

any major amendments or other material filings regarding the application to, among others, the Defense Information Systems Agency.

**List of Subjects in 47 CFR Part 1**

Administrative practice and procedure.

Federal Communications Commission.

**Sarah Van Valzah,**

*Assistant Bureau Chief, International Bureau.*

Accordingly, 47 CFR part 1 is corrected by making the following correcting amendments:

**PART 1—PRACTICE AND PROCEDURES**

■ 1. The authority citation for part 1 continues to read as follows:

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

■ 2. Section 1.767 is amended by revising paragraph (j) to read as follows:

**§ 1.767 Cable landing licenses.**

\* \* \* \* \*

(j) *Applications for streamlining.* Each applicant seeking to use the streamlined grant procedure specified in paragraph (i) of this section shall request streamlined processing in its application. Applications for streamlined processing shall include the information and certifications required by paragraph (k) of this section. On the date of filing with the Commission, the applicant shall also send a complete copy of the application, or any major amendments or other material filings regarding the application, to: U.S. Coordinator, EB/CIP, U.S. Department of State, 2201 C Street, NW., Washington, DC 20520-5818; Office of Chief Counsel/NTIA, U.S. Department of Commerce, 14th St. and Constitution Ave., NW., Washington, DC 20230; and Defense Information Systems Agency, ATTN: GC/DO1, 6910 Cooper Avenue, Fort Meade, MD 20755-7088, and shall certify such service on a service list

attached to the application or other filing.

\* \* \* \* \*

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**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 171 and 177**

[Docket No. PHMSA-2005-22987 (HM-238)]

RIN 2137-AE06

**Hazardous Materials: Requirements for Storage of Explosives During Transportation**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, PHMSA, in coordination with the Federal Motor Carrier Safety Administration (FMCSA), is approving the use of the National Fire Protection Association Standard (NFPA) 498—*Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives* (2010 Edition) for the construction and maintenance of safe havens used for unattended storage of Division 1.1, 1.2, and 1.3 explosives.

**DATES:** *Effective Date:* July 7, 2011.

*Voluntary Compliance Date:* Compliance with the requirements adopted herein is authorized as of June 7, 2011. However, persons voluntarily complying with these regulations should be aware that appeals may be received and as a result of PHMSA's evaluation of these appeals, the amendments adopted in this final rule may be revised accordingly.

*Incorporation by reference date:* The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of July 7, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ben Supko or Steven Andrews, Standards and Rulemaking Division, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

**SUPPLEMENTARY INFORMATION:**

**I. Current Federal Requirements Applicable to Explosives Stored During Transportation**

*A. Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180)*

Transportation includes the storage of materials “incident to the[ir] movement.” (49 U.S.C. 5102(13)). The HMR require hazardous materials stored incidental to movement to meet all applicable requirements for packaging, hazard communication (including shipping papers and emergency response information), and handling that apply when shipments are actually moving in transportation. The HMR include specific carrier requirements for transportation of hazardous materials by rail, air, vessel, and highway, including requirements for loading and unloading, blocking and bracing, stowage, segregation, and compatibility (49 CFR parts 174, 175, 176, and 177, respectively).

Explosive (Class 1) materials are among the most stringently regulated hazardous materials under the HMR. The HMR define a Class 1 material as any substance or article that is designed to function by explosion—that is, an extremely rapid release of gas or heat—or one that, by chemical reaction within itself, functions in a similar manner even if not designed to do so (49 CFR 173.50(a)). Class 1 materials are assigned to six divisions depending on the degree and nature of the explosive hazard, as shown in the following table (49 CFR 173.50(b)).

Division	Hazard	Description of hazard	Examples
1.1	Mass explosion hazard	Instantaneous explosion of virtually the entire package or shipment.	grenades, mines, and nitroglycerin.
1.2	Projection hazard without a mass explosion hazard.	Fragments projected outward at some distance.	rockets and warheads.
1.3	Fire hazard and either a minor projection hazard or minor blast hazard or both but not a mass explosion hazard.	Fire and possible projection of fragments outward at some distance.	projectiles, signal smoke, and tracers for ammunition.
1.4	Minor explosion hazard	Explosion largely confined to the package and no projection of fragments of any appreciable size or range is expected.	ammunition, airbags, and model rocket motors.
1.5	Very insensitive explosive	Mass explosion hazard, but low probability of initiation or detonation while in transportation.	blasting agents and ammonia-nitrate fuel oil mixture.

Division	Hazard	Description of hazard	Examples
1.6 .....	Extremely insensitive article .....	Negligible probability of accidental initiation or propagation.	insensitive article and military.

The HMR prohibit transportation of an explosive unless it has been examined, classed, and approved by PHMSA's Associate Administrator for Hazardous Materials Safety (49 CFR 173.51). Separate provisions apply to the transportation of new explosives for examination or developmental testing, explosives approval by a foreign government, small arms cartridges, and fireworks manufactured in accordance with American Pyrotechnics Association Standard 87-1 (49 CFR 173.56). Each approval granted by the Associate Administrator contains packaging and other transportation provisions (e.g., shipping paper requirements, labeling, marking, etc.) that must be followed by a person who offers or transports the explosive material. In addition to the specific requirements in the approval, the HMR require explosives to be marked and labeled and/or placarded to indicate the explosive hazard. Explosives shipments generally must be accompanied by shipping papers and emergency response information. The same requirements apply to the transportation of hazardous materials whether the materials are incidentally stored or actually moving.

In addition, any person who offers for transportation in commerce or transports in commerce a shipment of explosives for which placarding is required under the HMR must (1) register with PHMSA and (2) develop and adhere to a security plan (49 CFR 172.800(b)).<sup>1</sup> A security plan must include an assessment of possible transportation security risks for the covered shipments and appropriate measures to address the identified risks. At a minimum, a security plan must include measures to prevent unauthorized access to shipments and to address personnel and en route security (49 CFR 172.802(a)). The en route security element of the plan must include measures to address the security risks of the shipment while it is moving from its origin to its destination, including shipments stored incidental to movement (49 CFR 172.802(a)(3)). Thus, a facility at which a shipment

subject to the security plan requirements is stored during transportation must itself be covered by the security plan. Security plan requirements are performance-based to provide shippers and carriers with the flexibility necessary to develop a plan that addresses a person's individual circumstances and operational environment.

*B. Federal Motor Carrier Safety Regulations (FMCSRs; 49 CFR Parts 350-397)*

Motor carriers that transport hazardous materials in commerce must also comply with the Federal Motor Carrier Safety Regulations (FMCSRs) addressing driver qualifications; vehicle parts and accessories; driving requirements and hours of service; vehicle inspection, repair and maintenance; driving and parking rules for the transportation of hazardous materials; hazardous materials safety permits; and written route plans. The FMCSRs include requirements for storage of explosives incidental to movement. In accordance with the FMCSRs, a motor vehicle that contains Division 1.1, 1.2, or 1.3 explosives must be attended at all times, including during incidental storage, unless the motor vehicle is located on the motor carrier's property, the shipper or consignee's property, or at a safe haven (49 CFR 397.5).

Under the FMCSRs, a safe haven is an area specifically approved in writing by Federal, state, or local government authorities for the parking of unattended vehicles containing Division 1.1, 1.2, and 1.3 explosive materials (49 CFR 397.5(d)(3)). The decision as to what constitutes a safe haven is generally made by the local authority having jurisdiction over the area. The FMCSRs do not include requirements for safety or security measures for safe havens.

In addition, the FMCSRs require any person who transports more than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 material or an amount of a Division 1.5 (explosive) material that requires placarding under Subpart F of Part 172 of the HMR to hold a valid safety permit (49 CFR 385.403(b)). Persons holding a safety permit and transporting Division 1.1, 1.2, and 1.3 materials must prepare a written route plan that meets the requirements of § 397.67(d), which avoids heavily populated areas, places

where crowds are assembled, tunnels, narrow streets, or alleys.

Finally, a motor vehicle containing a Division 1.1, 1.2, or 1.3 explosive may not be parked on or within five feet of the traveled portion of a public highway or street; on private property without the consent of the person in charge of the property; or within 300 feet of a bridge, tunnel, dwelling, or place where people work or congregate unless for brief periods when parking in such locations is unavoidable (49 CFR 397.7(a)).

**II. Previous Rulemaking Activity in This Matter**

*A. July 16, 2002 ANPRM (HM-232A)*

On July 16, 2002, FMCSA and PHMSA's predecessor agency (the Research and Special Programs Administration) published an advance notice of proposed rulemaking under Docket HM-232A (67 FR 46622) entitled "Security Requirements for Motor Carriers Transporting Hazardous Materials." In the ANPRM, we examined the need for enhanced security requirements for motor carrier transportation of hazardous materials. We requested comments on the issue of storage of explosives at safe havens, as well as a variety of security measures generally applicable to a broader range of hazardous materials. FMCSA and RSPA requested comments on a variety of security measures including: escorts, vehicle tracking and monitoring systems, emergency warning systems, remote shut-offs, direct short-range communications, and notification to State and local authorities. The ANPRM also addressed the issue of explosives storage in safe havens. We received approximately 80 comments in response to the ANPRM.

On March 19, 2003, FMCSA published a further notice (68 FR 13250) that RSPA had assumed the lead role for this rulemaking proceeding. Due to the complexity of the issues raised in Docket HM-232A and the number of comments received on the ANPRM, RSPA decided to consider the storage of explosives in a separate rulemaking. RSPA indicated its intentions in the October 30, 2003 final rule published under Docket HM-223 (68 FR 61906) entitled "Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage." In the final rule, which became effective on June 1,

<sup>1</sup> When transported by highway, placards must be affixed to the transport vehicle or freight container when (1) any quantity of Division 1.1, 1.2, or 1.3 explosive materials are present, and (2) more than 1,000 pounds of Division 1.4, 1.5 or 1.6 materials are present. 49 CFR 172.504.

2005 (see 69 FR 70902; December 8, 2004), RSPA clarified the applicability of the HMR to specific functions and activities related to the transportation of hazardous materials in commerce. In the preamble to the HM-223 final rule, RSPA identified issues related to the storage of hazardous materials during transportation that need to be addressed (68 FR 61906; 61931). RSPA noted that the current HMR requirements applicable to the storage of explosives during transportation need to be reevaluated to ensure that they adequately account for potential safety and security risks. For example, the agency has concerns regarding the lack of Federal standards for safe havens and inconsistent State requirements.

Consistent with and supportive of the respective transportation security roles and responsibilities of the DOT and DHS as delineated in a Memorandum of Understanding (MOU) signed September 28, 2004, and of Transportation Security Administration (TSA) and PHMSA as outlined in an Annex to that MOU signed August 7, 2006 PHMSA published a withdrawal of HM-232A on June 27, 2007 (72 FR 35211). In the withdrawal we advised the public that the TSA assumed the lead role from PHMSA for rulemaking addressing the security of motor carrier shipments of hazardous materials under Docket HM-232A. Accordingly, PHMSA withdrew the ANPRM issued and closed its rulemaking proceeding. PHMSA also indicated it would continue to consider alternatives for enhancing the safety of explosives stored during transportation.

*B. November 16, 2005 ANPRM (HM-238)*

Some of the comments submitted in response to the July 16, 2002 ANPRM contained recommendations that the current requirements applicable to the storage of explosives during transportation should be reevaluated to ensure that they adequately account for potential safety and security risks. As a result, PHMSA and FMCSA initiated this rulemaking to evaluate current standards for the storage of explosives in transportation. We published a new ANPRM on November 16, 2005 (70 FR 69493), in which we summarized government and industry standards for explosives storage (which vary greatly by mode of transportation, type of explosives, and whether the explosive is in transportation) and requested comments on a list of concerns regarding the risks posed by the storage of explosives while in transportation. The November 16, 2005 ANPRM in this docket and the comments are accessible

through the Federal eRulemaking Portal (<http://www.regulations.gov>).

In the ANPRM, PHMSA solicited comments concerning measures to reduce the risks posed by the storage of explosives while they are in transportation and whether regulatory action is warranted. We invited commenters to address issues related to security and storage of other types of high-hazard materials. In addition, the ANPRM provided detailed information addressing the following regulations and industry standards:

- United States Coast Guard Requirements applicable to explosives storage (33 CFR parts 101–126).
- Bureau of Alcohol, Tobacco, Firearms, and Explosives Regulations for explosives in commerce (27 CFR Part 555).
- National Fire Protection Association (NFPA) 498, “Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives” (NFPA 498).
- Institute of Makers of Explosives Safety Library Publication No. 27, “Security in Manufacturing, Transportation, Storage and use of Commercial Explosives.”
- Surface Deployment and Distribution Command, “SDDC Freight Traffic Rules Publication NO. 1C (MFTRP NO. 1C)”.

*C. July 3, 2008 ANPRM and Public Meeting*

On July 3, 2008 PHMSA published a further ANPRM under this docket to re-open the comment period, and announce a public meeting (73 FR 38164) to provide an additional opportunity for interested persons to submit more focused comments on safety issues associated with the storage of explosives transported by highway and standards for establishing, approving, and maintaining safe havens for the temporary storage of explosives during motor vehicle transportation. As discussed above, there are currently no minimum or uniform criteria for Federal, state, or local governments to rely on for the approval of safe havens.

*D. July 27, 2010 NPRM*

On July 27, 2010, PHMSA published a NPRM in coordination with FMCSA to propose regulations to enhance existing attendance requirements for explosives stored during transportation by designating the National Fire Protection Association (NFPA) standard 498. In the NPRM PHMSA proposed that an existing standard—NFPA 498—be designated as a federally approved

standard for the construction and maintenance of safe havens used for unattended storage of 1.1, 1.2, and 1.3 explosives. As summarized in the NPRM, NFPA provides as follows:

1. A safe haven must be located in a secured area that is no closer than 300 ft (91.5m) to a bridge, tunnel, dwelling, building, or place where people work, congregate, or assemble. The perimeter of the safe haven must be cleared of weeds, underbrush, vegetation, or other combustible materials for a distance of 25 ft (7.6 m). The safe haven must be protected from unauthorized persons by warning signs, gates, and patrols. NFPA 498 sections 4.1.1, 4.1.2, 4.1.3, and 4.1.4.

2. When vehicles carrying Class 1 materials are parked in a safe haven, the entrance to the safe haven must be marked with this warning sign:

DANGER

NO SMOKING

NEVER FIGHT EXPLOSIVE FIRES

VEHICLES ON THIS SITE CONTAIN EXPLOSIVES

CALL \_\_\_\_\_

The sign must be weatherproof with reflective printing, and the letters must be at least 2 in. high. NFPA 498 sections 4.1.4.1 and 4.1.4.2.

3. Watch personnel must be made aware of the explosives, corresponding emergency response procedures, and NFPA 601. NFPA 498 sections 4.1.5.1.

4. A stand-by vehicle in good operating condition that is capable of moving the explosives trailers must be kept at the safe haven. NFPA 498 section 4.1.5.2.

5. Fire protection equipment must be provided—to include portable fire extinguishers and a dependable water supply source. NFPA 498 section 4.1.6.

6. Vehicles will be inspected before they enter the safe haven. Any risks (e.g., hot tires, hot wheel bearings, hot brakes, any accumulation of oil or grease, any defects in the electrical system, or any apparent physical damage to the vehicle that could cause or contribute to a fire) that are identified by the inspector must be corrected before the vehicle is permitted to enter the safe haven. NFPA 498 section 4.2.1.1, 4.2.1.2, and 4.2.1.3.

7. Trailers are to be positioned in the safe haven with spacing of not less than 5ft (1.5m) maintained in all directions between parked trailers. Additionally, trailers may not be parked in a manner that would require their movement to move another vehicle. Immediately upon correctly positioning a loaded

trailer the tractor must be disconnected and removed from the safe haven. NFPA 498 sections 4.2.2, 4.2.3, and 4.2.4.

8. Trailers in the safe haven must be maintained in the same condition as is required for highway transportation, including placarding. NFPA 498 section 4.2.5.

9. Where a self-propelled vehicle loaded with explosives is stored in a safe haven it must be parked at least 25 ft (7.6 m) from any other vehicles containing explosives, and must be in operable condition, properly placarded, and in a position and condition where it can be moved easily in case of necessity or emergency. NFPA 498 section 4.2.6.

10. No explosives may be transferred from one vehicle to another in a safe haven except in case of necessity or emergency. NFPA 498 section 4.2.7.

11. No vehicle transporting other hazardous materials may be stored in a safe haven unless the materials being transported are compatible with explosives. NFPA 498 section 4.2.8.

12. Except for minor repairs, no repair work involving cutting or welding, operation of the vehicle engine, or the electrical wiring may be performed on any vehicle parked in a safe haven that is carrying explosives. NFPA 498 sections 4.3.1.1 and 4.3.1.2.

13. Except for firearms carried by law enforcement and security personnel where specifically authorized by the authority having jurisdiction, smoking, matches, open flames, spark-producing devices, and firearms are not permitted inside or within 50 ft (15.3 m) of the safe haven, loading dock, or interchange lot. NFPA 498 section 4.3.2 and 4.3.3.

14. Electric lines must not be closer than the length of the lines between the poles, unless an effective means to prevent vehicles from contact with broken lines is employed. NFPA 498 section 4.3.4.

15. When any vehicle transporting explosives is stored in a safe haven, at least one trained person, 21 years of age or older, must be assigned to patrol the safe haven on a dedicated basis. Safe havens located on explosives manufacturing facilities or at motor vehicle terminals must employ other means of acceptable security such as existing plant or terminal protection systems or electronic surveillance devices. NFPA 498 section 4.4.1 and 4.4.2.

16. The safe haven operator must maintain an active safety training program in emergency response procedures for all employees working at the safe haven. NFPA 498 section 4.5.

17. Training in accordance with 49 CFR Part 172, Subpart H is required for

employees involved with the loading, shipping, or transportation of explosives. NFPA 498 section 4.5.2.

18. The safe haven operator must notify in writing the local law enforcement, fire department, and other emergency response agencies of the safe haven and the maximum quantity of Class 1 materials authorized for the safe haven. The operator must maintain copies of any approval documentation and notifications. NFPA 498 sections 4.6.1 and 4.6.2.

### III. Comments on July 27, 2010 NPRM

PHMSA received comments on the NPRM, from the following individuals and organizations:

- (1) Boyle Transportation (Boyle).
- (2) American Trucking Associations, Inc. (ATA).
- (3) Institute of Makers of Explosives (IME).
- (4) National Fire Protection Association (NFPA).
- (5) Paul Melander, an employee of FMCSA.

(6) Leigh Fabbri, an individual. IME, NFPA, and Mr. Melander recommend the incorporation by reference of the 2010 edition of NFPA 498 as opposed to the 2006 edition as included in this NPRM. The commenter is correct, since the July 27, 2010 publication of the NPRM, NFPA has made a new version of the NFPA 498 Standard available. PHMSA has reviewed the 2010 edition of the Standard for consistency with the 2006 edition, as applicable to safe havens. PHMSA did not identify any significant difference between the two editions. Therefore, PHMSA agrees with the commenter and is incorporating the 2010 edition of the NFPA 498 standard.

In its comments IME expresses support for PHMSA's proposal not to impose material quantity and/or interim storage time limits and states that existing rules for the transportation of hazardous materials without unnecessary delay, and commercial expectations for the timely delivery of shipments by consignees mitigate the need for additional arbitrary limitations. PHMSA agrees with this comment and is not incorporating material quantities and/or interim storage limits in this final rule.

IME also supports PHMSA's proposal not to impose in transit storage standards used by the US Department of Defense or the ATF for permanent storage of explosives. It states that no justification has been made to warrant the application of such standards to commercial shipments given existing FMCSA/PHMSA requirements and the new standards that will result from this

rulemaking. PHMSA agrees with the commenter and is not incorporating transit storage standards in this final rule.

ATA expresses concern about the level of participation by FMCSA in this rulemaking. It notes that the docket has been substantially narrowed in scope from what PHMSA initially proposed and that PHMSA proposed to use the scope established by FMCSA's attendance rules. ATA states it anticipated that PHMSA would invite FMCSA to join as an author of this proposal since "safe havens" are given a definition by the FMCSRs. ATA indicates that PHMSA's coordination with FMCSA is not sufficient to address related safe haven issues stemming from the FMCSRs and that these issues can only be addressed by amendment to the FMCSRs as well and the HMR. It recommends that 49 CFR 397.5 be amended: (1) To reference the edition of "safe haven" standards that will be incorporated by reference into the HMR; (2) to eliminate the requirement for written Federal approval; and (3) to accommodate other recommended changes to the safe haven attendance standard, such as replacing the requirement in 49 CFR 397.5(d)(1), that bailees have an "unobstructed field of view" of a vehicle during in-transit storage, with a requirement that allows vehicle monitoring by electronic surveillance as well as physical observation.

Boyle and Mr. Melander suggest that the FMCSR § 397.5 should be changed to reflect the updated definition of safe haven (see § 397.5(d)(3)). In each of these regards, FMCSA has advised PHMSA that changes to 49 CFR Part 397 may occur in a future rulemaking.

Boyle also suggests that although the term "safe haven" is defined in the standard, the full title "*Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives*" better encompasses the fact that a safe haven area may be co-located or contained within a truck terminal. Therefore, the commenter suggests modifying § 177.835(k) to read more precisely: "A facility that conforms to NFPA 498 "*Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosive*" (IBR, see § 171.7 of the subchapter) constitutes a Federally approved safe haven for the storage of vehicles containing Division 1.1, 1.2 or 1.3 materials." PHMSA disagrees with the commenter and the full title of NFPA 498 will not be added to the regulatory language. Section 171.7(a) provides the full title of the standard. This is consistent with current

practices for referencing IBR materials throughout the HMR.

IME recommends several other requirements for safe havens that are not currently specified in NFPA 498. These include requirements for operational plans, communications, and recordkeeping. The commenter adds that the PHMSA proposal does not address the merits of these additional operational and administrative conditions at all. PHMSA believes that adopting NFPA 498, which includes the incorporation of PHMSA training requirements, adequately address the concerns expressed by the commenter.

IME also suggests that PHMSA address theft and loss of explosives by referencing the theft/loss reporting standards of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in the HMR. The commenter indicates that this standard has a security benefit as well. In this regard, IME requests the presence of a robust risk assessment of the safe havens in the final rule. A risk assessment is a component of the security plan requirement in the current HMR. It questions whether security plan risk assessments are sufficient for safe havens, and suggests that risk assessments at safe havens should consider both safety and security risks to exposed populations. IME asks PHMSA not to propose a "safety" rule for safe haven operations without considering "security" needs at such sites. PHMSA has reviewed NFPA 498 and concluded that the standard provides adequate measures to ensure that unattended explosives are stored safely during transportation. NFPA 498 provides safety based requirements for the construction and maintenance of safe havens including standards for vehicle parking, control of ignition sources, security against trespassers, employee training, and notification of authority having jurisdiction. Section 4.5 of NFPA 498 requires operators of all safe havens to maintain an active safety training program that includes:

1. Emergency instructions;
2. Training for employees involved in the loading, shipping, or transportation of explosives that covers 49 CFR 172.700–172.704 (including security training); and
3. Familiarity with the Emergency Response Guidebook (ERG).

Separately, persons performing shipper or carrier functions are required to assess security risks in transportation in accordance with 49 CFR part 172, subpart I. This specifically includes measures to address en route security during transportation, which includes interim storage at a safe haven. At the same time, any decision to use a safe

haven as compared to other options (e.g., driver teams) is part of an individual carrier's assessment. It is the carrier's responsibility to fully assess the safety and security risks along the route. Separately, adding theft or loss reporting requirement is outside of the scope of this rulemaking. ATF requirements indicate that any person who has knowledge of the theft or loss of any explosive materials from their stock must report such theft or loss within 24 hours of discovery to ATF and to appropriate local authorities. (27 CFR 55.30, implementing 18 U.S.C. 842(k), requires that the report of theft or loss be made by telephone and in writing to ATF). The requirements for safe havens contained in NFPA 498 coupled with the carrier's assessment of safety and security risks along routes will enable carriers to make more uniform and risk-based decisions regarding the use of safe havens. Mr. Melander expresses concern with NFPA 498, Section 4.1.4.1 which requires signage warning of explosive danger. Specifically, the commenter suggests advertising to the public the location of explosives may present some security risks. The commenter questions whether, in accordance with NFPA 498, Section 4.2.1.1 and 4.2.1.2, the inspection for hot tires, hot wheel bearing, hot brakes will require infra-red devices and who will establish these inspection methods. Based on NFPA 498, Section 4.2.8 which states "No vehicle transporting other hazardous materials shall be parked in a safe haven unless the materials being transported are compatible with explosives" the commenter asks how will compatibility be determined (i.e., will it be based on § 177.848). Mr. Melander also asks for clarification on what authority will have jurisdiction in granting law enforcement permission to carry firearms in safe havens in accordance with Section 4.3.3.

Based on NFPA 498, Section 4.3.3 "the authority having jurisdiction" will decide which law enforcement and security personnel will be permitted to carry firearms within a safe haven. As stated above, PHMSA considers that NFPA 498 adequately balances safety and security. We also believe that incorporating NFPA 498 as written will promote a consistent understanding of the safe haven standards.

Boyle suggests that, if the intent of PHMSA is to improve the safety and security conditions under which vehicles with explosives Division 1.1, 1.2 and 1.3 are parked while in-transit then all facilities where these vehicles are parked for extended periods (e.g., more than 2 hours) should be mandated

to comply with NFPA 498. IME also raises concerns about preemption. It states that, by issuing these standards under the HMR, the preemptive effect of Federal hazardous materials transportation law is triggered. The commenter expresses disappointment by PHMSA's statement that the proposed new standard "does not preempt state [and local] requirements." IME recommends that PHMSA ask FMCSA to strike 397.5(d)(3) and replace the condition for state and local government approval with the national consensus standard for safe havens, NFPA 498. It states that absent such regulatory change, PHMSA perpetuates the ability of local interests to arbitrarily deny the location of safe havens and that the current regulatory default to state and local written approval is a primary reason why so few safe havens currently exist. It also states that the definition is consistent with Federal hazmat law, which clearly recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce.

Leigh Fabbri indicates that the HMR should provide the state or local community the ability to prohibit a safe haven in a location where appropriate safety cannot be provided, for example in high population areas and near unprotected buildings. The commenter suggests that local authorities that have knowledge of planned future development for an area should make the decision on the location of safe havens based on the conditions at the time the transportation company seeks the safe haven designation and existing community planning.

PHMSA sees no need to preempt or preclude State or local requirements for a safe haven, and considers that any specific non-Federal requirements regarding the "handling" of explosive materials at a safe haven can better be dealt with in a separate proceeding. In this final rule, PHMSA is adopting NFPA 498 as a Federally approved standard that may be used to construct, maintain, or evaluate a safe haven, but we are not mandating the use of the standard.

#### IV. Discussion of Requirements

In this final rule, PHMSA is incorporating NFPA 498 into the HMR. NFPA 498 is an accepted standard that imposes rigorous safety requirements on facilities at which explosives are temporarily stored during transportation. The standard is tailored to the risks posed by commercially transported explosives. In this final rule, any facility that conforms to the safe

haven requirements specified in NFPA 498 would be authorized for use as a safe haven. By specifically identifying a standard for safe havens PHMSA is enhancing the current level of safety. Note that nothing in this final rule is intended to preempt state and local zoning ordinances, building permits, land use restrictions, or other similar requirements that may apply to construction and operation of a safe haven.

In addition, we urge safe haven owners to utilize available explosive distancing tables or risk assessment tools when selecting locations for safe havens. Further, we encourage owners to share this information with state and local officials to support safe haven development. In all cases, owners must fully consider the risk to persons and the surrounding area from the explosives facility.

In accordance with the comments received and public meeting discussion this final rule adopts the following specific changes:

*Section 171.7.* We are amending paragraph (a)(3) by adding a reference to NFPA 498—Standard for Safe Havens and Interchange Lots for Vehicles.

*Section 177.835.* We are adding a new paragraph (k) to clearly indicate that Division 1.1, 1.2, and 1.3 explosives may be left unattended by the carrier in a safe haven that meets NFPA 498. This addition would provide a clear, consistent, and measurable Federal requirement for the development and operation of safe havens.

## V. Regulatory Analyses and Notices

### A. Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under authority of the Federal Hazardous Materials Transportation Law (49 U.S.C. 5101 *et seq.*), which authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in interstate, intrastate, and foreign commerce.

### B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the “most

cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” The incorporation of standards for safe havens into the HMR does not impose significant burden on the explosive industry. The adoption of existing standards applicable to the safe storage of Division 1.1, 1.2, and 1.3 explosives in safe havens provides a clear and specific mechanism for the construction and maintenance of safe havens. This change provides a Federally approved standard for safe havens in place of the existing arbitrary requirement that allows for state, local, or Federal approval of safe havens.

As described in the ANPRM comments and during the August 7, 2008 public meeting, the explosives industry indicates that it does not generally rely on safe havens for the attendance of explosives in transportation, but rather on team drivers to move explosives shipments. In most instances team drivers are a safe, efficient, and cost effective means of transporting explosives. These changes will provide explosives carriers with an optional means of compliance; therefore, any increased compliance costs associated with the proposals in this final rule would be incurred voluntarily by the explosives industry. Ultimately, we expect each company to make reasonable decisions based on its own business operations and future goals. Thus, costs incurred if a company elects to rely on a safe haven to fulfill attendance requirements would be balanced by the safety and security benefits accruing from the decision.

### C. Executive Order 13132

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. State representatives participating in the public meeting expressed support for the proposed incorporation of safe haven standards into the HMR. The final rule provides an option for safe havens to be developed and operated based on existing safety standards. It does not preempt state requirements (e.g., state and local zoning ordinances, building permits, land use restrictions, or other similar requirements). Safe haven owners must continue to follow

state and local requirements as applicable.

### D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination With Indian Tribal Governments”). Because this final rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

### E. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. The final rule will not impose increased compliance costs on the regulated industry. Rather, the final rule incorporates current standards for the construction and maintenance of safe havens. Overall, this final rule should reduce the compliance burden on the regulated industry without compromising transportation safety. Therefore, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

### F. Executive Order 13272 and DOT Regulatory Policies and Procedures

This notice has been developed in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

### G. Paperwork Reduction Act

There are no new information collection requirements in this proposed rule.

### H. Regulation Identifier Number (RIN)

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

*I. Unfunded Mandates Reform Act of 1995*

This final rule does not impose unfunded mandates, under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$141.3 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

*J. Privacy Act*

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://www.dot.gov>.

*K. National Environmental Policy Act*

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major Federal actions and that they prepare a detailed statement on actions significantly affecting the quality of the human environment. We requested comments on the potential environmental impacts of regulations

applicable to the storage of explosives transported in commerce. We asked for comments on specific safety and security measures that would provide greater benefit to the human environment, or on alternative actions the agency could take that would provide beneficial impacts. No commenters addressed the potential environmental impacts of the proposals in the ANPRM or NPRM.

Safe havens promote the safe storage of hazardous materials in transportation. Safe havens ensure that explosives are stored in a manner that protects them from release into the environment. This final rule does not prohibit or promote the development of safe havens; rather, it ensures that existing and future safe havens meet minimum design and safety criteria. The impact on the environment if any would be a reduction in the environmental risks associated with the unattended storage of explosives in transportation. As a result, we have determined that there are no significant environmental impacts associated with this rule.

**List of Subjects**

*49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

*49 CFR Part 177*

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

In consideration of the foregoing, 49 CFR Chapter I is amended as follows:

**PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS**

■ 1. The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub L. 104–134 section 31001.

■ 2. In § 171.7, in the paragraph (a)(3) table, under the entry “National Fire Protection Association,” the organization’s mailing address is revised and the entry “NFPA 498—Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives, 2010 Edition” is added.

The revision and addition read as follows:

**§ 171.7 Reference material.**

(a) \* \* \*

(3) *Table of material incorporated by reference.* \* \* \*

Source and name of material	49 CFR reference
* * * * *	*
National Fire Protection Association, 1 Batterymarch Park, Quincy, MA, 1–617–770–3000, <a href="http://www.nfpa.org">www.nfpa.org</a> .	*
NFPA 498—Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives, 2010 Edition .....	177.835
* * * * *	*

**PART 177—CARRIAGE BY PUBLIC HIGHWAY**

■ 3. The authority citation for part 177 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 4. In § 177.835 a new paragraph (k) is added to read as follows:

**§ 177.835 Class 1 materials.**

\* \* \* \* \*

(k) *Attendance of Class 1 (explosive) materials.* Division 1.1, 1.2, or 1.3 materials that are stored during transportation in commerce must be attended and afforded surveillance in accordance with 49 CFR 397.5. A safe haven that conforms to NFPA 498 (IBR,

see § 171.7 of the subchapter) constitutes a federally approved safe haven for the unattended storage of vehicles containing Division 1.1, 1.2, or 1.3 materials.

Issued in Washington, DC, on May 27, 2011, under authority delegated in 49 CFR part 106.

**Cynthia L. Quarterman,**

*Administrator.*

[FR Doc. 2011–13837 Filed 6–6–11; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No. 110303179–1290–02]

RIN 0648–XA163

**Fisheries of the Northeastern United States; 2011 Specifications for the Spiny Dogfish Fishery**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.