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## **Title 49 —Transportation**

### **Subtitle B —Other Regulations Relating to Transportation**

#### **Chapter I —Pipeline and Hazardous Materials Safety Administration, Department of Transportation**

#### **Subchapter A —Hazardous Materials and Oil Transportation**

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## **PART 109—DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIAL PROCEDURAL REGULATIONS**

**Authority:** 49 U.S.C. 5101-5128, 44701; Pub. L. 101-410 Sec. 4 (28 U.S.C. 2461 note); Pub. L. 104-121 Secs. 212-213; Pub. L. 104-134 Sec. 31001; 49 CFR 1.81, 1.97.

**Source:** 76 FR 11592, Mar. 2, 2011, unless otherwise noted.

## Subpart A—Definitions

### § 109.1 Definitions.

For purposes of this part, all terms defined in 49 U.S.C. 5102 are used in their statutory meaning. Other terms used in this part are defined as follows:

**Administrator** means the head of any operating administration within the Department of Transportation, and includes the Administrators of the Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and Pipeline and Hazardous Materials Safety Administration, to whom the Secretary has delegated authority in part 1 of this title, and any person within an operating administration to whom an Administrator has delegated authority to carry out this part.

**Agent of the Secretary or agent** means a Federal officer, employee, or agent authorized by the Secretary to conduct inspections or investigations under the Federal hazardous material transportation law.

**Chief Safety Officer or CSO** means the Assistant Administrator of the Pipeline and Hazardous Materials Safety Administration.

**Emergency order** means an emergency restriction, prohibition, recall, or out-of-service order set forth in writing.

**Freight container** means a package configured as a reusable container that has a volume of 64 cubic feet or more, designed and constructed to permit being lifted with its contents intact and intended primarily for containment of smaller packages (in unit form) during transportation.

**Immediately adjacent** means a packaging that is in direct contact with the hazardous material or is otherwise the primary means of containment of the hazardous material.

**Imminent hazard** means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.

**In writing** means unless otherwise specified, the written expression of any actions related to this part, rendered in paper or digital format, and delivered in person; via facsimile, commercial delivery, U.S. Mail; or electronically.

**Objectively reasonable and articulable belief** means a belief based on particularized and identifiable facts that provide an objective basis to believe or suspect that a package may contain a hazardous material.

**Out-of-service order** means a written requirement issued by the Secretary, or a designee, 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 or cease operations until specified conditions have been met.

**Packaging** means a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter. For radioactive materials packaging, see § 173.403 of subchapter C of this chapter.

**Perishable hazardous material** means a hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage, or hazardous materials consigned for medical use, in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meets a critical medical need.

**Properly qualified personnel** means a company, partnership, proprietorship, or individual who is technically qualified to perform designated tasks necessary to assist an agent in inspecting, examining, opening, removing, testing, or transporting packages.

**Related packages** means any packages in a shipment, series or group of packages that can be traced to a common nexus of facts, including, but not limited to: The same offeror or packaging manufacturer; the same hazard communications information (marking, labeling, shipping documentation); or other reasonable and articulable facts that may lead an agent to believe such packages are related to a package that may pose an imminent hazard. Packages that are located within the same trailer, freight container, unit load device, etc. as a package removed subject to this enhanced authority without additional facts to substantiate its nexus to an imminent hazard are not "related packages" for purposes of removal. The related packages must also demonstrate that they may pose an imminent hazard. They must exhibit a commonality or nexus of origin, which may include, but are not limited to, a common offeror, package manufacturer, marking, labeling, shipping documentation, hazard communications, etc.

**Remove** means to keep a package from entering the stream of transportation in commerce; to take a package out of the stream of transportation in commerce by physically detaining a package that was offered for transportation in commerce; or stopping a package from continuing in transportation in commerce.

**Safe and expeditious** means prudent measures or procedures designed to minimize delay.

## Subpart B—Inspections and Investigations

### § 109.3 Inspections and Investigations.

- (a) **General authority.** An Administrator may initiate an inspection or investigation to determine compliance with Federal hazardous material transportation law, or a regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto.
- (b) **Inspections and investigations.** Inspections and investigations are conducted by designated agents of the Secretary who will, upon request, present their credentials for examination. Such an agent is authorized to:
  - (1) Administer oaths and receive affirmations in any matter under investigation.
  - (2) Gather information by any reasonable means, including, but not limited to, gaining access to records and property (including packages), interviewing, photocopying, photographing, and video- and audio-recording in a reasonable manner.
  - (3) Serve subpoenas for the production of documents or other tangible evidence if, on the basis of information available to the agent, the evidence is relevant to a determination of compliance with the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto. Service of a subpoena shall be in accordance with the requirements of the agent's operating administration as set forth in 14 CFR 13.3 (Federal Aviation Administration); 49 CFR 209.7 (Federal Railroad Administration), 49 U.S.C. 502(d), 5121(a) (Federal Motor Carrier Safety Administration), and 49 CFR 105.45-105.55 (Pipeline and Hazardous Materials Safety Administration).

### § 109.5 Opening of packages.

- (a) *In general.* Except as provided in paragraph (b):
- (1) Stop movement of the package in transportation and gather information from any person to learn the nature and contents of the package;
  - (2) Open any overpack, outer packaging, or other component of the package that is not immediately adjacent to the hazardous materials contained in the package and examine the inner packaging(s) or packaging components.
- (b) *Perishable hazardous material.* To ensure the expeditious transportation of a package containing a perishable hazardous material, an agent will utilize appropriate alternatives before exercising an authority under paragraph (a) of this section.

[76 FR 11592, Mar. 2, 2011, as amended at 78 FR 60763, Oct. 2, 2013]

### § 109.7 Removal from transportation.

An agent may remove a package and related packages in a shipment or a freight container from transportation in commerce for up to forty-eight (48) hours when the agent has an objectively reasonable and articulable belief that the packages may pose an imminent hazard. The agent must record this belief in writing as soon as practicable and provide written notification stating the reason for removal to the person in possession.

### § 109.9 Transportation for examination and analysis.

- (a) An agent may direct a package to be transported to a facility for examination and analysis when the agent determines that:
- (1) Further examination of the package is necessary to evaluate whether the package conforms to subchapter C of this chapter;
  - (2) Conflicting information concerning the package exists; or
  - (3) Additional investigation is not possible on the immediate premises.
- (b) In the event of a determination in accordance with paragraph (a) of this section, an agent may:
- (1) Direct the offeror of the package, or other person responsible for the package, to have the package transported to a facility where the material may be examined and analyzed;
  - (2) Direct the packaging manufacturer or tester of the packaging to have the package transported to a facility where the packaging may be tested in accordance with the HMR; or
  - (3) Direct the carrier to transport the package to a facility capable of conducting such examination and analysis.
- (c) The 48-hour removal period provided in § 109.7 may be extended in writing by the Administrator pending the conclusion of examination and analysis under this section.

### § 109.11 Assistance of properly qualified personnel.

An agent may authorize properly qualified personnel to assist in the activities conducted under this part if the agent is not properly qualified to perform a function that is essential to the agent's exercise of authority under this part or when safety might otherwise be compromised by the agent's performance of such a function.

### § 109.13 Closing packages and safe resumption of transportation.

- (a) **No imminent hazard found.** If, after an agent exercises an authority under § 109.5, the agent finds that no imminent hazard exists, and the package otherwise conforms to applicable requirements in subchapter C of this chapter, the agent will:
- (1) Assist in preparing the package for safe and prompt transportation, when practicable, by reclosing the package in accordance with the packaging manufacturer's closure instructions or other appropriate closure method;
  - (2) Mark and certify the reclosed package to indicate that it was opened and reclosed in accordance with this part;
  - (3) Return the package to the person from whom the agent obtained it, as soon as practicable; and
  - (4) For a package containing a perishable hazardous material, assist in resuming the safe and expeditious transportation of the package as soon as practicable after determining that the package presents no imminent hazard.
- (b) **Imminent hazard found.** If an imminent hazard is found to exist after an agent exercises an authority under § 109.5, the Administrator or his/her designee may issue an out-of-service order prohibiting the movement of the package until the package has been brought into compliance with subchapter C of this chapter. Upon receipt of the out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance.
- (c) **Package does not contain hazardous material.** If, after an agent exercises an authority under § 109.5, the agent finds that a package does not contain a hazardous material, the agent shall securely close the package, mark and certify the reclosed package to indicate that it was opened and reclosed, and return the package to transportation.
- (d) **Non-compliant package.** If, after an agent exercises an authority under § 109.5, the agent finds that a package contains hazardous material and does not conform to requirements in subchapter C of this chapter, but does not present an imminent hazard, the agent will return the package to the person in possession of the package at the time the non-compliance is discovered for appropriate corrective action. A non-compliant package may not continue in transportation until all identified non-compliance issues are resolved.

### § 109.15 Termination.

When the facts disclosed by an investigation indicate that further action is not warranted under this part at the time, the Administrator will close the investigation without prejudice to further investigation and notify the person being investigated of the decision. Nothing herein precludes civil enforcement action at a later time related to the findings of the investigation.

### § 109.16 Notification of enforcement measures.

In addition to complying with the notification requirements in § 109.7 of this part, an agent, after exercising an authority under this subpart, will immediately take reasonable measures to notify the offeror and the person in possession of the package, providing the reason for the action being taken, the results of any preliminary investigation including apparent violations of subchapter C of this chapter, and any further action that may be warranted.

[78 FR 60763, Oct. 2, 2013]

## Subpart C—Emergency Orders

### § 109.17 Emergency Orders.

- (a) **Determination of imminent hazard.** When an Administrator determines that a violation of a provision of the Federal hazardous material transportation law, or a regulation or order prescribed under that law, or an unsafe condition or practice, constitutes or is causing an imminent hazard, as defined in § 109.1, the Administrator may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without advance notice or an opportunity for a hearing. The basis for any action taken under this section shall be set forth in writing which must—
- (1) Describe the violation, condition, or practice that constitutes or is causing the imminent hazard;
  - (2) Set forth the terms and conditions of the emergency order;
  - (3) Be limited to the extent necessary to abate the imminent hazard; and,
  - (4) Advise the recipient that, within 20 calendar days of the date the order is issued, recipient may request review; and that any request for a formal hearing in accordance with 5 U.S.C. 554 must set forth the material facts in dispute giving rise to the request for a hearing; and
  - (5) Set forth the filing and service requirements contained in § 109.19(f), including the address of DOT Docket Operations and of all persons to be served with the petition for review.
- (b) **Out-of-service order.** An out-of-service order is issued to prohibit the movement of an aircraft, vessel, motor vehicle, train, railcar, locomotive, transport unit, transport vehicle, or other vehicle, or a freight container, portable tank, or other package until specified conditions of the out-of-service order have been met.
- (1) Upon receipt of an out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance with the out-of-service order.
  - (2) A package subject to an out-of-service order may be moved from the place where it was found to present an imminent hazard to the nearest location where the package can be brought into compliance, provided that the agent who issued the out-of-service order is notified before the move.
  - (3) The recipient of the out-of-service order must notify the operating administration that issued the order when the package is brought into compliance.
  - (4) Upon receipt of an out-of-service order, a recipient may appeal the decision of the agent issuing the order to PHMSA's Chief Safety Officer. A petition for review of an out-of-service order must meet the requirements of § 109.19.
- (c) **Recalls.** PHMSA's Associate Administrator, Office of Hazardous Materials Safety, may issue an emergency order mandating the immediate recall of any packaging, packaging component, or container certified, represented, marked, or sold as qualified for use in the transportation of hazardous materials in commerce when the continued use of such item would constitute an imminent hazard. All petitions for review of such an emergency order will be governed by the procedures set forth at § 109.19.

**§ 109.19 Petitions for review of emergency orders.**

- (a) ***Petitions for review.*** A petition for review must—
- (1) Be in writing;
  - (2) State with particularity each part of the emergency order that is sought to be amended or rescinded and include all information, evidence and arguments in support thereof;
  - (3) State whether a formal hearing in accordance with 5 U.S.C. 554 is requested, and, if so, the material facts in dispute giving rise to the request for a hearing; and,
  - (4) Be filed and served in accordance with § 109.19(f).
- (b) ***Response to the petition for review.*** An attorney designated by the Office of Chief Counsel of the operating administration issuing the emergency order may file and serve, in accordance with § 109.19(f), a response, including appropriate pleadings, within five calendar days of receipt of the petition by the Chief Counsel of the operating administration issuing the emergency order.
- (c) ***Chief Safety Officer Responsibilities*** —
- (1) ***Hearing requested.*** Upon receipt of a petition for review of an emergency order that includes a formal hearing request and states material facts in dispute, the Chief Safety Officer shall immediately assign the petition to the Office of Hearings. Unless the Chief Safety Officer issues an order stating that the petition fails to set forth material facts in dispute and will be decided under paragraph (c)(2) of this section, a petition for review including a formal hearing request will be deemed assigned to the Office of Hearings three calendar days after the Chief Safety Officer receives it.
  - (2) ***No hearing requested.*** For a petition for review of an emergency order that does not include a formal hearing request or fails to state material facts in dispute, the Chief Safety Officer shall issue an administrative decision on the merits within 30 days of receipt of the petition. The Chief Safety Officer's decision constitutes final agency action.
- (d) ***Hearings.*** Formal hearings shall be conducted by an Administrative Law Judge assigned by the Chief Administrative Law Judge of the Office of Hearings. The Administrative Law Judge may:
- (1) Administer oaths and affirmations;
  - (2) Issue subpoenas as provided by the appropriate agency regulations (49 CFR 209.7, 49 CFR 105.45, 14 CFR 13.3, and 49 U.S.C. 502 and 31133);
  - (3) Adopt the relevant Federal Rules of Civil Procedure for the United States District Courts for the procedures governing the hearings when appropriate;
  - (4) Adopt the relevant Federal Rules of Evidence for United States Courts and Magistrates for the submission of evidence when appropriate;
  - (5) Take or cause depositions to be taken;
  - (6) Examine witnesses at the hearing;
  - (7) Rule on offers of proof and receive relevant evidence;
  - (8) Convene, recess, adjourn or otherwise regulate the course of the hearing;
  - (9) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and,

(10) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of an issue raised therein.

(e) **Parties.** The petitioner may appear and be heard in person or by an authorized representative. The operating administration issuing the emergency order shall be represented by an attorney designated by its respective Office of Chief Counsel.

(f) **Filing and service.**

(1) Each petition, pleading, motion, notice, order, or other document submitted in connection with an order issued under this subpart must be filed (commercially delivered or submitted electronically) with: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. All documents filed will be published on the Department's docket management Web site, <http://www.regulations.gov>. The emergency order shall state the above filing requirements and the address of DOT Docket Operations.

(2) **Service.** Each document filed in accordance with paragraph (f)(1) of this section must be concurrently served upon the following persons:

(i) Chief Safety Officer (Attn: Office of Chief Counsel, PHC), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590 (facsimile: 202-366-7041) (electronic mail: [PHMSAChiefCounsel@dot.gov](mailto:PHMSAChiefCounsel@dot.gov));

(ii) The Chief Counsel of the operating administration issuing the emergency order;

(iii) If the petition for review requests a formal hearing, the Chief Administrative Law Judge, U.S. Department of Transportation, Office of Hearings, M-20, Room E12-320, 1200 New Jersey Avenue, SE., Washington, DC 20590 (facsimile: 202-366-7536).

(iv) Service shall be made personally, by commercial delivery service, or by electronic means if consented to in writing by the party to be served, except as otherwise provided herein. The emergency order shall state all relevant service requirements and list the persons to be served and may be updated as necessary. The emergency order shall also be published in the FEDERAL REGISTER as soon as practicable after its issuance.

(3) **Certificate of service.** Each order, pleading, motion, notice, or other document shall be accompanied by a certificate of service specifying the manner in which and the date on which service was made.

(4) The emergency order shall be served by "hand delivery," unless such delivery is not practicable, or by electronic means if consented to in writing by the party to be served.

(5) Service upon a person's duly authorized representative, agent for service, or an organization's president constitutes service upon that person.

(g) **Report and recommendation.** The Administrative Law Judge shall issue a report and recommendation at the close of the record. The report and recommendation shall:

(1) Contain findings of fact and conclusions of law and the grounds for the decision based on the material issues of fact or law presented on the record;

(2) Be served on the parties to the proceeding; and

(3) Be issued no later than 25 days after receipt of the petition for review by the Chief Safety Officer.



- (h) **Expiration of order.** If the Chief Safety Officer, or the Administrative Law Judge, where appropriate, has not disposed of the petition for review within 30 days of receipt, the emergency order shall cease to be effective unless the Administrator issuing the emergency order determines, in writing, that the imminent hazard providing a basis for the emergency order continues to exist. The requirements of such an extension shall remain in full force and effect pending decision on a petition for review unless stayed or modified by the Administrator.
- (i) **Reconsideration.**
- (1) A party aggrieved by the Administrative Law Judge's report and recommendation may file a petition for reconsideration with the Chief Safety Officer within one calendar day of service of the report and recommendation. The opposing party may file a response to the petition within one calendar day of service of a petition for reconsideration.
  - (2) The Chief Safety Officer shall issue a final agency decision within three calendar days of service of the final pleading, but no later than 30 days after receipt of the original petition for review.
  - (3) The Chief Safety Officer's decision on the merits of a petition for reconsideration constitutes final agency action.
- (j) **Appellate review.** A person aggrieved by the final agency action may petition for review of the final decision in the appropriate Court of Appeals for the United States as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency.
- (k) **Time.** In computing any period of time prescribed by this part or by an order issued by the Administrative Law Judge, the day of filing of the petition for review or of any other act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

## § 109.21 Remedies generally.

An Administrator may request the Attorney General to bring an action in the appropriate United States district court seeking temporary or permanent injunctive relief, punitive damages, assessment of civil penalties as provided by 49 U.S.C. 5122(a), and any other appropriate relief to enforce the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law.

## Subpart D—Equipment

**Source:** 78 FR 60763, Oct. 2, 2013, unless otherwise noted.

## § 109.25 Equipment.

When an agent exercises an authority under subpart B of this part, the agent shall use the appropriate safety, handling, and other equipment authorized by his or her operating administration's equipment requirements for hazardous material inspectors and investigators.

## Subpart E—Prohibition on Hazardous Materials Operations After Nonpayment of Penalties

**Source:** 79 FR 46199, Aug. 7, 2014, unless otherwise noted.

**§ 109.101 Prohibition of hazardous materials operations.**

- (a) **Definition of hazardous materials operations.** For the purposes of this subpart, hazardous materials operations means any activity regulated under the Federal hazardous material transportation law, this subchapter or subchapter C of this chapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter C of this chapter.
- (b) **Failure to pay civil penalty in full.** A respondent that fails to pay a hazardous material civil penalty in full within 90 days after the date specified for payment by an order of the Pipeline and Hazardous Materials Safety Administration, Federal Aviation Administration, Federal Motor Carrier Safety Administration, or Federal Railroad Administration is prohibited from conducting hazardous materials operations and shall immediately cease all hazardous materials operations beginning on the next day (*i.e.*, the 91st). The prohibition shall continue until payment of the penalty has been made in full or at the discretion of the agency issuing the order an acceptable payment plan has been arranged.
- (c) **Civil penalties paid in installments.** On a case by case basis, a respondent may be allowed to pay a civil penalty pursuant to a payment plan, which may consist of installment payments. If the respondent fails to make an installment payment contained in the payment plan on the agreed upon schedule, the payment plan shall be null and void and the full outstanding balance of the civil penalty shall be payable immediately. A respondent that fails to pay the full outstanding balance of its civil penalty within 90 days after the date of the missed installment payment shall be prohibited from conducting hazardous materials operations beginning on the next day (*i.e.*, the 91st). The prohibition shall continue until payment of the outstanding balance of the civil penalty has been made in full, including any incurred interest or until at the discretion of the agency issuing the order another acceptable payment plan has been arranged.
- (d) **Appeals to Federal Court.** If the respondent appeals an agency order issued pursuant to § 109.103 to a Federal Circuit Court of Appeals, the terms and payment due date of the order are not stayed unless the Court so specifies.
- (e) **Applicability to ticketing.** This section does not apply to a respondent who fails to pay a civil penalty assessed by a ticket issued pursuant to § 107.310 of this subchapter.
- (f) **Applicability to debtors.** This section does not apply to a respondent who is unable to pay a civil penalty because the respondent is a debtor in a case under chapter 11, title 11, United States Code. A respondent who is a debtor in a case under chapter 11, title 11, United States Code must provide the following information to the agency decision maker identified in the original agency order or on its certificate of service.
  - (1) The chapter of the Bankruptcy Code under which the bankruptcy proceeding is filed;
  - (2) The bankruptcy case number;
  - (3) The court in which the bankruptcy proceeding was filed; and
  - (4) Any other information requested by the agency to determine a debtor's bankruptcy status.
- (g) **Penalties for prohibited hazardous materials operations.** A respondent that continues to conduct hazardous materials operations in violation of this section may be subject to additional penalties, including criminal prosecution pursuant to 49 U.S.C. 5124.

**§ 109.103 Notice of nonpayment of penalties.**

- (a) If a full payment of a civil penalty, or an installment payment as part of agreed upon payment plan, has not been made within 45 days after the date specified for payment by the final agency order, the agency may issue a cessation of hazardous materials operations order to the respondent.
- (b) The cessation of hazardous materials operations order issued under this section shall include the following information:
  - (1) A citation to the statutory provision or regulation the respondent was found to have violated and to the terms of the order or agreement requiring payment;
  - (2) A statement indicating that if the respondent fails to pay the full outstanding balance of the civil penalty within 90 days after the payment due date, the respondent shall be prohibited from conducting any activity regulated under the Federal hazardous material transportation law, this subchapter or subchapter C of this chapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter C of this chapter;
  - (3) A statement describing the respondent's options for responding to the order which will include an option to file an appeal for reconsideration of the cessation of operations order within 20 days of receipt of the order; and
  - (4) A description of the manner in which the respondent can make payment of any money due the United States as a result of the proceeding (*i.e.*, the full outstanding balance of the civil penalty).
- (c) The cessation of hazardous materials operation order will be delivered by personal service, unless such service is impossible or impractical. If personal service is impossible or impractical then service may be made by certified mail or commercial express service. If a respondent's principal place of business is in a foreign country, it will be delivered to the respondent's designated agent (as prepared in accordance with § 105.40 of this subchapter).