

Service; and Ken Thompson, USDA-Forest Service provided additional guidance.

#### List of Subjects

##### 36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

##### 50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

For the reasons set out in the preamble, the Federal Subsistence Board proposes to amend 36 CFR 242 and 50 CFR 100 for the 2004–05 regulatory year. The text of the amendments would be the same as the final rule for the 2003–04 regulatory year published in the **Federal Register** of 68 FR 38464, June 27, 2003.

Dated: July 28, 2003.

**Peggy Fox,**

*Acting Chair, Federal Subsistence Board.*

Dated: July 23, 2003.

**Steve Kessler,**

*Subsistence Program Manager, USDA-Forest Service.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 385, 390, and 397

[Docket No. FMCSA–97–2180; formerly FHWA–97–2180]

RIN 2126–AA07

### Federal Motor Carrier Safety Regulations: Hazardous Materials Safety Permits

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Supplemental Notice of Proposed Rulemaking (SNPRM).

**SUMMARY:** The FMCSA proposes to establish a safety permit program for motor carriers that transport any of the following hazardous materials in interstate or intrastate commerce: a highway route-controlled quantity of a Class 7 (radioactive) material; more than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material; more than one liter (1.08 quarts) per package of a material in Division 2.3, Packing Group I, Hazard Zone A, or Division 6.1,

Packing Group I, Hazard Zone A; and a shipment of compressed or refrigerated liquid methane or natural gas in a packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases. As part of this safety permit program, FMCSA proposes to consider additional “acute” and “critical” regulations relevant to its determination of a carrier’s safety fitness rating and, accordingly, the issuance of a safety permit.

This rulemaking would implement requirements in Federal hazardous material transportation law that DOT must establish a safety permit program and a motor carrier must hold a safety permit in order to transport certain hazardous materials in commerce. This rulemaking would also carry out a statutory provision to issue regulations requiring a pre-trip inspection and certification of a motor vehicle used to transport a highway route controlled quantity of a Class 7 (radioactive) material.

This rulemaking would also announce the agency’s decision to not prescribe a uniform permitting system for intrastate transportation of hazardous materials, as proposed in the 1993 notice of proposed rulemaking to this action. Specifically, FMCSA would not require States that issue permits for the intrastate transportation of hazardous materials to use uniform forms and procedures, or to require each State to register all persons who transport hazardous materials—or cause hazardous materials to be transported—intrastate by motor vehicle. FMCSA believes that it is not possible to devise a uniform system that would satisfactorily anticipate, address and resolve the myriad of permitting challenges and concerns that are unique to individual States.

This proposed rule, if promulgated, will promote the safe and secure transportation of the designated hazardous materials and enhance motor carrier safety.

**DATES:** Comments must be received on or before October 20, 2003.

**ADDRESSES:** You can mail, fax, hand deliver or electronically submit written comments to the Dockets Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001, FAX (202) 493–2251, on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comments. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., *e.t.*, Monday through Friday, except Federal holidays. You

can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at <http://dms.dot.gov/search.htm> by typing the last four digits of the docket number appearing in the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the “help” section of the Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the closing date will be included in the docket, and FMCSA will consider late-filed comments to the extent practicable. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19477–78) or you may visit <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Simmons, (202) 493–0496, Hazardous Materials Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., EST, Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Statutory Background

Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, was enacted “to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce \* \* \*”. Certain provisions of this law, including sections 5105(e), 5109, and 5119, apply only to the transportation of hazardous material by motor vehicle. The authority for implementing these provisions (except section 5109(f)) has been delegated to FMCSA under 49 CFR 1.73(d)(2). (This authority was transferred from the Federal Highway Administration (FHWA) to a separate Office of Motor Carrier Safety, 64 FR 56270 (Oct. 19, 1999), which became FMCSA on January 1, 2000. *See* 64 FR 72959 (Dec. 29, 1999), and 65 FR 220 (Jan. 4, 2000)).

Section 5105(e) provides that DOT "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 shall be inspected and certified as complying with this chapter and applicable United States motor carrier safety laws and regulations." This section also provides that DOT "may require that the inspection be carried out by an authorized United States Government inspector or according to appropriate State procedures." The definition of a "highway route controlled quantity" of a Class 7 (radioactive) material is set forth at 49 CFR 173.403, in terms of the activity level of the radioactive material in a single package. In general, this is a quantity that emits high levels of radioactivity and, accordingly, the packaging, hazard communication, and operating requirements that apply to a shipment of a highway route controlled quantity of a Class 7 material are intended to both adequately identify the presence of this material and ensure that the packaging will withstand normal transportation conditions and foreseeable accidents, without a breach of containment integrity.

Section 5109 requires DOT to issue regulations for safety permits for transporting certain hazardous materials. A motor carrier must hold a safety permit issued by DOT, and keep a copy of the permit or other proof of its existence in the vehicle, in order to transport certain hazardous materials in commerce or cause such materials to be transported in commerce by motor vehicle. 49 U.S.C. 5109(a). A person may not offer such hazardous materials for motor vehicle transportation in commerce unless the motor carrier has a safety permit. 49 U.S.C. 5109(f).

Under section 5109(b), a safety permit is required for the following four hazardous materials, above threshold amounts established by DOT, but DOT may also prescribe additional hazardous materials, and the amount of each, to be subject to the safety permit requirement:

1. A Class A or B explosive (now Division 1.1, 1.2, or 1.3 explosive);
2. Liquefied natural gas;
3. Hazardous material designated as extremely toxic by inhalation; and
4. A highway route controlled quantity of radioactive material.

Other provisions in section 5109 require DOT to issue regulations for issuing safety permits, including application procedures; the duration, term, and limitations of a safety permit; other conditions needed to protect public safety; and procedures to amend, suspend, or revoke a safety permit. In

order to issue a safety permit, DOT must find that the motor carrier is fit, willing, and able to (1) Provide the transportation to be authorized by the safety permit; (2) comply with Federal hazardous material transportation law and DOT's regulations under that law; and (3) comply with applicable Federal motor carrier safety laws and applicable minimum financial responsibility laws and regulations. 49 U.S.C. 5109(a).

Section 5119 directed DOT to establish a working group of State and local government officials to make recommendations to DOT with respect to uniform forms and procedures for a State "to register persons that transport or cause to be transported hazardous material by motor vehicle in the State" and "to allow the transportation of hazardous material in the State," including "whether to limit the filing of any State registration and permit forms and collection of filing fees to the State in which the person resides or has its principal place of business." After receiving a final report from the working group, DOT "shall prescribe regulations to carry out the recommendations contained in the [final] report \* \* \* with which the Secretary agrees."

#### Prior Proceedings

On June 17, 1993, the Federal Highway Administration (FHWA) published in the **Federal Register** a notice of proposed rulemaking to establish a safety permit program covering the four hazardous materials specified in 49 U.S.C. 5109(b), including the requirement for a pre-trip inspection of a motor vehicle to be used to transport a highway route controlled quantity of Class 7 (radioactive) material. 58 FR 33418. In response to that notice, FHWA received more than 50 written comments, and these comments have been considered in the preparation of this SNPRM, as discussed below.

On November 17, 1993, the Alliance for Uniform HazMat Transportation Procedures (Alliance), established under 49 U.S.C. 5119, transmitted its recommendations to DOT, and it submitted its final report to DOT on March 15, 1996. According to the Alliance, "[a]ll but nine states have some type of permitting and/or registration program for hazardous materials transportation." November 17, 1993 Report, p. 2-7. The Alliance recommended that DOT:

1. Explore options for consolidating State registration programs with the Federal registration program (applicable to shippers and carriers by all modes and administered by DOT's Research

and Special Programs Administration (RSPA), under 49 U.S.C. 5108);

2. Consider waiving the Federal requirement for a safety permit for a motor carrier that obtains a permit under a uniform State permit program; and

3. Promote a one-stop repository for up-to-date information on hazardous materials routing designations.

In its final report, the Alliance described a two-year pilot project carried out in four States (Minnesota, Nevada, Ohio, and West Virginia) of a "base-state" system for registration and collection of fees and reciprocity between States that require permits.

FHWA decided not to proceed with further rulemaking action to implement the requirements in 49 U.S.C. 5109 and 5105(e) until it had considered the final report and recommendations of the Alliance. In its July 9, 1996 notice published in the **Federal Register** (61 FR 36016), FHWA (1) summarized the Federal permit and registration requirements in the Federal hazardous material transportation law, (2) discussed the activities and recommendations of the Alliance, and (3) invited comments on the Alliance's final report and recommendations. In a supplemental notice published in the **Federal Register** on March 31, 1998 (63 FR 15362), FHWA discussed the comments received in response to its July 9, 1996 notice and directed a series of additional questions to State agencies and motor carriers. Only 11 States responded to the notice, and they did not reach a clear consensus on the direction FHWA should take. State designations and restrictions of highway routes for transporting hazardous materials have been published in the **Federal Register** on June 9, 1998 (63 FR 31549), and Dec. 4, 2000 (65 FR 75771), and are maintained on FMCSA's Internet Web site at <http://hazmat.fmcsa.dot.gov>.

DOT has asked Congress to amend or repeal 49 U.S.C. 5109 three times since 1997, because "many States have different permit requirements" for carriers of hazardous materials and because the agency believed it had appropriate safety monitoring systems in place to address unsafe carriers transporting these materials. In addition, the pilot project under 49 U.S.C. 5119 revealed that a uniform permit system will not likely resolve different States' concerns that their needs will be met, and raises additional concerns related to unnecessary preemption and expenses of a parallel Federal permitting system. In place of a Federal safety permit, DOT proposed that it should be authorized to continue

its safety monitoring of carriers transporting hazardous materials and consider alternative means of enhancing safety in motor carrier transportation of hazardous materials, by such means as additional monitoring of the safety performance of carriers and performing a safety review of "new entrants" within 18 months of the date when the carrier begins operations. (On May 13, 2002, FMCSA published an interim final rule in the **Federal Register** establishing minimum requirements for new entrant motor carriers. The rulemaking seeks to ensure that they are knowledgeable about the applicable Federal regulations and advises that FMCSA will conduct a safety audit as soon as the new entrant has been in operation for enough time (generally, at least three months) to have sufficient records to evaluate the carrier's basic safety management controls. 67 FR 31978.)

### The SNPRM

Congress has not eliminated the statutory requirement for a Federal safety permit. Accordingly, the FMCSA is issuing a revised proposal in this SNPRM. The FMCSA invites all interested persons to comment on this revised proposal and hopes to issue a final rule that will phase in the requirement for a safety permit over the 2005–2006 time period as motor carriers submit or update their Motor Carrier Identification Report (Form MCS–150) (according to the schedule set forth in 49 CFR 390.19(a)).

#### *Hazardous Materials for Which a Safety Permit Would Be Required*

In the 1993 NPRM, FHWA proposed that a motor carrier would be required to hold a safety permit in order to transport in commerce any of the four hazardous materials specified in 49 U.S.C. 5109(b), in the same threshold quantities for which the carrier must submit a registration statement and pay a registration fee under 49 U.S.C. 5108(a)(1)(A)–(D):

1. A highway route-controlled quantity of a Class 7 (radioactive) material;
2. more than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material;
3. more than one liter (1.08 quarts) per package of a poisonous-by-inhalation (PIH) material in Division 2.3, Packing Group I, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A; and
4. a shipment of compressed or refrigerated liquid methane or natural gas in bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

Accordingly, the motor carriers required to hold a safety permit would be a subset of the carriers required to register and pay a registration fee, and no carrier that did not have to register would be required to hold a safety permit. In this SNPRM, FMCSA is proposing the same scope of the safety permit requirement, with the following modifications from the proposals in the NPRM:

—For motor carriers already transporting these materials in interstate or intrastate commerce, there would be a two-year phase-in period to obtain a safety permit based on the schedule in 49 CFR 390.19(a) for submitting or updating the Motor Carrier Identification Report (Form MCS–150). Also, there would not be a separate three-year phase-in period for motor carriers who transport explosives, based on the amount of explosives transported in a single shipment, as proposed in the 1993 NPRM.

—Liquefied natural gas would include all liquefied gases having a methane content of at least 85%.

In response to the 1993 NPRM, several commenters supported limiting the scope of the safety permit requirement to the materials specified in the statute. The Edison Electric Institute (EEI) stated that the requirement to hold a safety permit should not be extended to additional classes and quantities of hazardous materials "unless and until DOT gathers substantial evidence that such extension would significantly enhance transportation safety," based on its view that this requirement "would impose additional administrative burdens on affected motor carriers and on FHWA." EEI quoted the statement from DOT's comments on H.R. 3520, which became the Hazardous Materials Transportation Uniform Safety Act of 1990, Public Law 101–615, 104 Stat. 3244 (Nov. 16, 1990), that "it is essential to begin with a limited permitting program that is administratively practicable, and then consider expanding the program, as determined necessary." House Report No. 101–444, Committee on Energy and Commerce, 101st Cong., 2d Sess., pp. 66–67 (April 3, 1990).

The Chemical Waste Transportation Institute (CWTI) recommended that the requirement for a safety permit be broadened to cover all motor carriers required to register and pay a registration fee under 49 U.S.C. 5108. CWTI stated that any motor carrier that transports a quantity of hazardous material for which a placard is required "should have a safety rating to

demonstrate that [its] safety rating is above "unsatisfactory," and the "only 'new' administrative burden would be that created by the requirement to 'review' each subject motor carrier's rating every three years."

Two commenters, Tri-State Motor Transport Co. (Tri-State) and the International Brotherhood of Teamsters, suggested that a safety permit should be required for motor carriers that transport any hazardous materials, without specifying any threshold amounts. According to Tri-State, "the sooner the program is expanded to cover all hazardous materials the more effect it will have in reaching this goal." The Teamsters noted that "all classes of hazmat" are involved in hazardous materials incidents.

Additional comments addressed the specific hazardous materials for which a safety permit would be required. With respect to explosives, a construction industry association stated that a safety permit should be required only for a carrier that transports large quantities of explosives "from manufacturer to the supplier," and that "[e]xisting OSHA regulations can cover the transportation" by a contractor who used explosives at a specific jobsite, because the 25 kg threshold "is often transported in a small 'pick-up' type truck." The American Pyrotechnics Association (APA) stated that requiring a safety permit to transport more than 25 kg of Division 1.3 G explosives (including "display" fireworks) would present "unnecessary burdens" for this industry. APA referred to the seasonal nature of this industry (around July 4), its "excellent safety record" as reflected in the few incidents in RSPA's Hazardous Materials Information System, and other requirements such as: (1) provisions in the Hazardous Materials Regulations (HMRs, 49 CFR parts 171–180) on training of hazmat employees, and (2) the Federal Motor Carrier Safety Regulations (49 CFR parts 350–399) for the driver to have a commercial driver's license with a hazmat endorsement. APA stated that a requirement for a safety permit "will do nothing to enhance public safety beyond that which will be achieved through the [hazmat] training," and it expressed concerns that States will develop separate programs "with duplicative permit requirements and unnecessary, burdensome paperwork." APA asked for a delay in the effective date of the safety permit program for carriers of explosives, while the Idaho State Police opposed any extension of the three-year phase-in period. Tri-State also recommended reducing the three-year phase-in period.

In the NPRM, FHWA proposed to limit the poisonous inhalation (PIH) materials for which a safety permit would be required to those Packing Group I materials in Hazard Zone A. However, it asked for information on materials in Hazard Zone B and whether the safety permit requirement "should be expanded to include the transportation of [PIH] Hazard Zone B hazardous materials," which "include such widely distributed chemicals as chlorine, hydrogen sulfide, ethylene oxide, and nitric oxide, to name a few." (58 FR at 33420). Two State police forces recommended including Hazard Zone B materials (California) or giving further consideration to Hazard Zone B materials (Idaho); with Idaho suggesting that "safety is a greater concern under the safety permit program than under the registration program," so that the reasons for not requiring registration by carriers of smaller amounts of Hazard Zone B materials (in a bulk container with a capacity less than 3,500 gallons) should not apply to the requirement for a safety permit. Three other commenters opposed expanding the safety permit requirement to Hazard Zone B materials, including the Oregon Public Utilities Commission, which stated that safety would not be increased by requiring a safety permit for "all movements of chlorine" and "many pesticide movements."

Many comments addressed the proposal to require a safety permit to transport "liquefied natural gas," including the gases covered by that term. Several persons said that the NPRM was ambiguous and could be read to cover all Division 2.1 materials that can be a "liquid natural gas" and all liquid fuels derived from natural gas. Air Products and Chemicals, Inc. stated that "liquefied petroleum gases and natural gas liquids represent at least comparable safety risks and require at least comparable carrier expertise," while the National Propane Gas Association (NPGA) opined that "propane, also known as liquefied petroleum gas or LP-gas, was not included in the statute as a product to be regulated through a permit," based on "the historical safety of the propane gas transportation system under the existing comprehensive DOT regulatory system." NPGA stated that there is no basis in legislative history or experience to require a safety permit for all Division 2.1 hazardous materials. The American Petroleum Institute recommended that the proper shipping name(s) of the specific materials be set forth in the regulations, rather than references to Division 2.1 materials. Three

commenters stated that the use of the term 'in bulk' to refer to a container with a capacity of 3,500 gallons or more would be confusing, because a "bulk packaging" is defined in 49 CFR 171.8 to include a container having a "maximum capacity greater than 450 L (119 gallons) as a receptacle for a liquid" and a "water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas." Yellow Freight System, Inc. supported the 3,500-gallon capacity threshold for liquefied natural gas, because "[l]ess than 'in bulk' quantities generally are less likely to pose an immediate danger to public safety while in transit compared to 'in bulk' shipments."

In the preliminary cost-benefit analysis of this rulemaking (a copy of which has been placed in the docket), the agency considered three different lists of hazardous materials for which a safety permit would be required:

Option No. 1 is the "statutory" list of the four categories of hazardous materials in 49 U.S.C. 5109(b), at the same threshold quantities for which registration is required. Under this option, almost 2,500 motor carriers (including about 800 intrastate carriers) would be required to obtain a safety permit.

Option No. 2 includes an "expanded" list of the following hazardous materials, which would make approximately 6,500 motor carriers (including about 1,830 intrastate carriers) subject to the safety permit requirement:

—*Explosive materials*: any quantity of Division 1.1 and 1.2 materials; more than 25 kg (55 pounds) of Division 1.3 materials; and more than 454 kg (1,000 pounds) of Division 1.5 materials.

—*PIH materials (in Divisions 2.3 and 6.1)*: Hazard Zone A materials in any quantity; a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons).

—*Flammable gases (Division 2.1), anhydrous ammonia (Division 2.2), and poisons (Division 6.1, Packing Group I, other than PIH materials)*: a shipment in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons).

—*Organic peroxides*: any quantity of a Type B, temperature controlled organic peroxide (Division 5.2) material.

—*Infectious substances (Division 6.2)*: any quantity of a select agent or toxin

regulated by the Centers for Disease Control and Prevention (CDC) under 42 CFR part 73, except for laboratory samples.

—*Radioactive (Class 7) materials*: any "exclusive use" shipment of Class 7 materials transported in accordance with 49 CFR 427(a) as well as any highway route controlled quantity.

Option No. 3 would apply the requirement for a safety permit to all motor carriers subject to the security plan requirements in 49 CFR 172.800, adopted in the final rule published by RSPA under docket No. RSPA-02-12064 (HM-232) on March 25, 2003 (67 FR 14521). This would be more than 16,250 motor carriers (including about 4,600 intrastate carriers) that are required to register with RSPA and pay a registration fee or transport a select agent or toxin regulated by the CDC under 42 CFR part 73.

FMCSA continues to believe that the initial requirements for a safety permit should apply to only those motor carriers that transport the materials mandated by Congress (option No. 1). However, expanding the existing statutory list to require a safety permit for motor carriers that transport other hazardous materials (covered by option Nos. 2 or 3) should provide the public with additional safety measures, and FMCSA invites comments on whether the agency should, in the future, apply the requirement for a safety permit to motor carriers that transport the hazardous materials in the "expanded" or "HM-232" lists above.

#### *Intrastate and Foreign Motor Carriers*

The requirement to hold a safety permit in 49 U.S.C. 5109 applies to both interstate and intrastate motor carrier operations within the United States. In the 1993 NPRM, FHWA proposed to require that intrastate motor carriers must comply with "all applicable parts of the FMCSRs" in order "to use the provisions of part 385, 'Safety Fitness Procedures,' in making determinations to issue, or deny, a request for a safety permit for either interstate or intrastate motor carriers" (58 FR at 33421). Several commenters raised concerns about applying the financial responsibility requirements in 49 CFR part 387 to intrastate carriers that are subject only to State requirements when they use a smaller vehicle (having a gross vehicle weight rating of less than 10,000 pounds) to transport the hazardous materials for which a safety permit would be required.

As discussed below under "Conditions for issuing a safety permit," FMCSA is still proposing to require that a motor carrier have a "satisfactory"

safety rating in order to obtain a safety permit. Accordingly, an intrastate carrier would be required to apply for a U.S. DOT number as a "new entrant" and subject itself to a compliance review. The safety rating issued by FMCSA to an intrastate carrier would be used only for purposes of issuing a safety permit; the safety rating issued to an intrastate carrier would not be posted on FMCSA's Web site nor would it be used by FMCSA for any purpose other than determining whether the carrier is entitled to a safety permit.

FMCSA does not consider that section 5109 is a mandate to make all intrastate motor carriers subject to provisions in the FMCSRs that do not already apply to them, including the financial responsibility requirements in 49 CFR part 387. Except for the requirement to hold a safety permit, in order to transport any of the designated hazardous materials, and to undergo a compliance review in order to demonstrate its fitness to hold a safety permit, an intrastate carrier would not become subject to other requirements in the FMCSRs that do not already apply.

The definition of "interstate commerce" includes foreign commerce. Therefore, Canadian and Mexico-domiciled motor carriers transporting HM permitted materials in the United States would be subject to the requirements proposed in this SNPRM.

#### *Application Procedures*

Each motor carrier that conducts operations in interstate commerce must submit to FMCSA a Motor Carrier Identification Report, Form MCS-150, before it begins operations and on a two-year cycle thereafter (the month and year of submission are based on the last two digits of the carrier's U.S. DOT number). 49 CFR 390.19(a). Effective January 1, 2003, a "new entrant" motor carrier must also submit Form MCS-150A, Safety Certification for Application for a U.S. DOT Number, and other forms to obtain operating authority. 49 CFR 385.305.

In the 1993 NPRM, FHWA proposed to use a revised Form MCS-150 as the application for a safety permit. Two commenters supported the use of the MCS-150 form (with revisions) for applying for a safety permit. Other commenters suggested combining the safety permit and registration programs, in terms of a single application form, registration and permit number, and expiration dates.

FMCSA believes that the safety permit program can best be coordinated with the biennial report filed on Form MCS-150 (and Form MCS-150A for a new entrant). Rather than revising the Form

MCS-150, however, FMCSA proposes to create a new Form MCS-150B for a motor carrier to provide the limited additional information required for issuance of a safety permit. FMCSA believes that keeping the safety permit program part of the motor carrier identification and safety fitness program with the same schedule for renewal will be more efficient than attempting to combine the safety permit application with the registration program (which applies to offerors and carriers by all modes of transportation, allows registration for one, two, or three years at the registrant's option, and operates on a mid-year basis [July 1 to June 30] rather than a staggered cycle throughout a two-year period).

Implementation of the safety permit requirement would be phased in beginning January 1, 2005. The actual date of compliance would depend on whether the motor carrier is already involved in the transportation of a permitted material. A motor carrier that is not involved in the transportation of a permitted material on January 1, 2005, would need to apply for and receive a safety permit before it may transport any of the hazardous materials for which a safety permit would be required.

However, a "new entrant" motor carrier that applies for a U.S. DOT number after January 1, 2005, would be required to apply for a safety permit (by submitting Form MCS-150B) during 2005 or 2006. Thus, until the motor carrier that is already operating is required to renew its U.S. DOT number during 2005 or 2006, it need not apply for a safety permit. In all cases, a safety permit will be valid until the next date for filing Form MCS-150 (in accordance with the schedule set forth in 49 CFR 390.19(a)(2) and (3)).

A draft of Form MCS-150B is available in the docket (at the DMS Web site <http://dms.dot.gov>), and interested persons are invited to submit comments on that draft. As indicated on that draft, FMCSA proposes to require that an official of the motor carrier must certify "under penalties of perjury," but not to require notarization. As in the 1993 NPRM, FMCSA is not proposing to charge a fee for applying for a safety permit, but it may consider the need to assess an application fee in the future, especially if the safety permit program is expanded to apply to motor carriers of additional types and quantities of hazardous materials.

#### *Conditions for Issuing a Safety Permit*

In the 1993 NPRM, FHWA proposed that its determination on an application for a safety permit would be based "upon a safety fitness finding made

pursuant to 49 CFR part 385." 58 FR at 33421. FHWA also proposed authority to issue a temporary safety permit to an unrated motor carrier, pending a safety fitness determination, when the carrier has certified in its application that it is operating in full compliance with the FMCSRs and HMRs, or comparable State regulations (including financial responsibility requirements in part 387 or State regulations, whichever is applicable). Under the 1993 proposal, a temporary safety permit would remain in effect for no more than 120 days "or until a safety rating is assigned, whichever occurs first" (58 FR at 33424).

As in the 1993 NPRM, FMCSA proposes to require that a motor carrier have a "satisfactory" safety rating in order to obtain a safety permit. Appendix B to 49 CFR part 385 contains an explanation of the safety rating process including a list of the regulations that FMCSA considers "acute" (where noncompliance is so severe as to require immediate compliance) and "critical" (where noncompliance relates to management and/or operational controls). This SNPRM also proposes additions to the list of "acute" and "critical" regulations in Section VII of Appendix B to part 385.

FMCSA is also proposing to add two further conditions for issuing a safety permit: (1) the motor carrier must show that it has a satisfactory security program, and (2) the motor carrier must be registered with RSPA (and remain registered). A satisfactory security program would apply to motor carriers transporting hazardous materials in commerce listed in this Supplemental Notice of Proposed Rulemaking (SNPRM). A satisfactory security program must include: (1) A security plan as prescribed in subpart I of Part 172 of this title, (2) means of communication that will enable the vehicle operator to immediately contact the motor carrier during the course of transportation as required in this SNPRM, and (3) means of providing its hazardous materials employees with security training for hazardous materials employees. FMCSA is also proposing to issue a temporary safety permit, valid for up to 270 days, to a motor carrier that does not have a safety rating but certifies that it has a satisfactory security program and is operating in full compliance with the HMRs, the FMCSRs or comparable State regulations, and minimum financial responsibility requirements in 49 CFR part 387 or State regulations (whichever are applicable). However, FMCSA would not issue a temporary safety

permit to a motor carrier that, as indicated in the Motor Carrier Management Information System (MCMIS), has a crash rate in the top 30% of the national average; has a driver, vehicle, hazardous material, or total out-of-service rate in the top 30% of the national average; or is listed on FMCSA's SafeStat A, B, C, or D lists.

Comments to the 1993 NPRM supported use of the safety rating to determine a motor carrier's fitness to hold a safety permit, but raised questions about the manner in which a safety rating is assigned and whether the 120 day limitation for a temporary safety permit was sufficient, especially to cover all intrastate carriers that have not previously been required to submit Form MCS-150 and obtain a U.S. DOT number. The California Highway Patrol (CHP) recommended that a safety rating be assigned only after a "compliance review," with greater emphasis on "the mechanical condition of the carrier's vehicles," and not a lesser "safety review" which it considered not to be "sufficient to determine a carrier's actual safety compliance." CHP also recommended that the compliance review be performed at the principal location where hazardous materials operations take place, rather than at its main office or headquarters which may be "far removed from the actual working locations."

The Oregon Public Utilities Commission expressed concern that the safety "rating system is difficult to decipher and appears \* \* \* to be somewhat arbitrary" with variations among different regions. Baker Performance Chemicals, Inc. suggested that there be more discussion on how the safety rating is determined. CWTI recommended that a written notification of an "unsatisfactory" or "conditional" safety rating include written notice that the carrier is prohibited from transporting any of the hazardous materials for which a safety permit is required.

FMCSA believes that most, if not all, of the concerns expressed about the safety rating system itself have been addressed in the 1997 revisions to 49 CFR part 385, including the addition of Appendix B to that part ("Explanation of Safety Rating Process"). See the final rules published May 28, 1997 (62 FR 28807), and November 6, 1997 (62 FR 60035). At present, FMCSA bases a safety rating only on a full compliance review, and it retains the discretion to perform that review at any of the motor carrier's facilities. FMCSA shares the concerns that 120 days may not be sufficient time to perform a compliance review for a motor carrier that does not

have a safety rating, and the agency proposes to allow a temporary safety permit to remain in effect for up to 270 days, providing that the applicant satisfies all the conditions for issuance of a temporary safety permit.

#### *Permit Number and Evidence in the Vehicle*

In the 1993 NPRM, FHWA proposed that its written notification of a "satisfactory" safety rating would "serve as the safety permit and shall include the safety permit number assigned." (59 FR at 33424) It also proposed that the safety permit number must be "clearly displayed on shipping papers or the appropriate transportation document," in order to meet the statutory requirement for the motor carrier to keep "a copy of the permit, or other proof of its existence, in the vehicle." 49 U.S.C. 5109(a). FHWA noted the prohibition in § 5109(f) against a person offering a designated hazardous material for transportation by motor vehicle unless the carrier holds a safety permit, and it indicated that "RSPA will subsequently initiate rulemaking which will address shipper responsibility." (58 CR at 33419)

The National Motor Freight Traffic Association (NMFTA) supported the use of a carrier's U.S. DOT number as the safety permit number and stated that "use of this number would minimize paperwork, inasmuch as the assigned safety permit number would be displayed on the carriers' transportation documents." It also stated that, since FHWA intended to add a "permit" database to its existing information systems, "safety fitness and permit information would be readily available to federal and state officials and enforcement personnel." CHP questioned whether use of the U.S. DOT identification number would be sufficient because "all private interstate motor carriers must obtain and display" this number. The Idaho State Police stated that "there is no way for an enforcement officer [to] know that the carrier has met the requirements for having a safety permit," and it recommended the creation of an approach providing "adequate measures for ensuring that safety permit numbers are legitimate and verifiable."

Some commenters suggested that the same number should be used for both registration and the safety permit, to cover the same period of time, and that DOT should use information from the registration program to issue safety permits to carriers with a U.S. DOT identification number. CWTI suggested that the safety permit number should be included on the registration certificate

or another document carried on the vehicle, rather than the shipping paper prepared by the shipper (or offeror).

Other commenters objected to the proposed requirement that the safety permit number must be on the shipping paper or stated that the specific location and manner of displaying the safety permit number needed to be addressed. Yellow Freight stated that law enforcement officers should be able to determine "through another source" whether a carrier holds a safety permit, and adding additional information to shipping papers "that is not essential to immediate safety concerns will not enhance the transportation of hazardous materials." The Institute of Makers of Explosives (IME) and the International Society of Explosive Engineers (ISEE) stated that requiring the shipper to put the carrier's safety permit number on the shipping paper would result in more errors, as well as increase the time and effort of preparing shipping papers. 3M suggested that the carrier (rather than the shipper) should be responsible for putting the safety permit number on shipping papers.

Associations of motor carriers endorsed the statutory requirement that a shipper (or offeror) must verify that the carrier holds a safety permit before offering a designated hazardous material for transportation. 3M objected and Mobil stated that access to FMCSA's Motor Carrier Management Information System (MCMIS) would be necessary for a shipper to verify that it has a permit, and that there would be no need to have the permit number on shipping papers if a carrier were required to provide "proof of fitness and safety permit issuance" to shippers. In addition, ISEE raised a concern about "the availability of explosives information to the public through the inclusion of carrier permit information in MCMIS."

In this SNPRM, FMCSA is no longer proposing that the carrier's safety permit number must appear on the shipping paper, but the carrier would be required to maintain a copy of the safety permit or another document showing the permit number in the vehicle transporting a designated hazardous material. A State or local law enforcement officer would be able to confirm the validity of this number through real-time or close to real-time information made readily accessible by FMCSA.

Section 5109(f) provides that a person may offer a designated hazardous material to a motor carrier for transportation in commerce "only if the carrier has a safety permit." The authority for implementing this

provision has been delegated to RSPA. See 49 CFR 1.53(b)(2), 1.73(d)(2).

#### *Written Route Plan and Communication*

The 1993 NPRM included a proposal to require compliance with the routing and route plan requirements then set forth in 49 CFR 177.825 (with regard to radioactive materials) and 397.9 (with regard to Class A and B explosives). These requirements (now contained in 49 CFR 397.67 and 397.101) specify that the carrier must provide its driver with a written route plan when the motor vehicle contains a highway route controlled quantity of a Class 7 (radioactive) material or any quantity of a Division 1.1, 1.2, or 1.3 (explosive) material.

FMCSA considers that preparation of and adherence to a written route plan will improve the safety and security of transportation of all materials for which a safety permit is required. Accordingly, in this SNPRM, FMCSA is proposing to revise 49 CFR 397.67(d) to require the carrier or its agent to prepare and provide its driver with a written route plan covering any shipment of a PIH material or liquefied natural gas for which a safety permit is required, in addition, to all shipments of Division 1.1, 1.2, and 1.3 materials. We are also proposing to require (in proposed § 385.415) that the written route plan be carried in the vehicle and followed, unless an alternate route is required by a law enforcement officer or emergency conditions. The written route plan when carried in the vehicle, must be maintained in such a manner that ensures security requirements set forth in Subpart I of part 172 of this title are met. The driver would no longer be allowed to prepare the written route plan for the carrier, but the driver would be required to amend the written route plan to show any deviation. In addition, the driver would be required to communicate with the carrier at least once every two hours and any time there is a deviation from the written route plan, and the motor carrier would be required to contact law enforcement officials in the event that there has been no communication from its driver for more than three hours.

FMCSA is also proposing to require that the vehicle driver must have in the vehicle, and make available to law enforcement officials upon request, the telephone number of an employee of the motor carrier who has a copy of the written route plan and is able to determine whether the motor vehicle is on the route specified in that route plan. Furthermore, FMCSA is proposing to require the motor carrier to maintain a record of all communications with the

vehicle driver during transportation of a hazardous material for which a safety permit is required, containing the name of the driver, identification of the vehicle, the hazardous material(s) being transported, the date and time of each communication, and each period of more than two hours without a communication with the driver including a statement of the facts or conditions that prevented communication for more than two hours.

#### *Pre-Trip Inspections*

To implement the pre-trip inspection requirement in 49 U.S.C. 5105(e), FHWA proposed in the 1993 NPRM to require an inspection of a vehicle transporting a highway route controlled quantity of a Class 7 (radioactive) material, before each trip, in accordance with Appendix G to the FMCSRs. FHWA also proposed that the inspector must have the qualifications specified in 49 CFR 396.19 and that written certification including certain information must be prepared and retained by the carrier for one year. It invited comments on its proposed inspection criteria and “whether radiological monitoring should be included.”

The comments on this topic addressed who should perform these inspections, the inspection criteria, and whether or not the inspection should include radiological monitoring. The Department of Energy (DOE) and EEI expressed concern that a requirement for radiological monitoring would duplicate the requirement in 49 CFR 173.441 to ensure that a package containing radioactive material is checked before shipment, but several other commenters supported a requirement for monitoring as part of the pre-trip inspection. To the extent that monitoring is performed, some commenters, including Tri-State, stated that only the shipper has monitoring equipment and trained personnel so that it (rather than the carrier) should perform the pre-trip inspection. DOE endorsed “the flexibility of allowing inspections to be performed by inspectors from organizations other than the carrier itself,” and other persons (besides a motor carrier official) should be allowed to sign the inspection certification. DOE also stated that in any case, radiological monitoring should not be done by “a qualified vehicle inspector” unless that person was also a qualified health physicist.

Tri-State and CHP supported use of the proposed inspection criteria and inspector qualifications in the FMCSRs. Others stated that the criteria in

Appendix G are not sufficient and suggested using standards then under development by the Commercial Vehicle Safety Alliance (CVSA). The Idaho State Police also recommended that “in order to pass the inspection, the vehicle must be defect free.” CHP and Montana DOT recommended that the inspection document or certification must be carried on the vehicle.

In this SNPRM, FMCSA is proposing inspection standards similar to those contained in the CVSA Level VI Inspection Program for Radioactive Shipments. The pre-trip inspection would have to be performed by a government inspector, (*i.e.*, one employed by or under contract to a Federal, State or local government). The inspector must have completed an appropriate training program of at least 104 hours, including at least 24 hours of training in conducting radiological surveys and inspecting vehicles transporting highway route controlled quantity (HRCQ) radioactive materials. The inspection must cover all applicable requirements in the HMRs and FMCSRs, or compatible State regulations, including 49 CFR parts 383 (commercial driver’s license), 391 (driver qualifications), 395 (hours of service), parts 393 and 396 (vehicle condition), provisions in the HMRs on the transportation of radioactive materials (49 CFR parts 171, 172, 173, and 178), and registration (49 CFR part 107, subpart G).

#### *Denial, Suspension, or Revocation of a Safety Permit*

As discussed above, in order to be issued a safety permit, a motor carrier would have to be registered with RSPA and have a “satisfactory” safety rating and a satisfactory security program. A temporary safety permit could be issued to a carrier that does not have a safety rating, valid for up to 270 days; if the carrier receives a “satisfactory” safety rating, it would receive a safety permit, but the temporary permit would be revoked if the carrier receives a safety rating that is less than “satisfactory.” FMCSA is also proposing that a safety permit will be subject to suspension or revocation if a carrier fails to maintain its “satisfactory” safety rating or under other specified circumstances, including the failure to submit a renewal application or providing any false or misleading information on a required application form; failure to maintain a satisfactory security plan; failure to comply with an out-of-service order; failure to comply with the FMCSRs, HMRs, or compatible State requirements, or an order issued under any of these, in a manner that shows the

carrier is not fit to transport the hazardous materials for which a safety permit is required; loss of its operating rights; and suspension of its registration for failure to pay a civil penalty or abide by a payment plan.

The SNPRM contains procedures for administrative review of a denial, suspension, or revocation of a safety permit. A motor carrier's rights to administrative review would depend on the ground for denial, suspension, or revocation of the safety permit. In summary, where there already exists a right to administrative review of the underlying basis for denial, suspension, or revocation, the carrier must pursue its existing rights to review.

Accordingly, if the basis for denial, suspension, or revocation of a safety permit is the carrier's failure to receive or maintain a "satisfactory" safety rating, its review rights are limited to those set forth in 49 CFR 385.15 (administrative review of a proposed safety rating) and 385.17 (change to safety rating based on corrective actions). If the basis for denial, suspension, or revocation of a safety permit is the carrier's failure to pay a civil penalty or abide by a payment plan, its review rights are limited to the show cause proceedings set forth in 49 CFR 386.83(b) and 386.84(b).

When a denial, suspension, or revocation of a safety permit is based on another ground, the SNPRM proposes that the carrier may submit a written request for administrative review within 30 days after service of a written notification that FMCSA has (1) denied a safety permit, (2) immediately suspended or revoked a safety permit (when an imminent hazard exists), or (3) proposed to suspend or revoke a safety permit. The specific procedures that would apply to a request for administrative review are contained in proposed § 385.423(d).

### State Permits

The 1993 NPRM contemplated that many States would continue to require carriers to obtain a permit in order to transport hazardous materials within the State. In the SNPRM, FMCSA proposes that the Federal safety permit would be in addition to any required State permit, but that FMCSA would issue a safety permit to a carrier without further inspection or investigation when FMCSA is able to verify that the carrier holds a safety permit issued by a State under a program that is equivalent to the Federal safety permit program.

As stated in the 1993 NPRM, a State permit requirement would be preempted "if compliance with both the State and Federal permit requirements

is not possible, or if the State requirement creates an obstacle to the accomplishment" of Federal hazardous material transportation law and the regulations." (58 FR at 33419) In addition to these general preemption criteria now set forth in 49 U.S.C. 5125(a), a State may impose a fee for a permit to transport hazardous materials, "only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response." (49 U.S.C. 5125(g)(1)).

RSPA has stated that "[a] permit may serve several legitimate State police power purposes, and the bare requirement \* \* \* that a permit be applied for and obtained is not inconsistent with Federal requirements. However, a permit itself is inextricably tied to what is required in order to get it" so that a permit requirement "must be considered together with the application requirements."

Inconsistency Ruling (IR) No. 2 (Rhode Island), 44 FR75566, 75570-71 (Dec. 20, 1979). Accordingly, a State and local permit for hazardous materials transportation is not preempted in all cases, but only when the underlying requirements that must be fulfilled in order to obtain the permit conflict with Federal hazardous materials law or the HMR. *Id.*; Preemption Determination (PD) No. 14 (Houston), 63 FR 67506, 67510 (Dec. 7, 1998), 64 FR 949, 33952 (June 24, 1999); IR-28 (San Jose, California), 55 FR 8884, 8890 (Mar. 8, 1990); IR-20 (Triborough Bridge and Tunnel Authority), 52 FR 24396, 24397-98 (June 30, 1987); IR-3 (Boston), 46 FR 18918, 18923 (Mar. 26, 1981).

The November 17, 1993 report of the Alliance discussed the two primary reasons that States carry out their own permit and registration programs: (1) The issuance of a permit provides an enforcement mechanism (suspension or revocation of the permit) if a carrier acts irresponsibly or violates State transportation or environmental laws, and (2) the registration or permit process provides a State information about the business activities of persons who operate within the State but are not based within the State. In its letter transmitting that report, the Alliance stated that its members had operated under the assumption that Federal hazardous material transportation law "authorized a dual system for registering and permitting motor carriers," and that a 1992 technical amendment to the law made this explicit. The Alliance stated that the language in the two separate sections of

the law on a Federal safety permit and State permits (now §§ 5109 and 5119) does not restrict "the types of hazardous materials" that may be covered under a State permit, and expressed opposition to finding that a Federal safety permit program "would preempt state permitting of carriers of hazardous materials covered under the federal program."

CWTI concurred that a uniform State permit system proposed by the Alliance and implemented under Federal regulations would not be subject to preemption under the dual compliance and obstacle criteria, contained in 49 U.S.C. 5125(a). It recommended that the applicability of these criteria to State permits should be clarified in several respects by placing the preemption standard in the regulations (rather than just in the preamble) and explicitly stating that "a motor carrier holding a valid federal safety permit would be exempt from all non-federal permit requirements."

The Public Utilities Commission of Ohio stated that it would be "against the public interest" to establish a Federal program under which a State permit program would be preempted with respect to the hazardous materials for which a safety permit would be required, but not with respect to other, "lower risk" materials. CHP asked for further clarification of the preemption standard to be applied to State permits, in light of the statement in the 1993 NPRM that a State permit covering the "same hazardous materials \* \* \* based on a demonstration of safety fitness" would be preempted after implementation of a Federal safety permit program. (58 FR at 33423)

Other persons submitting comments on the 1993 NPRM urged alignment of the Federal and State programs, suggesting that States "accept the FHWA program" (IME), "closely align this permit program with the work of the Alliance" (Yellow Freight), "see if one program could be established" under the Alliance proposal (Montana DOT), or "consider waiving the FHWA permitting requirement" if a uniform State program contained requirements that "duplicate or exceed those contained in the NPRM" (DuPont).

FMCSA agrees that Federal hazardous materials transportation law allows States to continue their permit requirements after the implementation of a Federal safety permit requirement, and that, if a State has a safety permit program that is equivalent to the requirements in 49 U.S.C. 5109, FMCSA may properly accept the findings of the State that a motor carrier is "fit, willing, and able" to transport the designated

hazardous materials and to comply with the applicable laws, regulations, and financial responsibility requirements. Section 5109 requires DOT to issue a Federal safety permit to a motor carrier that meets these requirements, rather than simply allow the carrier to operate under an equivalent State permit, so FMCSA proposes to issue a Federal permit, without further inspection or investigation, when it can verify that this condition exists. FMCSA encourages States to have or implement a HM Permit program equivalent to a Federal permit that will ultimately prevent duplication of a State and Federal requirement.

To the extent that a State permit program is equivalent to the Federal requirements, no preemption issues would arise. It is only differences between Federal and non-Federal requirements that should raise issues of preemption. In this regard, FMCSA and RSPA consider that the preemption criteria set forth in 49 U.S.C. 5125 will continue to apply to non-Federal permit requirements, just as those criteria have applied in the past, and that the impact on States of a Federal permit program should be "minimal." (58 FR at 33423)

Preemption would not necessarily arise simply if a State applies its permit requirements to a smaller, larger, or different group of hazardous materials, than those to be covered by a Federal safety permit. In a recent determination, RSPA noted that it "has considered numerous challenges to non-Federal requirements without finding that the specific requirements were preempted because they did not apply to all hazard classes and all materials listed in the Hazardous Materials Table in 49 CFR 172.101," although there are circumstances in which "a specific non-Federal requirement that applies only to one hazardous material may, indeed, be an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR." PD-13(R) (Nassau County), decision on petition for reconsideration, 65 FR 60238, 60241 (Oct. 10, 2000). As already discussed, in assessing a differing State (or local) permit requirement, the issue will be whether the underlying requirements that must be fulfilled in order to obtain the permit conflict with Federal hazardous materials law or the HMR. The preemption criteria set forth in 49 U.S.C. 5125 will continue to apply to State permits, and it is not considered necessary to repeat those criteria in the regulatory text of this final rule.

### Related Regulations and Rulemaking Projects

As discussed above, in this SNPRM, we are proposing to require an applicant for a safety permit to certify compliance with the HMR security plan and training requirements adopted in a final rule published by the Research and Special Programs Administration (RSPA) on March 25, 2003 (68 FR 14509). That final rule, published under RSPA's docket HM-232, requires persons who offer for transportation or transport certain hazardous materials in commerce to develop and implement security plans. The security plan requirement, codified in a new subpart I of part 172 of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180), applies to shipments of the following classes and quantities of hazardous materials:

(1) A highway route-controlled quantity of a Class 7 (radioactive) material in a motor vehicle, rail car, or freight container;

(2) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material in a motor vehicle, rail car, or freight container;

(3) More than one L (1.06 qt) per package of a material poisonous by inhalation that meets the criteria for Hazard Zone A;

(4) A shipment of a quantity of hazardous materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;

(5) A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required;

(6) A select agent or toxin regulated by the Centers for Disease Control and Prevention; and

(7) A quantity of hazardous material that requires placarding.

A security plan must include an assessment of possible transportation security risks for shipments of the hazardous materials listed above and appropriate measures to address the assessed risks. Specific measures put into place by the plan may vary commensurate with the level of threat at a particular time. At a minimum, a security plan must cover personnel security, unauthorized access to shipments, and en route security.

In addition, the HM-232 final rule requires all hazmat employees (as defined in § 171.8 of the HMR) to receive security awareness training that provides an awareness of security risks associated with hazardous materials transportation and methods to enhance transportation security. This training must also include a component covering

how to recognize and respond to possible security threats.

As part of DOT's effort comprehensively to enhance hazardous materials transportation security, FMCSA is conducting a field operational test (FOT) to quantify the security costs and benefits of an operational concept that applies technology and improved enforcement procedures to hazardous materials transportation by motor carriers. The FOT will demonstrate an approach that enhances the safety and security of hazardous materials shipments from origin to destination by examining possible vulnerabilities in the transportation system. In parallel with the FOT, FMCSA will also conduct an independent evaluation to ascertain whether the FOT met the objective of ensuring the safety and security of hazardous materials shipments. This evaluation will also include a benefit-cost analysis on the security technologies tested, including remote vehicle tracking systems, remote vehicle disabling systems, off-route alert systems, and electronic ignition locks. We expect to begin the FOT in the fall of 2003 and complete the FOT and evaluation by September 2004.

In a related action, on July 16, 2002, RSPA and FMCSA jointly published an advance notice of proposed rulemaking (ANPRM) under docket HM-232A to examine the need for enhanced security requirements for hazardous materials transportation that would be in addition to the security requirements adopted under HM-232 (67 FR 46622). The ANPRM sought comments on the feasibility of specific security enhancements and the potential costs and benefits of deploying such enhancements. Security measures under consideration include escorts, vehicle tracking and monitoring systems, emergency warning systems, remote shut-offs, direct short-range communications, and pre-notification of shipments to state and local authorities.

RSPA is currently evaluating comments received in response to the HM-232A ANPRM to determine if additional security rulemaking is necessary. This evaluation will include an examination of the security threats posed by specific classes and quantities of hazardous materials and an assessment of the effectiveness of specific operational or technological measures in reducing security threats. Persons who may be affected by the proposals in this NPRM should be aware that the ongoing research and rulemaking projects described above may result in modifications to the proposals in this NPRM.

Transportation Security Administration/Department of Homeland Security will continue to evaluate security issues, and in the future, may issue additional standards relating to security issues raised in this rulemaking.

### Rulemaking Analyses and Notices

#### *Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

The FMCSA has determined that this rulemaking is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of the Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979) because of significant public interest in the issues relating to hazardous material permitting. The FMCSA has estimated costs and benefits for three policy/regulatory options. These estimates are discussed in detail in the full regulatory evaluation contained in the docket. Option 1, the statutory option, is the one preferred by FMCSA. It is an option involving a limited listing of HM included by Congress in earlier rulemaking considerations. It is anticipated that the economic impact of this rule, implementing option 1, would be \$0.6 million in the first year and \$10.5 million in each subsequent year. The total discounted cost estimates are \$74.5 million over 10 years. The costs and benefits for this NPRM are discussed below.

*Permit Applications.* Industry costs directly tied to obtaining a permit include obtaining an application form, completing the information requested on the form, and submitting the form to FMCSA. Using data from RSPA on carriers that are registered with DOT under the provisions of 49 CFR Part 107 (FY 2002, most recent year available), FMCSA estimates that 2,434 carriers will be subject to this proposed rule. FMCSA estimates that it will take carriers 2 hours to obtain and complete the initial permit application at a total cost per carrier of \$42 (\$15 per hour plus fringe benefits). There are no permit application fees under the proposed program. The industry would thus incur an estimated \$102,228 in permit application costs. This is a one time non-recurring cost.

Permit renewal applications would be required every two years. The estimated burden to complete a renewal application is 15 minutes per carrier per year. This involves gathering some information and checking off a few

additional boxes on the MCS-150 Form. Using the same unit cost of \$15 per hour plus fringe benefits, the annual costs to industry are estimated at \$12,789.

*Safety Record Standards Compliance.* FMCSA data show that 1,865 motor carriers subject to the requirements proposed in this rule do not currently possess a satisfactory safety rating and will need to obtain one as part of the permit process. This includes carriers without a current safety rating and those whose most recent safety ratings were unsatisfactory or conditional. Carriers who transport HRCQ or radioactive materials (RAM) are assumed to have met the safety record requirements of this rule through their compliance with regulations imposed by the Department of Energy and the Nuclear Regulatory Commission. FMCSA assumes that a typical carrier will spend \$182 preparing for the compliance review necessary to obtain a new safety rating. This includes 2 hours for the carrier's safety director and 6 hours for a clerk to gather and process the necessary information. The total one-time non-recurring permit application and safety compliance costs to industry are, therefore, estimated to be \$339,430.

*Operational Costs.* The proposed rule imposes four requirements on carriers that will result in increased costs, most of which will recur annually. The rule requires that drivers must be able to contact the carrier and/or law enforcement in emergencies. While many carriers employ sophisticated satellite communication systems, FMCSA assumes that cell-phone type service will meet these requirements and that 90 percent of the vehicles in service already have such a device. The service life of the communications equipment is assumed to be 10 years. Utilizing data from the 1997 Vehicle Inventory and Use Survey (VIUS), FMCSA estimates the total number of vehicles affected by the proposed regulations to be 12,500. Ten percent of these vehicles will require new equipment, estimated at \$100 per vehicle, as well as a communications service plan, estimated at \$60 per month. The one-time non-recurring communication requirement cost to industry is expected to be \$125,000 (1,250 vehicles × \$100/vehicle) and \$900,000 annual cost in subsequent years (1,250 vehicles × \$60/month × 12 months).

Under current requirements for the Commercial Vehicle Safety Alliance (CVSA) Level VI inspections, point of origin inspections are conducted on all shipments of HRCQ or radioactive materials (RAM). Carriers of these HM are required to have route plans and

satisfy conditions for expeditious delivery. As such, HM carriers would not incur extra costs under the proposed permit program to satisfy point-of-origin inspections and route plan requirements.

The proposed rule requires carriers to develop and maintain route plans and ensure that route verification contact numbers are carried on the vehicle so that law enforcement could verify the correct location of the shipment. It is believed that the carrier's representative responsible for developing the route plans would be the one to ensure the numbers are placed in the vehicles and available for inspection. It was also assumed that the same individual would ensure that the permit verification number is placed in the vehicle. A unit cost of \$5.25 per shipment was based on an hourly rate of \$21 (including fringe benefits) for a clerk and 15 minutes to complete the task and was derived from comments to the joint FMCSA/RSPA ANPRM entitled "Security Requirements for Motor Carriers Transporting Hazardous Materials," published July 16, 2002 (67 FR 46622) (FMCSA Docket No. 2002-11650). FMCSA realizes that some shipments are moved along the same routes repeatedly between given origins and destinations and new route plans would not need to be generated each year for these shipments. Further, the HM permits would be valid for two years and the carrier contact numbers are not expected to change frequently, if at all. Therefore, developing route plans and providing verification contact numbers and permit numbers in the vehicles are assumed to be repeated for only 50 percent of the shipments in a given year. The annual number of shipments, 1,221,144, were estimated with FMCSA data and VIUS data on the number of vehicles transporting different HM and assumptions regarding the anticipated number of trips per vehicle per year. Class 1.1, 1.2, and 1.3 and HRCQ RAM shipments were excluded as they already meet the proposed requirements. The estimated annual costs for industry compliance is \$3,205,503 ( $[(1,221,144 \text{ annual shipments}) \times (\frac{1}{2} \text{ of shipments requiring action}) \times \$5.25/\text{shipment}]$ ).

The cost to a carrier to document and maintain written communication records between itself and its drivers assumes 15 minutes of a clerk's time per shipment. All shipments are considered to require this documentation. The estimated annual cost for this requirement is \$6,411,006 ( $[(1,221,144 \text{ annual shipments}) \times \$5.25/\text{shipment}]$ ).

*Benefits.* The benefits of the proposed HM permit program include improved

safety due to reductions in accidental and intentional HM releases. Secondary benefits were also considered. Among the secondary benefits is the reduction in incident delays, evacuations, product losses, property damages, environmental damages and cleanups. For accidental releases, incident cost estimates for specific hazard classes from a prior FMCSA risk study were combined with estimates of the number of crashes expected to occur annually in each hazard class among the permitted shipments. FMCSA assumes that the safety elements of the proposed permitting program will reduce the number of HM incidents among permitted shipments by 25 percent. Therefore, the expected annual benefit from reducing accidental HM releases is \$2,025,000.

The potential benefits of reducing intentional releases due to increased security measures are consistent with those analyzed in the NPRM for HM-232. The security measures under the HM-232 NPRM are consistent with, and applicable to, the proposed permitting program. Therefore, a separate analysis of the benefits of security was not conducted.

It is difficult to accurately ascertain the direct benefit of this proposal insofar as its impact upon reducing the malicious use of hazardous materials in transportation. To begin with, the actual costs that an averted terrorist attack of this nature would have imposed, and its probability of success with and without these measures, is unknowable. Terrorism is a fairly new phenomenon, and we have little notion of a likelihood function under the current conditions for HM transportation or under this proposal regarding hazardous materials permitting procedures. Similarly, we have little idea of the expected cost of a terrorist attack, given that one occurs. So although the theory for calculating the benefit is straightforward and simple, finding actual data for a future attack is not possible.

For purposes of this analysis and given the lack of data in this area, FMCSA has assigned 1/1000 as the probability that this proposal would be decisive in stopping an incident involving the malicious use of hazardous materials. FMCSA interprets this to mean that this proposal would result, over the next 1,000 years, in one additional year that is free from a malicious hazardous materials incident than would have occurred without these procedures. Interpreted differently, FMCSA estimates that this proposal would completely foil one of the next 1,000 attempted malicious hazardous materials incidents. FMCSA interprets

this to mean that this proposal would make each attempted malicious hazardous materials incident less likely to inflict its intended damage. Alternately, one could interpret this to mean that these procedures will completely foil one of the next 1,000 attempted malicious hazardous materials incidents.

Next, FMCSA derived a scaled estimate of \$25 billion as the cost of a malicious hazardous materials incident (This figure is based upon the lowest estimate reported of the most costly terrorist attack ever—the September 11th attacks and the costs of other recent terrorist attacks occurring in the past ten years. Please refer to the regulatory evaluation for this rulemaking, Hazardous Materials Carrier Permitting Program; Benefit-Cost Analysis of Permitting Options, for a more detailed discussion of how the scaled estimate was derived).

Finally, we multiplied the scaled estimate of the cost of a malicious hazardous materials incident by the probability estimate as follows: \$25 billion  $\times$  .001 = \$25 million. Therefore, FMCSA estimates that this proposal would result in a direct benefit of \$25 million each year for the ten-year planning horizon, insofar as it relates to a malicious hazardous materials incident. When calculating total benefits, these should be discounted using a standard 7% rate. We limit the analysis to ten years to conform to FMCSA analytical standards. (FMCSA uses a 10-year time frame for all its regulatory analyses to allow comparability from one rule to another.) There is no reason to believe that the benefits would stop unless the policy underlying this proposed rulemaking was to be changed.

Therefore, the combined annual direct benefit of this proposal would be \$27 million (\$2 million (rounded) + \$25 million). FMCSA invites comments from the public to assess any potential costs or burdens that may be associated with this proposal.

#### *Executive Order 13175 (Tribal Consultation)*

The FMCSA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the proposed rule would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

#### *Executive Order 13211 (Energy Supply, Distribution, or Use)*

FMCSA has analyzed this proposed rule under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” FMCSA has preliminarily determined that this action would not be a significant energy action under that Executive Order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

#### *Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532, *et seq.*) requires each agency to assess the effects of its regulatory actions on State, local, tribal governments, and the private sector. Any agency promulgating a final rule that is likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of \$100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. The FMCSA has determined that the changes proposed in this rulemaking would not have an impact of \$100 million or more in any one year.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires each agency to analyze proposed regulations and assess their impact on small businesses and other small entities to determine whether the proposed rule is expected to have a significant impact on a substantial number of small entities. Based on the assessment in the accompanying regulatory evaluation, and the absence of contradictory information submitted to the docket during the public comment period, FMCSA certifies that the proposals in this rulemaking are not applicable to a substantial number of small businesses.

The definition of “small businesses” has the same meaning as under the Small Business Act, established by the Small Business Administration (SBA), Office of Size Standards and codified in 13 CFR 121.201. The FMCSA evaluated the effects of this proposed rule on small business entities, including as applicable small businesses, small non-profit organizations, and small governmental entities with populations under 50,000. Many of these small business entities operate as motor carriers of property in interstate or intrastate commerce.

*Goal of the SNPRM.* FMCSA is required by the Hazardous Materials Transportation Uniform Safety Act (HMTUSA) of 1990 to develop and implement a new motor carrier safety permit program. The safety permit program is intended to enhance the safety and security of certain hazardous materials shipments that, if released either accidentally or intentionally during transportation, have the potential to kill or injure large numbers of people and damage property and the environment.

*Description of Actions.* This SNPRM identifies specific fitness, financial and regulatory criteria for interstate and intrastate motor carriers to qualify and obtain a safety permit from FMCSA. Criteria include imposing operational security requirements, setting minimum safety and security standards, and making safety and security assessments of carriers to ensure compliance with operational, safety, and security standards. The specific hazardous materials covered by this permit program are: highway route-controlled quantities of a Class 7 radioactive material; more than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material; more than one liter (1.08 quarts) per package of extremely toxic-by-inhalation hazardous material; and compressed or refrigerated liquid methane or natural gas in bulk packaging of 13,248 liters (3,500 water gallons) or more.

*Identification of potentially affected small entities.* The proposed rule would affect intrastate and interstate carriers of hazardous materials. The number of small carriers is determined based on the Small Business Administration (SBA) definition used for the RSPA registration file. RSPA flags the small carriers in their registration system based on the number of employees or annual revenue. Of the 2,434 total carriers expected to be affected by this proposed rule, 1,816 have been estimated to be small entities.

In addition to small carriers, other small businesses and small entities potentially could be affected by the proposed permit system. Small businesses that provide services to small carriers, offer hazardous materials for transportation, or receive shipments could also be affected by the proposed rule. The customers and suppliers of small carriers could be adversely affected if a carrier were prohibited from shipping certain hazardous materials because a permit was denied or revoked. Similarly, local government entities such as police could be affected by the proposed hazardous materials permitting requirements. Local police

would be notified anytime three or more hours elapsed after the last time that a communication was received from the driver of a hazardous materials vehicle covered by the permit. This probably would require the expenditure of law enforcement resources to investigate the communication lapse. The number of local police entities that would be involved is difficult to estimate before the permit program is implemented. It has been determined that 1,816 small motor carriers will be affected by the statutory requirements of this rule. Based on an expert judgment, the number of small businesses affected by this rule, excluding small motor carriers, was determined by doubling the number of small carriers affected by the statutory requirements. The application of expert judgment suggests that there could easily be two or more of these entities for each of the small carriers affected. Therefore, it is estimated that as many as approximately 4,000 small businesses could potentially be affected by the rule.

*Reporting and recordkeeping requirements.* This SNPRM proposes several new or modified recordkeeping requirements. While they have not been fully defined, they are detailed in the section of this preamble entitled "Paperwork Reduction Act." FMCSA has built flexibility into the proposed requirements, so that entities can choose the method by which they comply with the proposals. For example, there is no prescribed method of communication between the driver and the carrier. Carriers are permitted to use any system which meets the performance criteria specified. Similarly, there are no specifications for the manner in which carriers develop and maintain route plans, allowing either electronic or paper-based approaches to be used. Entities can assess their own situations and tailor the requirements to fit them.

*Related Federal rules and regulations.* If this rule is adopted as proposed, FMCSA will eliminate possible conflict with two pieces of legislation: 49 U.S.C. 5119 and U.S.C. 5105(e). 49 U.S.C. 5119 authorizes states to participate in the Alliance. The FMCSA intends to automatically issue a Federal permit to a carrier that obtains a permit from a State that is part of the Alliance program or another state that has a program equivalent to the Federal permit program in operation. Therefore, a comparable state program will be deemed equivalent to the Federal HM Permit Program and no statutory conflict will exist. The other area is the Point of Origin Inspections for Highway Route Controlled Quantities (HRCQ) shipments that are required by 49 U.S.C.

5105(e). These inspections are currently being conducted via the CVSA Level VI Enhanced Radioactive Materials Inspection Program. This current program would fulfill the requirements of this proposed rule and thus prevent any statutory conflict.

*Alternate proposals for small businesses.* The Regulatory Flexibility Act directs agencies to establish exceptions and differing compliance standards for small businesses, where it is possible to do so and still meet the objectives of applicable regulatory statutes. There are no significant alternatives to the proposed rule that would accomplish the stated proposed HM permitting rule and which would minimize any significant economic impact of the proposed rule on small entities. Alternative permitting systems, such as that of the Alliance program, could address national permitting needs if expanded to include all states, but the effects on small entities would be the same as under the proposed rule because the same requirements and provisions would be in effect.

We developed this SNPRM under the assumption that small businesses make up the majority of entities that will be subject to its provisions. Thus, we considered how to minimize the expected compliance costs as we developed this SNPRM.

Based on the discussion of the potential costs of this SNPRM in the section of this preamble entitled "Executive Order 12866 and DOT Regulatory Policies and Procedures," FMCSA certifies that although this rulemaking would impose a significant economic impact on those small business entities, these small entities do not represent a substantial number of small businesses within the trucking industry. The Research and Special Programs Administration (RSPA) identifies the small carriers in their registration system based on the number of employees or annual revenue, consistent with the Small Business Administration's Small Business Size Standards, which are matched to the North American Industry Classification System (NAICS). FMCSA estimates the costs to a small carrier to comply with this proposed rule to be \$4,512 in the initial year, and \$4,093 in subsequent years. A summary and breakdown of these first-year and annual costs is shown in Table 1. Note that the number of shipments was determined by using data provided by FMCSA in conjunction with U.S. Census Bureau Vehicle Inventory and Use Survey (VIUS) data for the number of trucks transporting particular HM, and assumptions regarding the anticipated number of

trips per vehicle per year. Communication requirements were assumed to be satisfied with a cell-phone-type service. Costs were calculated based on the assumption that 90 percent of the vehicles already have such a device and only 10 percent of the total vehicles will need new devices. Additionally, the table shows that the

cost for route plans, route verification contact numbers, and permit verification is only half that of communication recordkeeping requirements. This is because the route planning activities are applied to only one half of shipments. Divisions 1.1 and 1.2 and HRCQ of RAM were excluded because all shipments of these materials

have routing requirements under current DOT regulations. Finally, the unit cost is assumed to be a clerk's hourly pay of \$15/hour plus fringe benefits (40%) for a total of \$21/hour. A unit cost of \$5.25 represents fifteen minutes of a clerk's labor.

TABLE 1.—COST SUMMARY PER SMALL CARRIER

| Permit related activity  | Unit cost                      | Cost per carrier for first year | Cost per carrier for successive years |
|--|--------------------------------|---------------------------------|---------------------------------------|
| Permit application .....   | \$21/hour .....                | \$42.00                         | N/A                                   |
| Permit renewal .....   | 21/hour .....                  | N/A                             | \$5.25                                |
| Safety record compliance .....   | 182/carrier .....              | 182                             | N/A                                   |
| Communication requirements .....   | 100/vehicle, 60/month service. | 1,640                           | 1,440                                 |
| Route plans; route verification contact numbers; permit verification ..... | 5.25/shipment .....            | 883                             | 883                                   |
| Communication record keeping requirements .....                            | 5.25/shipment .....            | 1,765                           | 1,765                                 |
| Total Cost per Small Carrier .....   | .....                          | 4,512                           | 4,093                                 |

#### Paperwork Reduction Act

We submitted the information collection and recordkeeping requirements contained in this SNPRM to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act of 1995, Section 1320.8(d). Title 5, Code of Federal Regulations requires FMCSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. Under the Paperwork Reduction Act, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number.

FMCSA currently has an approved information collection under OMB Control No. 2126-0013, "Motor Carrier Identification Report" with 74,250 burden hours and \$0 cost. There will be an increase in the burden for OMB Control No. 2126-0013 due to extension of the data collection requirements to intrastate motor carriers that transport the permitted hazardous materials. Using RSPA registration data, it is estimated that 797 intrastate motor carriers will be required to comply with this current data collection, with an annual burden per carrier of 2 hours. In addition, there will be a new information collection burden for the new requirement to submit initial and renewal permit applications. This new information collection, "Hazardous Materials Safety Permits," will be assigned an OMB control number after review and approval by OMB.

The new information collection requires that the carriers provide estimates of the anticipated annual shipments. It is assumed that this information would be readily available for large carriers, which would apply an inflationary estimate to the prior year's number from their database. Small carriers would either have a ready estimate (due to a limited number of shipments) or, more likely, could determine their prior year shipment totals from data they are required to maintain to support their reporting under the International Fuel Tax Agreement (IFTA) and International Registration Plan (IRP).

The burden to provide estimates of anticipated shipments are as follows: small carriers—30 minutes and large carriers—15 minutes. It is estimated that an additional 0.25 burden hours (15 minutes) per carrier will be required to complete the permit application form, including information, such as, carrier name and address, DOT number, etc. This results in a total burden of 1,671 hours as follows: [1,816 small carriers (596 intrastate + 1,220 interstate) × 0.75 hours per carrier = 1,362 hours] + [618 large carriers (201 intrastate + 417 interstate) × 0.50 hours = 309 hours].

Permit renewal will require carriers only to check-off a few additional boxes on the new MCS-150B Form as well as providing estimates of the annual shipments. The burden hours to check-off the additional boxes on MC-150B Form are considered negligible. The time required to gather the required information for the permit renewal is considered to be part of the time in estimating the number of shipments.

The proposed permitting program requires that carriers develop and maintain route plans and ensure that route verification contact numbers are carried in the vehicle. These provisions would add an average burden of 0.25 hour per day per carrier. The total burden hours were estimated assuming 260 working days in a year, based on an average of five working days per week—and one shipment per day on average. FMCSA realizes that some shipments are moved along the same routes repeatedly between given origins and destinations and new route plans would not need to be generated each year for these shipments. Further, the HM permits would be valid for two years and the carrier contact numbers are not expected to change frequently, if at all. Therefore, in estimating the burden hours involved in developing route plans and providing verification contact numbers and permit numbers on the vehicles, it was assumed that this activity will be repeated for only 50 percent of the shipments in a given year or 130 days per year [*i.e.*,  $0.5 \times 260 = 130$  days]. Thus, the burden hours for this activity is estimated as 79,105 hours [*i.e.*,  $2,434$  (797 intrastate + 1,637 interstate) × 32.5 hours (0.25 hours per day × 130 days per year) = 79,105 hours].

The proposed permitting program also requires carriers to maintain written records of the communication between drivers and the carriers. The types of information required includes time of communication, HM transported, vehicle, and reasons for any communication lapses. While drivers and carriers are required under the

proposed permitting program to be in frequent contact, this requirement places an additional reporting burden on the carriers. It is assumed that recording and maintaining these communications between the driver and

carrier adds a burden of 0.25 hour per day on average per carrier. The total burden hours were similarly estimated assuming 260 working days in a year to be 158,210 hours as follows: [2,434 (797 intrastate + 1,637 interstate) × 65 hours

(0.25 hours per day × 260 days per year) = 158,210 hours].

The total burden hours for the proposed rule are summarized in Table 2.

TABLE 2.—FIRST-YEAR BURDEN HOURS

|   | Carriers   |            |       | Burden hours |         |
|---|------------|------------|-------|--------------|---------|
|   | Intrastate | Interstate | Total | Per carrier  | Total   |
| Increased reporting under OMB Control No. 2126–0013 ...                 | 797        | N/A        | 797   | 2            | 1,594   |
| Annual shipment estimates:  |            |            |       |              |         |
| Small carriers .....  | 596        | 1,220      | 1,816 | 0.75         | 1,362   |
| Large carriers .....  | 201        | 417        | 618   | 0.50         | 309     |
| Written route plans, verification number details, copy of permits ..... | 797        | 1,637      | 2,434 | 32.5         | 79,105  |
| Maintaining communications records .....                                | 797        | 1,637      | 2,434 | 65           | 158,201 |
| Total .....   |            |            |       |              | 240,580 |

In subsequent years, we estimate that burden hours would include the permit renewal application and the time to provide shipment estimates, route plans, and communication records as

indicated above. Given the biennial renewal process, the burden hours for application renewal and shipment estimates would be half as many in subsequent years. However, the burden

hours for maintaining route plans and communication records will be the same for all years. Subsequent-year burden hour estimates are shown in Table 3.

TABLE 3.—SUBSEQUENT-YEAR BURDEN HOURS

|   | Carriers   |            |       | Burden hours |         |
|---|------------|------------|-------|--------------|---------|
|   | Intrastate | Interstate | Total | Per carrier  | Total   |
| Increased reporting under OMB Control No. 2126–0013 ...                 | 797        | N/A        | 797   | 1            | 797     |
| Annual shipment estimates:  |            |            |       |              |         |
| Small carriers .....  | 596        | 1,220      | 1,816 | 0.375        | 681     |
| Large carriers .....  | 201        | 417        | 618   | 0.25         | 154.5   |
| Written route plans, verification number details, copy of permit: ..... | 797        | 1,637      | 2,434 | 32.5         | 79,105  |
| Maintaining communications records .....                                | 797        | 1,637      | 2,434 | 65           | 158,210 |
| Total .....   |            |            |       |              | 238,151 |

We estimate that the new total information collection and recordkeeping burden resulting from the additional Motor Carrier Identification Reports and permit applications under this rule are as follows.

*Motor Carrier Identification Report*  
[OMB No. 2126–0013]

*Total Annual Number of Respondents:* 275,297.  
*Total Annual Responses:* 275,297.  
*Total Annual Burden Hours:* 75,844.  
*Total Annual Burden Cost:* \$0.

*Hazardous Materials Permit*  
[OMB No. 2126–xxxx]

*First Year Annual Burden:*  
*Total Annual Number of Respondents:* 2,434.  
*Total Annual Responses:* 1,835,367.  
*Total Annual Burden Hours:* 240,580.  
*Total Annual Burden Cost:* \$0.  
*Subsequent Year Burden:*

*Total Annual Number of Respondents:* 2,434.  
*Total Annual Responses:* 1,835,367.  
*Total Annual Burden Hours:* 238,151.  
*Total Annual Burden Cost:* \$0.

Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503, *Attention:* DOT Desk Officer. We particularly request your comments on whether the collection of information is necessary for the FMCSA to meet its goals of reducing truck crashes, including whether the information is useful to this goal; the accuracy of the estimate of the burden of the information collection; ways to enhance the quality, utility and clarity of the information collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection

techniques or other forms on information technology.  
*National Environmental Policy Act*

FMCSA has performed an Environmental Assessment that is available for review in the public docket on the DMS Web site, <http://dms.dot.gov>. Based on the assessment, FMCSA has determined that this SNPRM rule does not have any significant negative impacts to the environment and may result in a net benefit from increased protection and monitoring of hazardous materials shipments. Therefore, we find that there are no significant environmental impacts associated with this SNPRM. The agency solicits comments on this issue.

*Executive Order 12988 (Civil Justice Reform)*

This action would meet applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

*Executive Order 12612 (Federalism)*

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, as discussed under "State permits," above, where the applicable law and the concerns previously expressed by State officials are set forth.

Federal hazardous material transportation law allows States, political subdivisions, and Indian tribes to continue their permit requirements after the implementation of a Federal safety permit program. To the extent that a State permit program is equivalent to the Federal requirements, no preemption issues would arise. To the extent that there are differences between Federal and non-Federal requirements, the preemption provisions in 49 U.S.C. 5125 will continue to apply to non-Federal permit requirements, just as those criteria have applied in the past.

For these reasons, FMCSA believes that nothing in this proposed rule, if adopted, will directly preempt any State law or regulation or have a substantial direct effect or sufficient federalism implications that would limit the policymaking discretion of the States. FMCSA invites States and other interested parties to comment on whether they believe any State permit requirement would be affected by the adoption of this proposed rule.

*Executive Order 13045 (Protection of Children)*

We have analyzed this action under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 1985). This proposed rule is not an economically significant rule because the FMCSA has determined that the proposed rule, if adopted, will not present an environmental risk to health or safety that may disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with

Constitutionally Protected Property Rights.

*Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance Program Number 20.217 Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

*Executive Order 13166 (Limited English Proficiency)*

Executive Order 13166, "Improving Access to Services for Persons With Limited English Proficiency" (LEP), requires each Federal agency to examine the services it provides and develop reasonable measures to ensure that persons seeking government services but limited in their English proficiency can meaningfully access these services consistent with, and without unduly burdening, the fundamental mission of the agency.

Its purpose is to clarify for Federal-fund recipients the steps those recipients can take to avoid administering programs in a way that results in discrimination on the basis of national origin. Thus, we believe that this proposed action complies with the principles enunciated in the Executive Order.

**List of Subjects***49 CFR Part 385*

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements; Safety fitness procedures.

*49 CFR Part 390*

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

*49 CFR Part 397*

Administrative practice and procedure, Highway safety, Intergovernmental relations, Motor carriers, Parking, Radioactive materials, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, the Federal Motor Carrier Safety Administration proposes to amend 49 CFR chapter III as set forth below:

**PART 385—SAFETY FITNESS PROCEDURES [AMENDED]**

1. Revise the authority citation for part 385 to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5105(c), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.73.

2. Amend § 385.1 by redesignating paragraph (c) as paragraph (d) and by adding a new paragraph (c) to read as follows:

**§ 385.1 Purpose and scope.**

\* \* \* \* \*

(c) This part establishes the safety permit program for a motor carrier to transport the types and quantities of hazardous materials listed in § 385.403 of this part.

\* \* \* \* \*

3. Add a new subpart E to this part 385 to read as follows:

**Subpart E—Hazardous Materials Safety Permits**

Sec.

- 385.401 What are the definitions of terms used in this subpart?  
 385.403 Who must hold a safety permit?  
 385.405 How does a motor carrier apply for a safety permit?  
 385.407 What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?  
 385.409 When may a temporary safety permit be issued to a motor carrier?  
 385.411 Must a motor carrier obtain a safety permit if it has a State permit?  
 385.413 What happens if a motor carrier receives a proposed safety rating that is less than satisfactory?  
 385.415 What operational requirements apply to the transportation of a hazardous material for which a permit is required?  
 385.417 Is a motor carrier's safety permit number available to others?  
 385.419 How long is a safety permit effective?  
 385.421 Under what circumstances will a safety permit be subject to revocation or suspension by the FMCSA?  
 385.423 Does a motor carrier have a right to an administrative review of a denial, suspension, or revocation of a safety permit?

**Subpart E—Hazardous Materials Safety Permits****§ 385.401 What are the definitions of terms used in this subpart?**

(a) The definitions in parts 390 and 385 of this subchapter apply to this subpart, except where otherwise specifically noted.

(b) As used in this part, *Hazardous material* has the same meaning as under § 171.8 of this title, a substance or material that the Secretary of Transportation has determined as capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials

transportation law (439 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see 49 CFR 172.101), and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of this chapter.

*Hazmat employee* has the same meaning as under § 171.8 of this title, a person who is employed by a hazmat employer as defined under § 171.8 of this title, and who in the course of employment directly affects hazardous materials transportation safety. This term includes an owner-operator of a motor vehicle which transports hazardous materials in commerce. This term includes an individual, including a self-employed individual, employed by a hazmat employer who, during the course of employment:

- (1) Loads, unloads, or handles hazardous materials;
- (2) Manufactures, tests, reconditions, repairs, modifies, marks, or otherwise represents containers, drums, or packaging as qualified for use in the transportation of hazardous materials;
- (3) Prepares hazardous materials for transportation;
- (4) Is responsible for safety of transporting hazardous materials; or
- (5) Operates a vehicle used to transport hazardous materials.

*Liquefied natural gas (LNG)* means a Division 2.1 liquefied natural gas material that is transported in a liquid state with a methane content of 85% or more.

*Safety permit* means a document issued by FMCSA that contains a permit number and confers authority to transport in commerce the hazardous materials listed in § 385.403(a) of this subpart.

*Shipment* means the offering or loading of hazardous material at one loading facility using one transport vehicle, or the transport of that transport vehicle.

#### **§ 385.403 Who must hold a safety permit?**

After the date following January 1, 2005 that a motor carrier is required to file a Motor Carrier Identification Report (Form MCS-150) according to the schedule set forth in § 390.19(a) of this subchapter, the motor carrier may not transport in interstate or intrastate commerce any of the following hazardous materials, in the quantity indicated for each, unless the motor carrier holds a safety permit:

- (a) A highway route-controlled quantity of a Class 7 (radioactive)

material, as defined in § 173.403 of this title;

- (b) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material;

(c) More than one liter (1.08 quarts) per package of a "material poisonous by inhalation," as defined in § 171.8 of this title, that meets the criteria for "hazard zone A," as specified in §§ 173.116(a) or 173.133(a) of this title; or

- (d) A shipment of liquefied natural gas in a packaging having a capacity equal to or greater than 13,248 L (3,500 gallons).

#### **§ 385.405 How does a motor carrier apply for a safety permit?**

(a) *Application form(s)*. To apply for a new safety permit or renewal of the safety permit, a motor carrier must complete and submit Form MCS-150B, HM Permit Application. If the motor carrier does not have a current U.S. DOT identification number, it must also submit Form MCS-150, Motor Carrier Identification Report (see § 390.19 of this subchapter). A new entrant must also submit Form MCS-150A, Safety Certification for Application for U.S. DOT Number (see subpart D of this part).

(b) *Where to get forms and instructions*. The forms listed in paragraph (a) of this section and instructions for completing them, may be obtained on the Internet at <http://www.fmcsa.dot.gov> or by contacting FMCSA at Federal Motor Carrier Administration, MC-RIS, Room 8214, 400 7th St. SW., Washington, DC 20590, Telephone: 1-800-802-5668.

(c) *Signature and certification*. An official of the motor carrier must sign each of these forms and certify that the information is correct.

(d) *Updating information on Form MCS-150B*. A motor carrier that holds a safety permit must report to the FMCSA in writing any change in the information on its Form MCS-150B, within 30 days of the change, using the contact information in paragraph (b) of this section.

#### **§ 385.407 What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?**

(a) *Satisfactory safety rating*. The motor carrier must have a "satisfactory" safety rating assigned by either FMCSA, pursuant to the Safety Fitness Procedures of part 385 of this subchapter, or the State in which the motor carrier has its principal place of business, if the State has adopted and implemented safety fitness procedures that are equivalent to the procedures in subpart A of part 385 of this subchapter.

(b) *Satisfactory security program*. The motor carrier must establish that it has a satisfactory security program, including:

(1) A security plan meeting the requirements of part 172, subpart I of this title. The security plan must address how the carrier will ensure the security of the written route plan required by this part;

(2) A communications system installed on each motor vehicle used to transport a hazardous material listed in § 385.403(a) of this subpart that enables the vehicle operator to immediately contact the motor carrier during the course of transportation of the hazardous material, and each operator must be trained in the use of the communications system; and

(3) Hazmat employees who have all successfully completed the security training required in § 172.704(a)(4) of this title.

(c) *Registration with RSPA*. The motor carrier must be registered with RSPA in accordance with subpart G of part 107 of this title.

#### **§ 385.409 When may a temporary safety permit be issued to a motor carrier?**

(a) *Temporary safety permit*. If a motor carrier does not have a safety fitness rating, FMCSA may issue a temporary safety permit. To obtain a temporary safety permit a motor carrier must certify on Form MCS-150B that it is operating in full compliance with the HMRs, the FMCSRs, or comparable State regulations, and the minimum financial responsibility requirements in part 387 of this subchapter or State regulations, whichever is applicable.

(b) FMCSA will not issue a temporary safety permit to a motor carrier that meets any of the following conditions. The motor carrier:

(1) Does not certify that it has a satisfactory security program as required in § 385.407(b) of this subpart;

(2) Has a crash rate in the top 30% of the national average as found in the FMCSA Motor Carrier Management Information System (MCMIS);

(3) Has a driver, vehicle, hazardous material, or total out-of-service rate in the top 30% of the national average as found in the FMCSA MCMIS; or

(4) Is on the FMCSA SafeStat List A, B, C, or D.

(c) A temporary safety permit shall be valid for 270 days after the date of issuance or until the motor carrier is assigned a safety rating, whichever occurs first.

(1) A motor carrier that receives a satisfactory safety rating will be issued a safety permit.

(2) A motor carrier that receives a less than satisfactory safety rating, is

ineligible for a safety permit and will be subject to revocation of its temporary safety permit.

(d) If a motor carrier has not received a safety rating within the 270-day time period, the FMCSA will extend the effective date of the temporary safety permit for an additional 60 days, provided the motor carrier demonstrates that it is continuing to operate in full compliance with the FMCSRs and HMRs.

**§ 385.411 Must a motor carrier obtain a safety permit if it has a State permit?**

Yes. However, if FMCSA is able to verify that a motor carrier has a safety permit issued by a State under a program that FMCSA has determined is equivalent to the provisions of this subpart, FMCSA will immediately issue a safety permit to the motor carrier upon receipt of an application in accordance with § 385.405 of this subpart, without further inspection or investigation.

**§ 385.413 What happens if a motor carrier receives a proposed safety rating that is less than satisfactory?**

(a) If a motor carrier does not already have a safety permit, it will not be issued a safety permit unless and until a satisfactory safety rating is issued to the motor carrier.

(b) If a motor carrier holds a safety permit (including a temporary safety permit), the safety permit will be subject to revocation or suspension (see § 385.421 of this subpart).

**§ 385.415 What operational requirements apply to the transportation of a hazardous material for which a permit is required?**

(a) *Information that must be carried in the vehicle.* During transportation, the following must be maintained in each motor vehicle that transports a hazardous material listed in § 385.403(a) of this subpart and, upon request, made available to an authorized official of a Federal, State, or local government agency:

(1) A copy of the safety permit or another document showing the permit number;

(2) A written route plan that meets the requirements of § 397.101 of this subchapter (for Class 7 (radioactive) materials) or § 397.67 of this subchapter (for non-radioactive materials); and

(3) The telephone number of an employee of the motor carrier who has a copy of the route plan required in paragraph (a)(2) of this section and is able to determine whether the motor vehicle is on the route specified in that route plan. This phone number must be monitored by the motor carrier at all times the vehicle is in transit.

(b) *Inspection of vehicle transporting Class 7 (radioactive) materials.* Before a motor carrier may transport a highway route controlled quantity of a Class 7 (radioactive) material, the motor carrier must have a pre-trip inspection performed on each motor vehicle to be used to transport a highway route controlled quantity of a Class 7 (radioactive) material, in accordance with the following requirements:

(1) The inspection must be performed by a inspector who—

(i) Is employed by or under contract to a Federal, State, or local government, and

(ii) Has completed a commercial vehicle inspection-training program of at least 104 hours in duration, including 24 hours on the inspection of vehicles transporting HRCQ of Class 7 (radioactive) materials and conducting radiological surveys.

(2) The inspection must determine whether the motor carrier, driver(s) and the motor vehicle are in compliance with requirements governing:

(i) Commercial driver's licenses, in part 383 of this subchapter;

(ii) Qualifications and hours of service of drivers, in parts 391 and 395 of this subchapter, or compatible State requirements that are applicable;

(iii) The mechanical condition of the vehicle, in parts 393 and 396 of this subchapter, or compatible State requirements that are applicable;

(iv) The requirements in the Hazardous Materials Regulations (49 CFR parts 171 through 180) and compatible State requirements applicable to the acceptance and transportation of a highway route controlled quantity of a Class 7 (radioactive) material, including the limits for external radiation, heat, and contamination specified in §§ 173.441, 173.442, and 173.443 of this title;

(v) Registration and payment of the registration fee, in subpart G of part 107 of this title; and

(vi) Requirements for motor carriers and drivers, in subpart D of part 397 of this title.

(3) If any violation of the requirements in paragraph (b)(2) of this section is discovered, the vehicle may not begin transportation until the violation has been corrected. If any violation of the requirements in paragraph (b)(2)(iii) of this section is discovered, the vehicle must be placed "out of service" and may not be moved until completion of all repairs necessary for compliance with the requirements in paragraph (b)(2)(iii) of this section.

(4) If the inspector determines that the driver(s) and vehicle are in compliance with all the requirements set forth in

paragraph (b)(2) of this section, the inspector shall affix to the vehicle a decal indicating the nature of the inspection and containing the date of the inspection. This decal must be removed upon delivery of the shipment to the consignee.

(c) *Additional requirements.* (1) The operator of a motor vehicle used to transport a hazardous material listed in § 385.403(a) of this subpart must:

(i) Follow the written route plan required by paragraph (a)(2) of this section, unless an alternate route is required by a law enforcement official or emergency conditions (in which case the operator must amend the written route plan to show the deviation); and

(ii) At least once each two hours during transportation of a hazardous material for which a safety permit is required, and any time there is a deviation from the written route plan required by paragraph (b) of this section, communicate with the motor carrier by means of the communications system required by § 385.407(b)(2) of this subpart.

(2) The motor carrier must contact law enforcement authorities at any time more than three hours have elapsed since the last communication from the operator of a motor vehicle used to transport a hazardous material listed in § 385.403(a) of this subpart. The motor carrier must maintain a record for 6 months after the initial acceptance of a shipment of hazardous material for which a safety permit is required, containing the name of the operator, identification of the vehicle, hazardous material(s) being transported, the date and time of each communication, and each period of more than two hours without a communication with the operator including a statement of the facts or conditions that prevented communication for more than two hours.

**§ 385.417 Is a motor carrier's safety permit number available to others?**

Upon request, a motor carrier must provide the number of its safety permit to a person who offers a hazardous material listed in § 385.403(a) of this subpart for transportation in commerce. A motor carrier's permit number will also be available to the public on the FMCSA Safety and Fitness Electronic Records System at <http://www.safersys.org>.

**§ 385.419 How long is a safety permit effective?**

Unless suspended or revoked, a safety permit (other than a temporary safety permit) is effective for two years, except that:

(a) a safety permit will be subject to revocation if a motor carrier fails to submit a renewal application (Form MCS-150B) in accordance with the schedule set forth for filing Form MCS-150 in § 390.19(a)(2) and (3) of this subchapter; and

(b) a safety permit will remain in effect pending FMCSA's processing of an application for renewal if a motor carrier submits the required application (Form MS-150B) in accordance with the schedule set forth in § 390.19(a)(2) and (3) of this subchapter.

**§ 385.421 Under what circumstances will a safety permit be subject to revocation or suspension by the FMCSA?**

(a) *Grounds.* A safety permit will be subject to revocation or suspension by the FMCSA for the following reasons:

(1) A motor carrier fails to submit a renewal application (Form MCS-150B) in accordance with the schedule set forth in § 390.19(a)(2) and (3) of this subchapter;

(2) A motor carrier provides any false or misleading information on its application (Form MCS-150B), Form MCS-150A (when required), or an update of information on its Form MCS-150B (see § 385.405(e) of this subpart);

(3) A motor carrier is issued a final safety rating that is less than satisfactory;

(4) A motor carrier fails to maintain a satisfactory security plan as set forth in § 385.407(b) of this subpart;

(5) A motor carrier fails to comply with applicable requirements in the FMCSRs, the HMRs, or compatible State requirements governing the transportation of hazardous materials, in a manner that shows that the motor carrier is not fit to transport or offer for transportation the hazardous materials listed in § 385.403(a) of this subpart;

(6) A motor carrier fails to comply with an out-of-service order;

(7) A motor carrier fails to comply with any other order issued under the FMCSRs, the HMRs, or compatible State requirements governing the transportation of hazardous materials, in a manner that shows that the motor carrier is not fit to transport or offer for transportation the hazardous materials listed in § 385.403(a) of this subpart;

(8) A motor carrier fails to maintain the minimum financial responsibility required by § 387.9 or an applicable State requirement;

(9) A motor carrier fails to maintain current hazardous materials registration with the Research and Special Programs Administration; or

(10) A motor carrier loses its operating rights or has its registration suspended in accordance with § 386.83 or § 386.84

of this subchapter for failure to pay a civil penalty or abide by a payment plan.

(b) *Effective date of suspension or revocation.* A suspension or revocation of a safety permit is effective:

(1) immediately when FMCSA determines that an imminent hazard exists, when FMCSA issues a final safety rating that is less than satisfactory, or when a motor carrier loses its operating rights or has its registration suspended for failure to pay a civil penalty or abide by a payment plan;

(2) 30 days after service of a written notification that FMCSA proposes to suspend or revoke a safety permit, if the motor carrier does not submit a written request for administrative review within that time period; or

(3) as specified in § 385.423(c) of this subpart, when the motor carrier submits a written request for administrative review of FMCSA's proposal to suspend or revoke a safety permit.

**§ 385.423 Does a motor carrier have a right to an administrative review of a denial, suspension, or revocation of a safety permit?**

A motor carrier has a right to an administrative review pursuant to the following procedures and conditions:

(a) *Less than satisfactory safety rating.*

If a motor carrier is issued a proposed safety rating that is less than satisfactory, it has the right to request (1) an administrative review of a proposed safety rating, as set forth in § 385.15 of this part, and (2) a change to a proposed safety rating based on corrective action, as set forth in § 385.17 of this part. After a motor carrier has had an opportunity for administrative review of, or change to, a proposed safety rating, FMCSA's issuance of a final safety rating constitutes final agency action, and a motor carrier has no right to further administrative review of FMCSA's denial, suspension, or revocation of a safety permit when the motor carrier has been issued a final safety rating that is less than satisfactory.

(b) *Failure to pay civil penalty or abide by payment plan.* If a motor carrier is notified that failure to pay a civil penalty will result in suspension or termination of its operating rights, it has the right to an administrative review of that proposed action in a show cause proceeding, as set forth in § 386.83(b) or § 386.84(b) of this subchapter. The decision by FMCSA's Chief Safety Officer in the show cause proceeding constitutes final agency action, and a motor carrier has no right to further administrative review of FMCSA's

denial, suspension, or revocation of a safety permit when the motor carrier has lost its operating rights or had its registration suspended for failure to pay a civil penalty or abide by a payment plan.

(c) *Other grounds.* Under circumstances other than those set forth in paragraphs (a) and (b) of this section, a motor carrier may submit a written request for administrative review within 30 days after service of a written notification that FMCSA has denied a safety permit, that FMCSA has immediately suspended or revoked a safety permit or that FMCSA has proposed to suspend or revoke a safety permit. The rules for computing time limits for service and requests for extension of time in §§ 386.31 and 386.33 apply to the proceedings on a request for administrative review under this section.

(1) The motor carrier must send or deliver its written request for administrative review to FMCSA Chief Safety Officer, with a copy to FMCSA Chief Counsel, at the following addresses:

FMCSA Chief Safety Officer, Federal Motor Carrier Safety Administration, c/o Adjudications Counsel (Room 8302A), 400 Seventh Street, SW., Washington, DC 20590.

FMCSA Chief Counsel, Federal Motor Carrier Safety Administration, Office of the Chief Counsel, Room 8125, 400 Seventh Street, SW., Washington, DC 20590.

(2) A request for administrative review must state the specific grounds for review and include all information, evidence, and arguments upon which the motor carrier relies to support its request for administrative review.

(3) Within 30 days after service of a written request for administrative review, the Office of the Chief Counsel shall submit to the Chief Safety Officer a written response to the request for administrative review. The Office of the Chief Counsel must serve a copy of its written response on the motor carrier requesting administrative review.

(4) The Chief Safety Officer may decide a motor carrier's request for administrative review on the written submissions, hold a hearing personally, or refer the request to an administrative law judge for a hearing and recommended decision. The Chief Safety Officer or administrative law judge is authorized to specify, and must notify the parties of, specific procedural rules to be followed in the proceeding (which may include the procedural rules in Part 386 of this subchapter that are considered appropriate).

(5) If a request for administrative review is referred to an administrative law judge, the recommended decision of the administrative law judge becomes the final decision of the Chief Safety Officer 45 days after service of the recommended decision is served, unless either the motor carrier or the Office of the Chief Counsel submits a petition for review to the Chief Safety Officer (and serves a copy of its petition on the other party) within 15 days after service of the recommended decision. In response to a petition for review of a recommended decision of an administrative law judge:

(i) The other party may submit a written reply within 15 days of service of the petition for review.

(ii) The Chief Safety Officer may adopt, modify, or set aside the recommended decision of an administrative law judge, and may also remand the petition for review to the administrative law judge for further proceedings.

(6) The Chief Safety Officer will issue a final decision on any request for administrative review when:

(i) The request for administrative review has not been referred to an administrative law judge;

(ii) A petition for review of a recommended decision by an administrative law judge has not been remanded to the administrative law judge for further proceedings; or

(iii) An administrative law judge has held further proceedings on a petition for review and issued a supplementary recommended decision.

(7) The decision of the Chief Safety Officer (including a recommended decision of an administrative law judge that becomes the decision of the Chief Safety Officer under paragraph (c)(5) of this section) constitutes final agency action, and there is no right to further administrative reconsideration or review.

(8) Any appeal of a final agency action under this section must be taken to an appropriate United States Court of Appeals. Unless the Court of Appeals issues a stay pending appeal, the final agency action shall not be suspended while the appeal is pending.

4. Appendix B to Part 385 is amended by adding to the List of Acute and Critical Regulations under Paragraph VII the following information in numerical order between §§ 171.16 and 177.800:

#### APPENDIX B TO PART 385— EXPLANATION OF SAFETY RATING PROCESS

\* \* \* \* \*

#### VII. List of Acute and Critical Regulations

**§ 172.313(a) Accepting for transportation or transporting a package containing a poisonous-by-inhalation material that is not marked with the words "Inhalation Hazard" (acute).**

**§ 172.704(a)(4) Failing to provide security awareness training (critical).**

**§ 172.704(a)(5) Failing to provide in-depth security awareness training (critical).**

**§ 172.800(b) Offering or transporting HM without a security plan that conforms to Subpart I requirements (acute).**

**§ 172.800(b) Failure to adhere to a required security plan (acute).**

**§ 172.802(b) Failure to make copies of security plan available to hazmat employees (critical).**

**§ 173.24(b)(1) Accepting for transportation or transporting a package that has an identifiable release of a hazardous material to the environment (acute).**

**§ 173.421(a) Accepting for transportation or transporting a Class 7 (radioactive) material described, marked, and packaged as a limited quantity when the radiation level on the surface of the package exceeds 0.005mSv/hour (0.5 mrem/hour) (acute).**

**§ 173.431(a) Accepting for transportation or transporting in a Type A packaging a greater quantity of Class 7 (radioactive) material than authorized (acute).**

**§ 173.431(b) Accepting for transportation or transporting in a Type B packaging a greater quantity of Class 7 (radioactive) material than authorized (acute).**

**§ 173.441 Accepting for transportation or transporting a package containing Class 7 (radioactive) material with external radiation exceeding allowable limits (acute).**

**§ 173.442(b) Accepting for transportation or transporting a package containing Class 7 (radioactive) material when the temperature of the accessible external surface of the loaded package exceeds 50°C (122°F) in other than an exclusive use shipment, or 85°C (185°F) in an exclusive use shipment (acute).**

**§ 173.443 Accepting for transportation or transporting a package containing Class 7 (radioactive) material with removable contamination on the external surfaces of the package in excess of permissible limits (acute).**

4a. Appendix B to Part 385 is amended by adding to the List of Acute and Critical Regulations under Paragraph VII the following information in numerical order after § 177.800(c):

**§ 177.801 Accepting for transportation or transporting a forbidden material (acute).**

4b. Appendix B to Part 385 is amended by adding to the List of Acute and Critical Regulations under

Paragraph VII the following information in numerical order after § 177.823(a):

**§ 177.835(a) Loading or unloading a Class 1 (explosive) material with the engine running (acute).**

**§ 177.835(c) Accepting for transportation or transporting Division 1.1 or 1.2 (explosive) materials in a motor vehicle or combination of vehicles that is not permitted (acute).**

**§ 177.835(j) Transferring Division 1.1, 1.2, or 1.3 (explosive) materials between containers or motor vehicles when not permitted (acute).**

\* \* \* \* \*

#### PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

5. The authority citation for Part 390 continues to read as follows:

**Authority:** 49 U.S.C. 13301, 13902, 31131, 31133, 31502, and 31504, Pub. L. 104-88, 109 Stat. 803, 941 (49 U.S.C. 701 note); and 49 CFR 1.73.

#### § 390.3 General applicability.

\* \* \* \* \*

(g) *Motor carriers that transport hazardous materials in intrastate commerce.* The rules in the following provisions of subchapter B of this chapter apply to motor carriers that transport hazardous materials in intrastate commerce and to the motor vehicles that transport hazardous materials in intrastate commerce:

(1) Subparts A, C, and E of Part 385, for carriers subject to the requirements of § 385.403(a) of this subchapter.

(2) Part 386, Rules of practice for motor carrier, broker, freight forwarder, and hazardous materials proceedings.

(3) Part 387, Minimum Levels of Financial Responsibility for Motor Carriers, to the extent provided in § 387.3 of this subchapter.

(4) Section 390.19, Motor carrier identification report, and § 390.21, Marking of CMVs, for carriers subject to the requirements of § 385.403(a) of this subchapter. Intrastate motor carriers operating prior to January 1, 2005, are excepted from § 390.19(a)(1).

#### PART 397—TRANSPORTATION OF HAZARDOUS MATERIALS; DRIVING AND PARKING RULES [AMENDED]

7. The authority citation for Part 397 continues to read as follows:

**Authority:** 49 U.S.C. 322, 5112; 49 CFR 1.73. Subpart A also issued under 49 U.S.C. 5103, 31136, 31502, and 49 CFR 1.53. Subparts C, D, and E also issued under 49 U.S.C. 5112, 5125.

8. Amend § 397.67 to revise paragraph (d) to read as follows:

**§ 397.67 Motor carrier responsibility for routing.**

\* \* \* \* \*

(d) Before a motor carrier requires or permits the operation of a motor vehicle containing any of the following hazardous materials, the carrier or its agent shall prepare and furnish to the vehicle operator a written route plan that complies with this section:

(1) A Division 1.1, 1.2, or 1.3 (explosive) material (*see* § 173.50 of this title);

(2) More than one liter (1.08 quarts) per package of a "material poisonous by inhalation," as defined in § 171.8 of this title, that meets the criteria for "hazard zone A," as specified in §§ 173.116(a) or 173.133(a) of this title); or

(3) A shipment of liquefied natural gas in a bulk packaging (*see* § 171.8 of this title) having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

Issued on: August 11, 2003.

**Warren E. Hoemann,**

*Deputy Administrator.*

[FR Doc. 03-20887 Filed 8-18-03; 8:45 am]

BILLING CODE 4910-EX-P

**DEPARTMENT OF TRANSPORTATION****National Highway Traffic Safety Administration****49 CFR Part 571**

[Docket No. NHTSA 03-15097; Notice 1]

**Federal Motor Vehicle Safety Standards; Occupant Crash Protection**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Denial of petition.

**SUMMARY:** This notice denies a petition for rulemaking from DaimlerChrysler Corporation requesting that the agency amend Federal Motor Vehicle Safety Standard (FMVSS) No. 208, "Occupant crash protection," to allow for the deactivation of passenger air bags through the use of certain features of the child restraint lower anchorages described in FMVSS No. 225, "Child restraint anchorage systems." This was proposed both in lieu of, and in addition to, a manual passenger air bag on-off switch. The agency has analyzed the main issues surrounding the petitioner's request in the context of current and future air bag requirements. This notice completes agency rulemaking on that petition.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, you may contact Lori

Summers, Office of Crashworthiness Standards. Telephone: (202) 366-4917, Facsimile: (202) 493-2739.

For legal issues, you may contact Rebecca MacPherson, Office of the Chief Counsel. Telephone: (202) 366-2992, Facsimile: (202) 366-3820.

**SUPPLEMENTARY INFORMATION:****I. Background**

In 1995, vehicle manufacturers were beginning to install, and would soon be required to install, right front passenger air bags in all passenger cars and light trucks. At that time, the National Highway Traffic Safety Administration (NHTSA) believed that placing a rear facing child safety system (RFCSS) in the front seat of passenger air bag-equipped vehicles would have the potential for producing harmful effects. The agency's laboratory tests had shown that when RFCSSs were placed in the front seat of a passenger air bag-equipped vehicle, they extended forward to a point near the instrument panel where they could be struck by a deploying air bag and have the potential to cause serious injury to infants. This possibility was particularly acute when caregivers had no other choice because the rear seats of the vehicle were too small to accommodate the RFCSS or because the vehicle was not equipped with a rear seat.

As a countermeasure to this potential safety problem, the agency amended FMVSS No. 208, "Occupant crash protection," on May 23, 1995 (60 FR 27333) to allow manufacturers the option of installing an on-off switch that motorists could use to deactivate the front passenger-side air bag in vehicles that have no rear seat or a rear seat too small to accommodate a RFCSS. A yellow telltale light was also required to indicate when the passenger air bag was deactivated. On January 6, 1997, the agency published a Final Rule (62 FR 798) extending the allowance for on-off switches until September 1, 2000, and this was further extended to September 1, 2012 in the May 12, 2000 Final Rule regarding advanced air bag requirements (65 FR 30680).

In addition to the manual on-off switch extension, the FMVSS No. 208 Final Rule regarding advanced air bags added requirements for minimizing air bag risk to infants in RFCSS and car beds, and children in forward-facing child safety seats. The requirements allow manufacturers to meet one of two options: Option 1—Automatic Suppression Feature, or Option 2—Low Risk Deployment.<sup>1</sup> Advanced air bag

<sup>1</sup> NOTE: Manufacturers are required to pick a certification option for each of the three child

systems designed to meet the requirements are expected to work automatically. Once installed, the device should require no action on the part of the occupant. For example, if an automatic suppression system recognizes the presence of a RFCSS in the right front passenger seat, the air bag should automatically not deploy. We note that vehicle manufacturers are not restricted in their choice of technology. Unlike the earlier on-off switch requirements, there are no restrictions limiting installation of suppression systems to vehicles that have no rear seat or have rear seats that are too small to accommodate a RFCSS.

Currently FMVSS No. 225, "Child restraint anchorage systems," mandates that if a vehicle does not have an air bag on-off switch meeting the requirements of S4.5.4 of FMVSS No. 208, it shall not have a child restraint anchorage system installed at a front designated seating position. The on-off switch requirements in S4.5.4 of FMVSS No. 208 specify, among other things, that the on-off device be operable by means of the ignition key for the vehicle.

**II. DaimlerChrysler's Petition**

On November 16, 1999, DaimlerChrysler Corporation (DaimlerChrysler) petitioned NHTSA to amend FMVSS No. 208, to allow for the deactivation of passenger air bags through the use of certain features of the child restraint lower anchorages described in FMVSS No. 225. DaimlerChrysler believes the attachment should be permitted as a substitute for, or in addition to, a manual on-off switch.

DaimlerChrysler stated they were considering the development of a system that would sense the presence of a RFCSS held in place with components (identified in FMVSS No. 213, "Child restraint systems") for attaching to the child restraint lower anchorages described in FMVSS No. 225. In addition to sensing RFCSSs, the system would also deactivate the passenger air bag when forward facing child safety systems equipped with similar components are installed in the front seat. According to DaimlerChrysler, air bag deactivation would be accomplished and assured by the act of installing the child safety system attachment components onto the anchorages described in FMVSS No. 225. The attachment components would be detected by a switch actuator that is

occupant categories: 12-month-old infant, 3-year-old and 6-year-old child. The 3-year-old and 6-year-old child categories also have a third option for dynamic automatic suppression.