSTHA petitioned PHMSA on June 14, 2011 for a rulemaking to incorporate the terms of the special permit into the HMR. As part of the petition COSTHA appended the results of tests conducted by TEN-E Packaging Services, Inc. on the types of packages used in DOT-SP 9275. COSTHA hereby incorporates by reference that Appendix 1 to the petition for rulemaking as part of this petition to modify DOT-SP 9275. PHMSA has not yet acted on the petition for incorporation.

### **New Marking Requirements**

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<sup>2</sup>In meetings with COSTHA representatives, PHMSA officials have referred to 14 incidents, presumably involving leaking packages, in transportation under DOT-SP 9275 out of the millions of shipments over 25 years. But the agency has not provided any data indicating that these incidents involved any fatalities, serious physical injury or even significant property damage. Thus, the agency must conclude that the safety history of shipments under DOT-SP 9275 is exemplary.

<sup>3</sup> 49 U.S.C. § 5103(a) directs the Secretary of Transportation to designate material as hazardous, and therefore subject to regulation, “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.” (Emphasis supplied.)

On June 15, 2011 PHMSA issued a show cause letter to all active grantees of DOT-SP 9275 proposing to modify the special permit by adding a paragraph 8.d to require that the outer packagings be marked with the following hazard communication information:

- Company name
- Contains ethyl alcohol, exempted quantity

PHMSA also proposed that the markings meet durability, legibility and visibility requirements.

Despite objections from many of the grantees, PHMSA then reissued DOT-SP 9275 on August 18, 2011 (Thirteenth Revision) to include these new marking requirements in paragraph 7.d. The new requirements are not effective until September 1, 2012, however.

These new marking requirements are unnecessary to promote safety, will impede commerce, cause considerable confusion among shippers, carriers and transportation intermediaries, will add significant costs to distribution for training and compliance, and are not consistent with European regulations. Moreover, contrary to assertions from PHMSA in the letter accompanying the Thirteenth Revision, U.S. airline safety personnel uniformly oppose these new requirements and do not believe that the additional hazard communication information will provide an additional safety margin.

A large cosmetic company reports that in order to accommodate the new marking requirement they would have to add a second wave in their pick-and-pack operation significantly increasing costs and shipments. Their average distribution center ships over 5 million cosmetics per year, 52% of which currently contain some type of regulated material. In the members many years of experience they have not had a damage loss or claim for one of these shipments.

A second large cosmetic company indicates that implementation of the new marking requirement would require additional time for pick and pack operations, programming changes, a second inventory of boxes. In his 35 years of experience in the cosmetics industry he has never experienced a claim or been aware of a damaged shipment.

## **Safety History**

In the 25 years since DOT-SP 9275 was first granted by PHMSA's predecessor agency, millions of packages containing ethyl alcohol have been shipped without any significant incident. This is real world, actual evidence of the safety of transportation pursuant to DOT-SP 9275 without any additional marking requirements.

This record alone meets the standard of an equivalent level of safety in 49 CFR § 107.113(f)(2)(i). There is nothing in the marking requirements that will provide an additional margin of safety beyond what has already been achieved in practice. Moreover, this safety record is consistent with the public interest as the public is already adequately protected against any risks to life or property inherent in hazardous materials transportation. 49 CFR § 107.113(f)(2)(ii).

In its August 18, 2011 letter accompanying the Thirteenth Revision to DOT-SP 9275, PHMSA noted that the “few reported incidents” may not “accurately represent the number of actual incidents” because of the lack of hazard communication markings. But if there was an incident involving a leaking package, and the package was found to contain a hazardous material, the carrier would be required to report the incident regardless of hazard communication marking on the package.

In the past 8 years, one pharmaceutical member and its associated business units have shipped over 15 million packages under this special permit, with no known incidents. Prior to 2006 they owned a sizable consumer products line and often shipped products in 1.5 liter (or larger) sizes under S-9275. (An average of 2 to 3 million packages a year of this size were shipped with no known incidents.)

COSTHA asserts that the lack of reported incidents is actually representative of the very few incidents that have occurred with transportation under DOT-SP 9275. Moreover, if there were any incidents involving fatalities, injuries or significant property damage, there is a very high likelihood that PHMSA would have knowledge of these through news accounts or other sources in addition to incident reports. In any event, PHMSA may not base its decision to add a regulatory requirement on a hypothetical problem or a supposition that additional incidents might have occurred when all real world evidence over a quarter of a century is to the contrary.

### **Air Carriers Response**

PHMSA’s August 18, 2011 letter accompanying the Thirteenth Revision to DOT-SP 9275 stated that the SP currently authorizes undeclared shipments of hazardous materials as defined in 49 CFR § 171.8. The SP also authorizes transportation by cargo and passenger aircraft, and that for air carriers that have chosen not to transport hazardous materials, these “Will Not Carry” air carriers could not identify shipments made under DOT-SP 9275 as hazardous materials except for the new markings.

Yet COSTHA has interviewed representatives of the major U.S. passenger and cargo air carriers and they uniformly oppose addition of the marking requirements as contained in the Thirteenth Revision. The listing below of grantees supporting this petition illustrates that air carriers do not believe the marking requirement is warranted for safety considerations. They have further stated that inclusion of the new and unprecedented marking requirement will cause confusion among shipper, air carrier and freight forwarder personnel and likely will interfere with the smooth distribution of these products.

When air carrier or forwarder personnel see a package with this unfamiliar marking the most probable response is to set the package aside for further analysis. This impedes commerce, slows up the sorting and loading process while a determination is made as to how to handle the package. Further, as the new marking requirements are inconsistent with European

requirements<sup>4</sup> for shipments of limited quantities of products containing ethyl alcohol, European trade partners will not know how to respond when receiving a package with this new marking.

Even “Will Not Carry” airlines such as \_\_\_\_\_ oppose the new marking requirements as unnecessary and prone to cause confusion. These carriers have transported the products containing limited quantities of ethyl alcohol for years without complaint or incident. Now, however, these carriers will incur the additional costs of training personnel to recognize and interpret this marking in order to address a problem that does not exist in the real world of commerce.

### **Equivalent Level of Safety**

The testing services by TEN-E Packaging Services, Inc. on the types of packages used in DOT-SP 9275, dated June 1, 2011, has a stated objective to conduct DOT/United Nations 4G performance tests and ISTA 1A sequential packaging testing on a corrugated shipper containing a variety of inner packagings. The results indicated that performance tests “help to establish that safety is not compromised during conditions normally incident to transportation.” Performance Evaluation Report 11-2294, page 3.

Further, the report stated that the tested units “are representative of packaged products commonly employed by industry,” and that the testing and results obtained “demonstrate[] an equivalent level of safety as provided by the Special Permit (DOT-SP 9275) currently in use.” *Id.*

Thus, COSTHA has provided testing results on packages used in actual commerce under this special permit and the results are consistent with a level of safety equivalent to compliance with the HMR. The fact that there have been so few (and no significant) incidents under this SP over 25 years is related to the fact that the packages are strong and appropriate for the type of products they contain. These test results support continuation of the SP without any additional marking requirements.

### **Costs of Compliance**

Requiring a new marking on the packages transported under DOT-SP 9275 will add cost and delays to distribution. All shippers and carriers handling these packages will need to conduct additional training of hazmat employees on how to recognize, interpret and handle these packages. In addition, grantees will face delays in distribution due to these requirements.

For example, many distribution centers run “pick and pack” operations where employees go through a large warehouse filling orders for delivery to their own stores or customer facilities. The employees must pull product from shelves and place them into shipping package for

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<sup>4</sup> European regulations, ADR Special Provision 601, exempt from regulation finished pharmaceutical products (medicines) ready for use, which are substances manufactured and packaged for retail sale or distribution for personal or household consumption. In addition, ethyl alcohol and extracts are generally exempt from regulation up to a 1 liter or 5 liter quantity.

delivery, and the merchandise required in the store orders changes on a daily basis. Under the Thirteenth Revision to DOT-SP 9275, each time an employee must pick a product containing ethyl alcohol, the employee will need to place that product in a separate package with the required marking.

The distribution process is slowed down while the employee makes the determination that the SP applies to the product and that a specially marked package is required, and the employee then physically obtains the marked package and places the product in the separate package. Although this might not sound like a significant imposition of time or effort, repeated thousands of times each day at thousands of distribution centers nationwide, the aggregate cost is substantial.

### **Conclusion**

In conclusion, for the reasons stated above COSTHA requests that PHMSA modify DOT-SP 9275 to eliminate paragraph 7.d as unnecessary to provide an equivalent level of safety. Given the September 1, 2012 implementation date, COSTHA also requests that PHMSA provide expedited treatment of this petition so that grantees need not incur the costs of compliance with the marking requirements prior to that date.<sup>5</sup>

Respectfully submitted,

Richard P. Schweitzer  
General Counsel  
Council on Safe Transportation of Hazardous Articles, Inc.

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<sup>5</sup> PHMSA has implicitly recognized there is no urgency in implementing these marking requirements by providing a one-year phase-in of the new requirements. Additionally, packages have been shipped without the markings for over 25 years, so another delay to properly consider and process this petition for modification will not jeopardize safety.

**List of Supporting Grantees:**

AstraZeneca Pharmaceutical  
P&G Prestige  
Pfizer  
Pharmacia & Upjohn  
Richemont North America, Inc.  
Tiffany and Company  
Wyeth  
Warner Lambert

**Additional Supporting Organizations:**

Sun Chemical  
DG Advisor LLC

Air Carrier Members of COSTHA (21 carriers)