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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 173 and 177

[Docket No. RSPA-01-10533 (HM-218A)]

RIN 2137-AD44

Transportation of Hazardous Materials; Unloading of Intermodal (IM) Portable Tanks on Transport Vehicles

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: RSPA proposes to amend the Hazardous Materials Regulations to permit, for an interim period and subject to certain unloading conditions, the unloading of intermodal (IM) portable tanks transporting certain liquid hazardous materials that are not equipped with a thermal means of remote activation of the internal self-closing stop-valves fitted on the bottom discharge outlets. Permitting such unloading for an interim period would afford operators time to bring the IM portable tanks into conformance with the regulations.

DATES: Comments must be received by April 8, 2002.

ADDRESSES: Address your comments to the Dockets Management System, U.S. Department of Transportation, 400 Seventh St., SW., Room PL 401, Washington, DC 20590-0001. Comments must identify Docket Number RSPA-01-10533 (HM-218A). If you wish to receive confirmation of receipt of your comments, include a self-addressed, stamped postcard. You may also submit and review all comments by accessing the Dockets Management System's website at <http://dms.dot.gov>. The Dockets Management System is located on the Plaza Level of the Nassif Building at the above address. You may view public dockets between the hours of 9 a.m. and 5 p.m., Monday through Friday, except on federal holidays.

FOR FURTHER INFORMATION CONTACT: Joan McIntyre, Office of Hazardous Materials Standards, Research and Special Programs Administration, U.S.

Department of Transportation, 400 Seventh St., SW., Washington, DC 20590-0001, telephone (202) 366-8553.

SUPPLEMENTARY INFORMATION:

I. Background

In this NPRM, the Research and Special Programs Administration (RSPA) (hereafter, "we" means RSPA) addresses the appeal of a denial of a petition for reconsideration and a petition for rulemaking. Both of these actions are regarding the provisions in § 177.834(o) of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180), permitting an IM portable tank to be unloaded while it remains on a transport vehicle.

On July 10, 1998, we published a final rule under Docket RSPA-97-2905 (HM-166Y; 63 FR 37454) amending the HMR by incorporating miscellaneous changes based on petitions for rulemaking and our own initiative. The effective date of the final rule was October 1, 1998. Among other provisions, the final rule allows an IM portable tank transporting a liquid hazardous material that is flammable, pyrophoric, oxidizing, or toxic, to be unloaded while remaining on a transport vehicle with the power unit attached, provided the outlet requirements in 49 CFR 178.345-11 and the attendance requirements in 49 CFR 177.834(i) are met. Section 178.345-11 includes requirements for loading/unloading outlets on cargo tanks to be equipped with self-closing systems with remote means of closure capable of thermal activation at temperatures not exceeding 250°F. Section 177.834(i) includes requirements for ensuring that cargo tanks are attended by a qualified person during loading and unloading.

We received three petitions for reconsideration to the July 10, 1998, final rule. The Dangerous Goods Advisory Council (DGAC), the Tank Container Association (TCA), and Merck & Co., Inc. requested a 2½ year extension of the compliance date, stating it was not feasible to equip existing IM portable tanks with fusible links by October 1, 1998. On October 30, 1998, we published a final rule (HM-166Y; 63 FR 58323) denying the three petitions for reconsideration to the July 10, 1998, final rule. The denial was based on our belief that unloading an IM portable tank in the same manner as a cargo tank, but without the same outlet requirements, poses increased safety risks in a fire situation when an operator is not able to manually activate the closure.

After publication of the October 30, 1998, final rule, we received an appeal of the denial of the petitions for reconsideration from TCA, reiterating

the request for extending the compliance date for 2½ years. We also received a petition for rulemaking from the DGAC, requesting we adopt operating conditions for unloading an IM portable tank with no thermal means of remote activation of the internal self-closing stop-valves installed on the bottom discharge outlets, when it is on a transport vehicle. DGAC suggested these unloading operations be permitted only at facilities:

1. Equipped with fire suppression systems as required by the Department of Labor's Occupational Safety and Health Administration (OSHA) regulations codified at 29 Code of Federal Regulations (CFR) 1910.106;

2. Providing static electricity protection and bonding as required by 29 CFR 1910.106;

3. Implementing emergency response plans and procedures in accordance with OSHA regulations codified at 29 CFR 1910.120;

4. Conforming to the OSHA process safety management standards, codified at 29 CFR 1910.119, the Environmental Protection Agency (EPA) risk management regulations, codified at 40 CFR Part 68, or an equivalent program; and

5. Prohibiting public access to the unloading area.

In addition, the operator would be required to comply with the attendance requirements in § 177.834(i) of the HMR.

DGAC stated its recommended operating restrictions would ensure an equivalent level of safety to the outlet requirements in § 178.345-11. DGAC suggested these operating restrictions could be adopted on an interim basis to provide sufficient time for operators to equip their IM portable tanks with the outlet requirement. In a subsequent submission, DGAC requested a three-year extension of the compliance date to assure sufficient time for operators to equip all affected IM portable tanks.

The intent of the unloading provision in the July 10, 1998, final rule was to provide regulatory relief for operators of IM portable tanks equipped with a thermal means of remote activation of the internal self-closing stop-valves fitted on the bottom discharge outlets. We continue to believe if a portable tank is to be unloaded in the same manner as a cargo tank, it should be equipped with the same emergency shutdown devices required for cargo tanks. However, after re-examining the issues raised by DGAC and TCA, we are proposing to permit, for an interim period, an IM portable tank not currently equipped with a thermal means of remote activation of the

internal self-closing stop-valve fitted on bottom discharge outlets, to be unloaded while remaining on a transport vehicle under certain conditions. The conditions, as proposed later in this preamble, would provide an acceptable level of safety during an interim period by reducing the possibility of fire and release of hazardous materials during the unloading of IM portable tanks. Permitting such unloading for a temporary period affords operators additional time to equip IM portable tanks in accordance with the outlet requirement, if they want to be able to unload these tanks in the same manner as cargo tanks.

In this NPRM, we are proposing to permit such unloading operations until October 1, 2003. This date provides manufacturers, lessors, and users of the affected IM portable tanks a total of five years from the October 1, 1998 effective date of the July 10, 1998 final rule to equip the tanks with a thermal means for remotely activating bottom discharge outlets. Since these tanks are periodically inspected every five years, it also provides the opportunity for the retrofit to be done at the time of the periodic inspection, thus minimizing cost impacts. Many of these tanks should already be so equipped. On and after October 1, 2003, an IM portable tank containing a hazardous material that is flammable, pyrophoric, oxidizing or toxic, could not be unloaded while remaining on a transport vehicle with the power unit attached unless it fully conforms to the outlet requirements in § 178.275(d)(3).

We are also proposing to change the outlet section reference for IM portable tanks from § 178.345-11 to § 178.275(d)(3). In a final rule published June 21, 2001 (RSPA-2000-7702, HM-215D; FR 66 33316), we added § 178.275(d)(3) to address the requirements for equipping UN portable tanks with a thermal means of remote activation of the internal self-closing stop-valves fitted on the bottom discharge outlets. Although the two sections contain the same requirements, the addition of § 178.275(d)(3) into the HMR now makes it a more appropriate reference because it is specific to IM portable tank requirements.

Based on the above discussion, we are proposing to revise § 177.834(o) to permit, until October 1, 2003, the unloading of an IM portable tank not meeting the outlet requirements in § 178.275(d)(3), provided certain unloading conditions are met. The shipper and the carrier would share responsibility for verifying that the consignee's facility meets certain

conditions and that the following requirements are met:

(1) The facility at which the IM portable tank is to be unloaded must have systems in place that conform to applicable OSHA fire suppression requirements in 29 CFR 1910.106(e); the emergency shutdown requirements in 29 CFR 1910.119(f); and OSHA's and EPA's emergency response planning requirements in 29 CFR 1910.119(f) and 40 CFR part 68, respectively; or equivalent or more stringent non-federal requirements; and an emergency discharge control procedure in place applicable to unloading operations, including instructions for handling emergencies that may occur during the unloading operation.

(2) Public access to the unloading area must be controlled in a manner ensuring that public access is denied during unloading.

(3) The attendance requirements in § 177.834(o) must be met.

(4) Prior to unloading, the operator of the vehicle on which the IM portable tank is transported must ascertain the conditions in proposed paragraph (o) are met.

(5) Persons performing unloading functions must be trained in handling emergencies that may occur during the unloading operation.

In § 173.32, as amended under HM-215D, we are proposing to revise paragraph (g)(1) by removing the reference to § 177.834(i)(2). The referenced section, which addresses attendance and unloading requirements, would no longer be necessary with the adoption of proposed § 173.32(h)(3), which references a more appropriate section for IM portable tanks (§ 177.834(o)). Proposed paragraph (h)(3) would alert shippers of their shared responsibility for ensuring that IM portable tanks not conforming to the requirements in § 178.275(d)(3) are unloaded only at facilities conforming to the applicable OSHA and EPA requirements, or are equipped to remove the portable tank from the transport vehicle prior to unloading.

Finally, we are proposing to further revise § 177.834(o) to clarify the requirement for a thermal means of remote activation of bottom discharge outlets applies only to liquid hazardous materials that are flammable, pyrophoric, oxidizing or toxic. In this way we are limiting the applicability to materials posing a risk of fire or acute health and environmental risks. This clarification proposal is consistent with the current requirements located in §§ 178.345-11 and 178.275.

II. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. The proposed rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034]. The costs and benefits of this proposed rule are considered to be so minimal as to not warrant preparation of a regulatory impact analysis or a regulatory evaluation. The provisions of this proposed rule respond to an industry petition and would impose little or no additional costs on the affected companies. The proposed alternative interim provisions provide the industry additional time to come into compliance with existing regulatory requirements for those IM portable tanks intended to be unloaded in the same manner as cargo tanks. There is no requirement in the current regulations, and we are not proposing one in this NPRM, for an IM portable tank to conform to the outlet requirements if it is not intended to be unloaded while it remains on a transport vehicle with the power unit attached. Any adverse safety impacts from the regulatory relief provided by this proposal would be minimized by conformance with the interim provisions proposed herein.

B. Executive Order 13132

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This proposed rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Federal hazardous material transportation law, 49 U.S.C. 5101-5127, contains an express preemption provision (49 U.S.C. 5125(b)) preempting state, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous; or

(5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This proposed rule addresses covered subject items (2) and (5) above and would preempt state, local, and Indian tribe requirements not meeting the "substantively the same" standard.

Federal hazardous materials transportation law provides at § 5125(b)(2) that if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA proposes the effective date of federal preemption will be 180 days from publication of a final rule in this matter in the **Federal Register**.

C. Executive Order 13175

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not have tribal implications, does not impose substantial direct compliance costs, and is required by statute, the funding and consultation requirements of Executive Order 13175 do not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines a rule is not expected to have a significant impact on a substantial number of small entities. This proposed rule applies to manufacturers, operators, lessors and users of IM portable tanks, some of whom are small entities. This proposed rule would benefit such persons by further relaxing an existing requirement for an interim period. Therefore, I certify this rule will not have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid Office of Management and Budget (OMB) control number. This proposed rule does not propose any new information collection burdens. The information collection associated with information specified in § 177.834(o) of this proposed rule is currently required by other Federal regulations. In the proposed § 177.834(o)(2)(i) and (o)(2)(iii), the information collection requirements pertaining to fire suppression and emergency shutdown are currently required by the Department of Labor's OSHA. Finally, in the proposed § 177.834(o)(2)(iv), the emergency response planning requirements are currently required by the Environmental Protection Agency. Based on this discussion, this proposed rule does not require any additional incremental burden hours.

F. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$100 million or more to either state, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

H. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. We developed an assessment to determine the effects of this proposed revision on the environment and whether a more comprehensive environmental impact statement may be required. Our findings conclude there are no significant environmental impacts associated with this proposed rule. Allowing the unloading of IM portable tanks for an interim period, provided the unloading conditions proposed in this rulemaking

are met, permits operators to avoid the potential for environmental damage or contamination and allows manufacturers, lessors and users the needed time to properly equip the IM portable tanks. For interested parties, an environmental assessment is available in the public docket.

List of Subjects

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, we propose to amend 49 CFR Chapter I as follows:

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

1. The authority citation for part 173 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

2. In § 173.32, paragraph (g)(1) would be revised and a new paragraph (h)(3) would be added to read as follows:

§ 173.32 Requirements for the use of portable tanks.

* * * * *

(g) * * *

(1) A portable tank containing a hazardous material may not be loaded on to a highway or rail transport vehicle unless loaded entirely within the horizontal outline of the vehicle, without overhang or projection of any part of the tank assembly.

* * * * *

(h) * * *

(3) No person may offer an IM portable tank transporting a liquid hazardous material that is flammable, pyrophoric, oxidizing, or toxic, as defined in part 173, to a facility for unloading while it remains on a transport vehicle with the power unit attached, unless—

(i) The tank outlets conform to § 178.275(d)(3) of this subchapter;

(ii) The facility at which the IM portable tank is to be unloaded conforms to the requirements in § 177.834(o) of this subchapter; or

(iii) The facility at which the IM portable tank is to be unloaded is equipped to remove an IM portable tank

from a transport vehicle prior to unloading.

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PART 177—CARRIAGE BY PUBLIC HIGHWAY

4. The authority citation for part 177 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

5. In § 177.834, paragraph (o) would be revised to read as follows:

§ 177.834 General requirements.

* * * * *

(o) *Unloading of IM portable tanks.* No person may unload an IM portable tank while it remains on a transport vehicle with the motive power unit attached except under the following conditions:

(1) The unloading operation must be attended by a qualified person in accordance with the requirements in

paragraph (i) of this section. The person performing unloading functions must be trained in handling emergencies that may occur during the unloading operation.

(2) Prior to unloading, the operator of the vehicle on which the IM portable tank is transported must ascertain the conditions of this paragraph (o) are met.

(3) An IM portable tank containing a liquid hazardous material that is flammable, pyrophoric, oxidizing, or toxic, as defined in part 173 of this subchapter, must conform to the outlet requirements in § 178.275(d)(3) of this subchapter; or, until October 1, 2003, be unloaded only at a facility conforming to the following—

(i) The applicable fire suppression requirements in 29 CFR 1910.106(e), (f), (g), (h), and (i);

(ii) The emergency shutdown requirements in 29 CFR 1910.119(f), 1910.120(q) and 1910.38(a);

(iii) The emergency response planning requirements in 29 CFR Part 1910, 40 CFR Part 68, or equivalent or more stringent non-federal requirements, and an emergency discharge control procedure applicable to unloading operations including instructions on handling emergencies that may occur during the unloading operation; and

(iv) Public access to the unloading area must be controlled in a manner ensuring no public access during unloading.

Issued in Washington, DC on February 19, 2002, under authority delegated in 49 CFR part 106.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

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