

§ 171.8 Definitions and abbreviations.

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Special permit means a document issued by the Associate Administrator, or other designated Department official, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 *et seq.* (e.g., Federal Motor Carrier Safety routing requirements).

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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 the Storage of Explosives During Transportation

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: PHMSA, in coordination with the Federal Motor Carrier Safety Administration (FMCSA), is proposing to enhance existing attendance requirements for explosives stored during transportation by designating the

National Fire Protection Association (NFPA) standard 498 as the Federally approved standard for the construction and maintenance of safe havens used for unattended storage of Division 1.1, 1.2, and 1.3 explosives.

DATES: Comments must be received by September 27, 2010.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2005–22987 by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this rule. Note that all comments received will be posted without change, including any personal information provided. Please *see* the discussion of the Privacy Act below.

Docket: For access to the docket to read background documents and comments received, go to <http://www.regulations.gov> at any time or to Room W12–140, Ground Level, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ben Supko, Office of Hazardous Materials Standards, (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 divided into 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.
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 APA Standard 87-1 (49 CFR 173.56). Each approval granted by the Associate Administrator contains packaging and other transportation provisions 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 develop and implement security plans (49 CFR 172.800(b)). 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 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.

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 is accessible through the Federal eRulemaking Portal (<http://www.regulations.gov>), at docket number PHMSA-2005-22987).

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" (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.

III. Comments on the July 3, 2008 ANPRM

A. Public Meeting

Representatives of the following organizations and government agencies attended the public meeting held on August 7, 2008 (a transcript of the public meeting is accessible through the Federal eRulemaking Portal (<http://www.regulations.gov>):

National Volunteer Fire Council,
Commercial Vehicle Safety Alliance (CVSA),
BNA Daily Environmental Report,
Baker Hughes Corporation,
Sporting Arms and Ammunition Manufacturers Association,
Institute of Makers of Explosives (IME),
Orica, USA,
Science Applications International Corporation,
Automotive Occupant Restraint Council (Autoliv Inc.),
Delphi Corporation,
National Fire Protection Association,
Bureau of Alcohol, Tobacco, Firearms & Explosives, Department of Justice (ATF),
Explosives Safety Board, Department of Defense (DDESB),
Office of Packaging and Transportation Safety, Department of Energy,
Surface Deployment and Distribution Command.

Under FMCSA regulations a motor vehicle which contains a Division 1.1, 1.2, or 1.3 material must be attended at all times by the driver or a qualified

representative of the motor carrier that operates it or be parked in a safe haven. 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, or 1.3 explosive materials. Except for the fact that States select and approve locations where safe havens can be placed, there are no specific safety standards provided in the FMCSRs for safe havens. Participants at the public meeting generally noted that safe havens are not generally available for use by commercial carriers of explosives and that the State/local government approval process can be difficult, and supported adoption of an industry consensus standard, such as NFPA 498.

One solution discussed in the public meeting is the incorporation by reference of an existing, widely used, and accepted standard—such as NFPA 498. According to public meeting participants, NFPA 498 is straightforward, designed for highway transportation, and intended to enhance FMCSA standards. The key focus of NFPA 498 is to provide safety guidelines, such as vehicle inspection, five feet space between trailers, notification of local emergency response of the type and quantity of materials authorized, and no cutting or welding repairs, firearms, or smoking allowed. In addition, NFPA 498 provides some very general security requirements such as a requirement for a security guard or surveillance equipment to protect a safe haven from trespassers.

During the meeting, CVSA noted that its 1990 report entitled “Recommended National Criteria for Establishment and Operation of Safe Havens” (a copy is in the docket) was the most recent effort to catalogue safe havens in the United States. In a brief summary of that report, CVSA stated that the approval process for a safe haven varied greatly between States and even towns of a single State. Further, CVSA indicated that the system in place at the time of the report was susceptible to arbitrary and opaque decisions concerning the designation of safe havens, with little or no provision for public participation or comment.

CVSA suggested that relying on State or local governments to designate and operate safe havens has not been a successful strategy. Instead, private entities use their own facilities to safely store explosives during transportation, but do not make those facilities

generally available because of liability concerns. CVSA stated that DOD operates safe havens for military shipments, but that these facilities are not available to commercial carriers.

IME pointed out that the sensitivity of DOD munitions dictates stringent storage standards, but the same standards would likely be excessive for commercial products. IME also suggested that because the explosives industry has implemented a variety of measures to address storage and attendance issues, such as dual drivers, a nationwide network of safe havens is not necessary. Rather, there appears to be a need for safe havens near port locations or transportation end points, such as Seattle, Washington; Savannah, Georgia; Louisville, Kentucky; anywhere in West Virginia; and Morgan, Louisiana.

ATF emphasized that the location of a safe haven is critical to ensure both safety and security, noting that a facility should be removed to the extent possible from populated areas and suggesting that minimum distances should be considered. In response, IME recommended a risk analysis approach for locating safe havens, using tools such as the Institute of Makers of Explosives Safety Analysis for Risk (IMESAFR) software developed by IME. According to IME, IMESAFR is a probabilistic risk assessment tool used to calculate risk to personnel from explosives facilities. As detailed by IME, the system provides a sophisticated methodology for determining appropriate safety measures, because it assesses the unique characteristics of a particular site. DDESB suggested the use of a risk assessment approach that considers ATF quantity distances. IME discussed the differences between transportation storage and permanent storage and suggested that while the ATF requirements for the permanent storage of explosives have proven to be effective in ensuring the protection of the general public, those requirements may not be necessary or practical for temporary storage facilities.

B. Written Comments

We received written comments in response to the July 3, 2008 ANPRM from the following five entities (available for review through the Federal eRulemaking Portal (<http://www.regulations.gov>):

Commenter	Document No.
R & R Trucking, Inc. (R & R Trucking)	PHMSA-2005-22987-0027

Commenter	Document No.
Surface Deployment and Distribution Command, (SDDC).	PHMSA-2005-22987-0028
Sporting Arms and Ammunition Manufacturers Institute, Inc (SAAMI).	PHMSA-2005-22987-0030
Boyle Transportation	PHMSA-2005-22987-0031
Institute of Makers of Explosives (IME)	PHMSA-2005-22987-0032

Generally, the comments indicate that a lack of consistent regulations for the storage of explosives creates a safety concern. However, the comments do not support a prescriptive solution that could limit transportation options or create an undue burden on a particular mode of transportation. Commenters suggest that an effective approach would be one that promotes flexibility and provides several storage options for explosives while they are in transportation.

As indicated above, the intention of the July 3, 2008 ANPRM was to gather information from commenters to help us make a determination regarding further regulatory action. The ANPRM posed several questions and solicited commenter response. Below we paraphrase the 18 questions asked in the ANPRM, provide a summary of the comments applicable to the safe transportation of explosives, and provide our response.

(1) Are safe havens currently available? How many? Where are they located?

Boyle Transportation indicates that there are no commercial safe havens that are available to any motor carrier or transporter of explosives. Boyle Transportation notes that the Department of Defense (DOD) provides secure holding areas at military facilities (some sites require attendance by drivers while parked) but only for motor carriers that are transporting DOD explosives shipments, and that a few motor carriers and explosives manufacturers have facilities for temporary parking of trailers loaded with explosives.

IME states that it has only anecdotal information on the location and operational state of third-party safe havens. IME indicates that given the absence of standards for these sites, this information is likely not reliable, with the exception of sites meeting DOD standards.

R&R Trucking states that public safe havens are not currently available. The safe havens utilized by R&R Trucking are private facilities owned and operated by R&R Trucking.

Sporting Arms and Ammunition Manufacturers Institute, Inc. (SAAMI) indicates that safe havens generally do

not exist and references the report CVSA prepared as supporting documentation.

(2) Would a network of safe havens provide a safety benefit?

Boyle Transportation indicates that a network of safe havens would provide a safety benefit. IME suggests safe havens provide a benefit if they are operated in accordance with risk-based performance standards and located at cargo delivery chokepoints, such as ports. R&R Trucking states that safe havens would provide a safety benefit for emergency situations and hours-of-service relief.

SAAMI agrees that a network of safe havens would provide a safety benefit, but notes that there are other options that would obviate the need for such network, including short distance hauling or the use of dual drivers. SAAMI states that safe havens are intended as one alternative to satisfy the applicable attendance requirements for Division 1.1, 1.2, and 1.3 explosives, but suggests that establishment of an extensive safe havens network for routine use by commercial motor carriers likely would not provide a sufficient safety benefit to offset associated costs.

(3) What is the value of a rest stop for the vehicle and the driver?

Boyle Transportation states that safe havens are necessary since most shippers and consignees do not operate 24 hours a day, seven days a week and suggests that without a safe haven either en route or at the destination for arrival during non-working hours, even team drivers would eventually run out of available hours of service when complying with 49 CFR 397.5.

IME and R&R Trucking note rest stops enable a driver to comply with hours-of-service requirements and to address fuel, food, rest, and other personal needs. According to IME, the main benefit of a safe haven, given the safety and security preference for team drivers of Division 1.1, 1.2, and 1.3 materials to meet attendance requirements for long-haul (greater than hours-of-service) trips, is to serve as a buffer between shipping time, transit time and delivery time. IME suggests that a safe haven can be used to stage vehicles prior to

delivery, thereby avoiding situations where vehicles must remain on highways or parked at various locations with unknown risk and response capabilities. SAAMI suggests that existing attendance requirements should be modified to allow short absences, *e.g.* for fueling, eating or using a restroom.

(4) Would companies use safe havens or continue using driver teams? Does one promote safety more than the other?

Boyle Transportation notes that safe havens are not a replacement for team drivers since team drivers are required to provide constant attendance and surveillance and suggests that the use of team drivers promotes safety since it is impractical to expect that a single driver would always be able to reach a safe haven without having to stop en route and temporarily leave the motor vehicle unattended. IME agrees that companies will continue to prefer team drivers to meet attendance requirements for Division 1.1, 1.2, and 1.3 materials for trips greater than one driver's hours-of-service period because teams provide faster delivery, better use of equipment, less fuel consumption and enhanced security while the vehicle is in motion or temporarily parked at a rest stop. Additionally, driver teams are healthier and less likely to have accidents than driving alone. IME suggests that there is a need for incidental storage locations as a buffer between shipping time, transit time, and delivery time.

R&R Trucking states that generally motor carriers use a single driver for local deliveries without a required layover; for longer deliveries, whether a single driver or a team driver is used. R&R Trucking suggests that the value of a safe haven with single or team drivers is based on its location and availability and further that providing relief from current attendance requirements would promote safety. SAAMI agrees that motor carriers will continue to utilize team drivers and short-haul deliveries to comply with hours-of-service and attendance requirements. In addition, SAAMI contends that there are significant liability issues associated with the use of safe havens open to all operators; SAAMI does not consider the concept viable.

(5) Would the adoption of standards such as NFPA 498 promote the development of safe havens?

Boyle Transportation answers “possibly.” However, it indicates that DOD accounts for a majority of explosives shipments and suggests that PHMSA should work with DOD and the Transportation Security Administration to establish consistent transport rules for explosives and criteria for safe havens.

IME indicates that to enable motor carriers to meet the attendance requirement of 49 CFR 397.5, it supports inclusion in the HMR of performance standards based on those contained in Chapter 4 of NFPA 498 as a replacement for the current requirement for a location approved by State, local, or Federal authorities. IME indicates that it supports providing notice to States and localities that explosives will temporarily be stored at a safe haven in their jurisdiction and requiring a safe haven to conform with local zoning ordinances, provided such requirements would not act as *de facto* bans on explosives storage in a given jurisdiction. IME suggests that PHMSA-adopted HMR standards that are backed by the agency’s preemption authority in 49 U.S.C. 5125 would inject a degree of certainty into the process and could encourage investment in such properties. R&R Trucking agrees that adoption of a DOT standard could encourage some States to designate safe havens. Similarly, SAAMI indicates that safe havens might expand to a limited degree, *e.g.*, near high volume areas of mining or ports, if the requirements for authorization, operation and site selection were standardized and suggests that performance standards could be added to PHMSA regulations to aid those interested in establishing a safe haven.

(6) Do facilities that are being used as safe havens meet the requirements of NFPA 498?

Boyle Transportation, R&R Trucking, and SAAMI all state that some safe havens may meet the NFPA 498 standards, while others conform with DOD standards, or local standards or requirements. IME suggests that DOD-approved safe havens exceed the standard provided in NFPA 498.

(7) Would you expect companies to convert existing facilities that meet NFPA 498 into safe havens?

Boyle Transportation answered “yes,” if PHMSA issues regulations that incorporate NFPA 498. IME and R&R Trucking suggest that the decision to

convert existing facilities to meet NFPA 498 requirements would be driven by market considerations.

(8) How can PHMSA improve on the safety measures provided in NFPA 498? Should a regulation for safe havens include aggregation limits, time limits, *etc.*?

R&R Trucking states that the NFPA 498 standard is satisfactory, but that a carrier or safe haven operator should be permitted to improve on these standards as they see fit. SAAMI suggests that a safe haven regulation should include both time and aggregation limits with some flexibility for the facility to accept vehicles that would exceed the aggregation limits if refusing entry would increase a safety risk.

IME opposes per vehicle aggregation limits, suggesting that such limits would have the effect of putting more vehicles on the road, adding to congestion, wasting fuel, and increasing the opportunity for accident or mischief. According to IME, the ability to fully load a truck means fewer trucks, fewer trips, fewer miles traveled, and less exposure to accidents or incidents. Further, IME suggests that any site aggregation and/or time limits should be flexible in terms of system-wide impact—turning vehicles away because of the aggregation limits, when they need a place to stop, or pushing vehicles out when time limits expire when they cannot make a delivery will just put vehicles on the road, adding more miles, more exposure, more pressure to remove placards, or other undesirable outcomes. IME concludes that if time/aggregation limits are established and exceeded, local emergency response authorities should be notified.

(9) If we incorporate by reference NFPA 498 into the HMR, should we expect a drop in the number of carriers similar to what occurred when DOD implemented SDDS MFTRP No. 1C?

The commenters generally do not expect that the number of carriers transporting explosives would drop if PHMSA adopted a safe haven standard based on NFPA 498 because carriers primarily rely on dual drivers or short hauls to meet attendance requirements.

IME indicates that the only way PHMSA would see a drop in carriers would be if a carrier relied on a “safe haven” as the only means to meet attendance requirements for the transportation of Division 1.1, 1.2, and 1.3 materials and the safe haven was eliminated because the site did not meet the new requirement. IME suggests that the drop in carriers that occurred with the implementation of SDDS MFTRP

No. 1C resulted because the DOD standard is more than a site standard; it requires operational controls for the vehicles and drivers that carriers were unwilling or (unable) to meet. According to IME, adopting NFPA performance-standards would only affect the condition of the site and could result in fewer available safe haven sites rather than fewer carriers.

(10) Would it be more appropriate to align safe havens with the Surface Deployment and Distribution Command (SDDC) MFTRP No. 1C than a consensus standard such as NFPA 498?

The commenters generally agree that the NFPA 498 standard is more appropriate for commercial safe havens and note that it is the standard of choice for fire marshals and fire departments throughout the United States. The commenters suggest that the DOD standard is more stringent than required for commercial shipments and that it would be cost prohibitive to operate a commercial safe haven under the MFTRP. IME suggests that in times of heightened security, DOD should open its military sites to commercial shipments looking for a secure harbor.

(11) What is the impact of eliminating the requirement for safe havens to be approved by Federal, State, or local government officials?

IME indicates that this requirement is arbitrary and subjective and recommends that it should be replaced (not eliminated) with performance standards based on Chapter 4 of NFPA 498. R&R Trucking indicates that it would support a well written regulation that would allow carriers to make a sound business decision to operate safe havens; however, R&R asserts that State and local laws should still prevail on safe haven approval.

(12) Would State and local governments allow the development of safe havens without prior approval?

Commenters are uncertain whether State and local governments would allow the designation of safe havens with prior approval. SAAMI suggests that even without a formal approval process, State and local requirements related to zoning, building permits, and the like would still apply. IME recommends a number of measures to provide State and local governments a role in the process that would attract investment in safe havens while ensuring that State or local requirements do not result in *de facto* bans on the storage of explosives within a given jurisdiction.

(13) Are zoning restrictions the primary factor restricting the development of safe havens?

All of the commenters agree that zoning restrictions are not insurmountable. Boyle Transportation indicates the initial investment and on-going operating expenses are the primary impediments to safe havens. IME contends that local officials take a "NIMBY" approach to this kind of investment and simply do not approve sites. IME also suggests that another factor inhibiting safe havens investment is the infrequent use of sites as opposed to other uses for such property. SAAMI notes that the primary factors are need and liability, and that an extensive safe haven network is not generally needed. SAAMI states that when there is a local need, it may be related to the operations of a particular company or group of companies in a high volume area. According to SAAMI, a company or group that wishes to establish a safe haven can calculate the cost versus benefit, estimate the risk of the operations for which they are responsible, and work with local governments to obtain building permits in an appropriate location.

(14) What emergency response needs must be taken into consideration when selecting a location for a safe haven and how should they be addressed?

Commenters generally agree that emergency response needs must be considered as part of the process for designating a safe haven. R & R Trucking notes that emergency response needs would vary depending on the location of the safe haven and the type and quantity of explosives authorized at the site. Access to the site, location of local fire department, capability of the local fire department, area to be evacuated in case of a fire, and the effect on the community (including traffic and businesses) in case of a fire or emergency should be considered.

(15) Are areas that house carrier facilities (close proximity to transportation arteries, industrial parks, etc.) sufficient locations for safe havens in terms of emergency response capabilities?

Boyle Transportation, R & R Trucking, and SAAMI all indicate that it would depend on several factors, including: Location of carrier facilities; quantity of explosives involved; and separation distances. According to the commenters each situation would need to be evaluated.

IME indicates that carrier facilities would be sufficient locations. IME

indicates also that performance standards based on Chapter 4 of NFPA 498 would minimize the possibility that fire (accidental or intentional) would propagate from one vehicle to another on the site. According to IME, fire is the biggest safety concern for in-transit explosives.

(16) What costs apply to the operation of safe havens?

Commenters generally agree that the costs would include those related to the acquisition of land for the facility, building permits and approvals, construction, and insurance. In addition, commenters note that operating costs would include salaries and training for personnel, taxes and fees, communication, fire suppression materials, office supplies, account auditing, buffer zone maintenance, and overhead (maintenance, electricity, water/sewer, *etc.*)

(17) Would safe haven operators charge a fee to carriers for allowing them to use their safe haven?

Boyle Transportation indicates that the primary issue would be the liability associated with the explosives shipments and suggests that third-party operators would require liability limitations from carriers. IME recommends that a safe haven regulation not include restrictions or limits on fees that would be charged and suggests that the market should dictate the amount of any such fees. R & R Trucking expresses concern that the costs could be prohibitive. SAAMI notes that operators of safe havens likely would be private rather than government entities and would operate a safe haven to support their own operations and not for industry at large due to liability issues.

(18) Is the concept of temporary parking (less than 4 hours) at truck stops and carrier terminals a sufficient alternative to safe havens?

Boyle Transportation indicates that temporary parking at truck stops and carrier terminals is a necessity. In most instances, a long-distance truckload shipment will need to stop at truck stops along the route (for example, the average transportation distance for DOD explosives shipments is nearly 1,000 miles). Carrier terminals are preferable to truck stops since hazardous materials workers at the terminals are trained and familiar with the hazards of the material being transported; also, fueling, change of drivers, and maintenance can be prioritized and accomplished in much less time than if these activities were to be completed at truck stops. Boyle

Transportation recommends that carriers that transport explosives should be required to operate at least one safe haven so that there is a safe location for shipments that may exceed temporary parking limits or are frustrated due to the inability of the consignee to receive the freight.

IME indicates that safe havens are an alternative to driver attendance. Explosives vehicles parked temporarily at a truck stop should be attended in accordance with current requirements, and drivers should notify the truck stop operator that the truck is present. IME further states that temporary parking should be permitted only for reasons of food, fuel, and other personal needs. If a truck stop is used as a staging facility, IME recommends that it should meet performance requirements based on those in Chapter 4 of NFPA 498.

SAAMI indicates that in the absence of an extensive safe haven network, drivers must be permitted to use truck stops for rest, fueling, and to meet personal needs. SAAMI recommends that the current attendance requirements should be modified to allow drivers time at a rest stop for such purposes.

General Comments

In addition to answering the specific questions raised in the ANPRM, IME provided additional comments. IME suggests that given the intermodal nature of transportation and distances traveled by some shipments, a system of safe havens, especially where explosives are staged pending intermodal transfers, would provide a useful alternative to other forms of attendance. IME indicates that it does not believe that the current requirement for authorizing safe havens—simply obtaining the approval of a local, State, or Federal authority—is sufficient to ensure that safety and security precautions are in place or to ensure that the safe haven storage option is not arbitrarily denied.

IME expresses concern with existing requirements applicable to explosives storage during transportation:

1. State or local approval of safe havens can, on the one hand, lead to approval of sites without adequate operational, administrative, or engineering controls, and on the other hand, act as a ban when practically no risk exists. PHMSA should revise 49 CFR 397.5(d)(3), to include performance standards for safe havens. Requirements based on Chapter 4 of NFPA 498—Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives, edition 2006, National Fire Protection Association

would provide an adequate performance standard for safe havens.

2. There currently is no mechanism under the HMR for reporting thefts or losses. The HMR should either incorporate the ATF requirement on how to report thefts and losses at 27 CFR 555.30(d), or adopt its own theft/loss reporting requirement.

3. The requirement to have an "unobstructed field of view" of the vehicle being attended, set forth in § 397.5(b)(3), should be revised to allow for either in-person or electronic monitoring at safe havens.

IME indicates the risk assessment for a safe haven should take into consideration the probability of an incident on-site (both accidental and intentional), the consequences of such an incident, and the exposure of personnel. There are many acceptable ways in which the risk assessment could be conducted, but IME encourages PHMSA to recognize the software model IMESA FR (Institute of Makers of Explosives Safety Analysis for Risk; IMESA FR was developed by IME in conjunction with APT Research, Inc.) is a probabilistic risk assessment tool used to calculate risk to personnel from explosives facilities, as one, not the only, acceptable means of arriving at a quantitative assessment of the risk. An advantage of quantitative assessment of risk is that it can easily be factored with other risks, options, and alternatives during a system-wide assessment of risk. IME believes that PHMSA should ensure that any information generated, or records maintained, from risk or vulnerability assessments performed in order to meet performance-based standards at safe havens, be protected as security sensitive information pursuant to 49 CFR 1520.7(r). (See 49 CFR 15.11).

IV. Discussion of Proposals

PHMSA continues to believe that the lack of Federal standards for safe havens poses a safety concern. Commenters to this rulemaking generally support this view and recommend incorporation of NFPA 498 into the HMR. A summary NFPA 498 is provided below:

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 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 5 ft (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.

In this NPRM, PHMSA proposes to incorporate 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. As proposed in this NPRM, 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 NPRM 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.

V. Summary of Changes by Section

In accordance with the comments received and public meeting discussion this NPRM proposes the following changes by section:

Part 171

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

Part 177

Section 177.835. We propose to add 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.

VI. 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 and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the

Office of Management and Budget (OMB). This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

Executive Order 12866 requires 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 would provide 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.

The industry, as described in the ANPRM comments and during an August 7, 2008 public meeting, indicates that it does not rely on safe havens for the attendance of explosives in transportation. Generally, industry relies on team drivers to move explosives shipments. In most instances team drivers are a safe, efficient, and cost effective means of transporting explosives. The proposed changes would provide explosives carriers with an optional means of compliance; therefore, any increased compliance costs associated with the proposals in this NPRM 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. We invited State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific requirements for carriers that transport and store explosives in commerce may

have on State or local safety or environmental protection programs. State representatives participating in the public meeting expressed support for the proposed incorporation of safe haven standards into the HMR. The proposed 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 proposed 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 proposed 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 proposed rule will not impose increased compliance costs on the regulated industry. Rather, the proposed rule incorporates current standards for the construction and maintenance of safe havens. Overall, this proposed 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 proposed 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.

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 proposed 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 preliminarily determined that there are no significant environmental impacts associated with this proposed rule. We request comment on this determination.

List of Subjects

49 CFR Part 177

Exports, Hazardous materials transportation, Hazardous waste,

Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 177

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

In consideration of the foregoing, 49 CFR Chapters I and III are proposed to be 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, 2006 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, www.nfpa.org .						
*	*	*	*	*	*	*
NFPA 498—Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives, 2006 Edition						177.835
*	*	*	*	*	*	*

PART 177—CARRIAGE BY PUBLIC HIGHWAY

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

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

4. In Section 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. An area 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 July 22, 2010 under authority delegated in 49 CFR Part 106.

R. Ryan Posten,

Senior Director for Hazardous Materials Safety.

[FR Doc. 2010–18368 Filed 7–26–10; 8:45 am]

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