responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 21, 2004.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1254 is added to subpart D to read as follows:

§ 180.1254 Aspergillus flavus NRRL 21882 on peanut; exemption from requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of *Aspergillus flavus* NRRL 21882 on peanut and its food/feed commodities.

[FR Doc. 04–14609 Filed 6–29–04; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, and 390

[Docket No. FMCSA–97–2180]

RIN 2126–AA07

Federal Motor Carrier Safety Regulations: Hazardous Materials Safety Permits

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

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration is establishing a national safety permit program for motor carriers that transport certain hazardous materials in interstate or intrastate commerce. This final rule implements provisions of Federal hazardous materials transportation law. The rule will promote safe and secure transportation of the designated hazardous materials and thereby improve motor carrier safety.

DATES: *Effective:* This rule is effective: July 30, 2004. *Compliance:* Compliance with this rule is required beginning January 1, 2005. The publication incorporated by reference in this final rule is approved by the Director of the Federal Register as of July 30, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Johnsen, (202) 366–4111, Hazardous Materials Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

List of Topics

I. Background

Federal hazardous materials transportation law, 49 U.S.C. 5101 *et seq.*, was enacted ''to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce.'' The Federal Motor Carrier Safety Administration (FMCSA), formerly part of the Federal Highway Administration (FHWA), is responsible for implementing certain provisions of this law, including Sec. 5105(e), Inspections of motor vehicles transporting certain material; Sec. 5109, Motor carrier safety permits; and Sec. 5119, Uniform forms and procedures.

Section 5109 requires the U.S. Department of Transportation (DOT) to issue regulations for safety permits for transporting certain hazardous materials. A motor carrier must hold a safety permit issued by DOT and keep a copy of the permit or other proof of its existence in the vehicle, in order to transport certain hazardous materials in commerce or cause such materials to be transported in commerce by motor vehicle (49 U.S.C. 5109(a)).

FHWA published three notices in the 1990s to enact a permitting rule. FHWA's notice of proposed rulemaking (NPRM) of June 17, 1993 (58 FR 33418) was followed by notices in 1996 (61 FR 36016, Jul. 9, 1996) and 1998 (63 FR 15362, Mar. 31, 1998) addressing the role of States in implementing a unified permitting program State by State. FHWA's June 1993 NPRM formed the basis of a supplemental notice of proposed rulemaking (SNPRM) published by FMCSA on August 19, 2003 (68 FR 49737), with a correction notice published September 11, 2003 (68 FR 53535). The proposals in the SNPRM were based on statutory requirements and on public comments to the previous **Federal Register** notices. For a complete discussion of the prior proceedings, including the notices published by FMCSA and FHWA, please see the background discussion in the SNPRM.

The major proposals in the SNPRM are described below.

Hazardous Materials for Which a Safety Permit Would Be Required

FMCSA proposed that a motor carrier would be required to hold a safety permit in order to transport in commerce any of the four hazardous materials specified in 49 U.S.C. 5109(b), in the same threshold quantities for which the carrier must submit a registration statement and pay a registration fee under 49 U.S.C. 5108(a)(1)(A)–(D). The cost-benefit analysis for the rulemaking considered two other options: (a) an expanded list of materials that are sometimes subject to additional regulations, such as infectious substances and Hazard Zone B toxics, and (b) all materials subject to

the Research and Special Programs Administration (RSPA) security requirements.

Intrastate and Foreign Motor Carriers

In the proposed rule, an intrastate carrier would be required to apply for a USDOT number and undergo a compliance review. The safety rating issued by FMCSA to an intrastate carrier would be used only for purposes of issuing a safety permit. Likewise, an intrastate carrier would not be required to comply with any Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR parts 390–399) to which it is not already subject.

The definition of ''interstate commerce'' includes foreign commerce. Therefore, Canada- and Mexico-domiciled motor carriers transporting hazardous materials (HM) required to be permitted in the United States would be subject to the requirements proposed in the SNPRM.

Application Procedures

FMCSA proposed to create a new form (Form MCS–150B) for a motor carrier to provide the limited additional information required for issuance of a safety permit. FMCSA proposed to phase in the safety permit program beginning January 1, 2005. The actual compliance date would depend on when the carrier is required to complete the MCS–150 under § 390.19(a). FMCSA did not propose to charge a fee for applying for a safety permit, but stated that it may consider the need to assess an application fee in the future, especially if the safety permit program is expanded to apply to motor carriers of additional types and quantities of hazardous materials.

Conditions for Issuing a Safety Permit

FMCSA proposed in the SNPRM to require that a motor carrier have a ''Satisfactory'' safety rating in order to obtain a safety permit. Appendix B to 49 CFR part 385 contains an explanation of the safety rating process including a list of violations that FMCSA considers ''acute'' (where noncompliance is so severe as to require immediate compliance) and ''critical'' (where noncompliance relates to management and/or operational controls). The SNPRM also proposed additions to the list of acute and critical violations in 49 CFR part 385, appendix B, paragraph VII.

FMCSA proposed two further conditions for issuing a safety permit: (1) the motor carrier must show that it has a satisfactory security program, and (2) the motor carrier must be (and remain) registered with RSPA. A satisfactory security program would apply to motor carriers transporting in commerce hazardous materials listed in the SNPRM.

Finally, FMCSA also proposed issuing a temporary safety permit, valid for up to 270 days, to a motor carrier that does not have a safety rating but certifies it has a satisfactory security program and is operating in full compliance with the Hazardous Materials Regulations (HMRs; 49 CFR parts 171–180); the FMCSRs; comparable State regulations, if applicable; and minimum financial responsibility requirements in 49 CFR part 387 or in State regulations, as applicable. However, FMCSA would not issue a temporary safety permit to a motor carrier that, as indicated in the Motor Carrier Management Information System (MCMIS), has a crash rate in the top 30 percent of the national average; has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average; or is listed on FMCSA's SafeStat A, B, C, or D lists.

Permit Number and Evidence in the Vehicle

FMCSA proposed that the carrier be required to maintain in the vehicle transporting a hazardous material a copy of the safety permit or another document (including a shipping paper) showing the permit number. The carrier's safety permit number would not be required to appear on the shipping paper.

Written Route Plan and Communication

In the SNPRM, we proposed to revise 49 CFR 397.67(d) to require the carrier, or its agent, to prepare and provide its driver with a written route plan covering any shipment of a toxic-by-inhalation (TIH) material or liquefied natural gas for which a safety permit is required, in addition to all shipments of Division 1.1, 1.2, and 1.3 materials. FMCSA proposed (in § 385.415) that the written route plan be carried in the vehicle and followed, unless an alternate route is required by a law enforcement officer or emergency conditions. A phone number would need to be provided where a company official or representative could provide route plan and other information about the shipment to the caller. This phone number would have to be maintained during the course of transportation of permitted loads.

In addition, FMCSA proposed a communications plan requiring the driver to communicate with the carrier at least once every two hours and any time there is a deviation from the written route plan. The motor carrier would be required to contact law enforcement officials if there had been no communication from its driver for more than three hours.

Finally, FMCSA proposed to require the motor carrier to maintain a record of all communications with the vehicle driver during transportation of a hazardous material for which a safety permit is required. The record would be required to contain the name of the driver, identification of the vehicle, the hazardous material(s) being transported, the date and time of each communication, and each period of more than two hours without a communication with the driver, including a statement of the facts or conditions that prevented communication for more than two hours.

Pre-Trip Inspections

To implement the pre-trip inspection requirement in 49 U.S.C. 5105(e), FMCSA proposed inspection standards similar to those contained in the North American Standard (NAS) Level VI Inspection developed by the Commercial Vehicle Safety Alliance (CVSA) for radioactive shipments. The pre-trip inspection would have to be performed by a government inspector—that is, an inspector employed by or under contract to a Federal, State or local government. The inspection would be required to cover all applicable requirements in the HMRs and in the FMCSRs—including 49 CFR parts 383 (commercial driver's license), 391 (driver qualifications), 395 (hours of service), 393 and 396 (vehicle condition)—or compatible State regulations. The inspection also would be required to cover provisions in the HMRs on the transportation of radioactive materials (49 CFR parts 171, 172, 173, and 178) and registration (49 CFR part 107, subpart G).

Denial, Suspension, or Revocation of a Safety Permit

FMCSA proposed that a safety permit would be subject to suspension or revocation if a carrier fails to maintain its ''Satisfactory'' safety rating, or under other specified circumstances. These include: (1) Failure to submit a renewal application or providing any false or misleading information on a required application form; (2) failure to maintain a satisfactory security plan; (3) failure to comply with an out-of-service order; (4) failure to comply with the FMCSRs, HMRs, compatible State requirements, or an order issued under any of these, in a manner that shows the carrier is not fit to transport the hazardous materials for which a safety permit is required; (5)

loss of the carrier's operating rights; and (6) suspension of the carrier's registration for failure to pay a civil penalty or to abide by a payment plan.

The SNPRM proposed procedures for administrative review of a denial, suspension, or revocation of a safety permit. A motor carrier's rights to administrative review would depend on the reason for denial, suspension, or revocation.

II. Summary of Final Rule

This final rule amends the FMCSRs to incorporate the following new provisions for a safety permit program:

Hazardous Materials for Which a Safety Permit Would Be Required

The final rule adopts a slightly revised list comprised of hazardous materials requiring a safety permit. The new list compiles the statutory list and additional explosive and toxic-by-inhalation (TIH) materials in certain quantities as appropriate. Specifically, a permit will be required for:

1. Radioactive Materials—A highway route-controlled quantity of Class 7 materials.

2. Explosives—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 material requiring a placard under 49 CFR part 172, subpart F.

3. Toxic-by-Inhalation (Division 2.3 and 6.1) Materials—Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.

4. A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

Intrastate and Foreign Motor Carriers

The safety permit program will apply to intrastate as well as interstate carriers. In addition, the program will apply to foreign carriers. Intrastate carriers must apply for a USDOT number and will be subject to a compliance review. The safety rating issued to the intrastate carrier is for the safety permit process only and, unless specifically noted, will be calculated based on State violations equivalent to FMCSA's list of critical and acute violations. Beyond the requirements to obtain a USDOT number and submit to a compliance review, the intrastate carrier seeking a safety permit will generally not be subject to any additional safety regulations under the FMCSRs (such as driver qualification requirements in 49 CFR part 391) that did not apply to such carriers before this final rule. Several sections of the regulations are being modified to include intrastate motor carriers subject to the permitting requirements. This revised text includes § 385.3 (definitions), § 385.5, and Appendix B to Part 385.

Application Procedures

The safety permit program will require hazmat carriers to complete Form MCS–150B in lieu of Form MCS–150. In addition, permitted carriers must complete the MCS–150B in lieu of the MCS–150 to renew both their permit and their USDOT number, according to the USDOT number renewal schedule. Implementation of the safety permit program will be phased in beginning January 1, 2005. The actual compliance date will depend on the schedule in § 390.19. A motor carrier not involved in the transportation of a permitted material on January 1, 2005, will need to apply for and receive a safety permit before it can transport any permitted material. FMCSA will not charge a fee for applying for a safety permit under this final rule.

Conditions for Issuing a Safety Permit (Security Program)

Motor carriers must have a ''Satisfactory'' safety rating in order to obtain a safety permit. In addition, until we complete a compliance review, FMCSA will not issue a safety permit to a motor carrier that has, as indicated in the agency's Motor Carrier Management Information System (MCMIS), a crash rate in the top 30 percent of the national average, or a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average. A motor carrier must have a satisfactory security program in place and must be registered with RSPA. A satisfactory security program consists of: (1) A security plan as prescribed in 49 CFR part 172, subpart I; (2) a means of communication that will enable the vehicle operator to contact the motor carrier during the course of transportation; and (3) a means of providing hazardous materials employees with security training as required in 49 CFR part 172.

FMCSA will adopt the proposed changes to the list of acute and critical violations in 49 CFR part 385, appendix B, paragraph VII, with some corrections.

Temporary safety permits will be issued to motor carriers without safety ratings, but only for a period of 180 days. In addition, a temporary safety permit will only be issued to companies that certify they have a satisfactory security program and are operating in full compliance with the HMRs, FMCSRs, or comparable State regulations. FMCSA will not issue a temporary safety permit to a motor carrier that has, as indicated in MCMIS, a crash rate in the top 30 percent of the national average, or a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average.

Permit Number and Evidence in the Vehicle

We are requiring that the carrier's safety permit number appear on the shipping paper, on a copy of the safety permit, or on other documents maintained in the vehicle transporting a hazardous material requiring a safety permit.

Written Route Plan and Communication

We are maintaining the written route plan required for radioactive materials set forth in 49 CFR 397.101, and for explosives in § 397.19 of the same title. Written route plans will not be expanded to include the other materials that require safety permits. However, we are requiring that while a permitted material is in transportation, the driver must have the telephone number of an employee or representative of the motor carrier who is able to determine whether the vehicle is on the general route for delivery of the material as expected by the company. The phone number must be made available to law enforcement officials upon request.

We are requiring companies holding safety permits to develop a communications plan that allows for the periodic tracking of the shipment. This may be accomplished either through phone calls or radio calls placed by the driver or through an electronic monitoring or tracking system. At a minimum, the communication plan must require contact from the driver or electronic tracking equipment at the beginning and end of transportation (during loading or unloading of a permitted material) or at the beginning and end of each duty period. If the driver is making the calls, he or she should make them during periodic rests (taken for reasons other than making the call), or at the beginning and end of each duty period while not operating the vehicle or obtaining necessary rest. If the company has any reason to suspect the shipment has been stolen, diverted, or otherwise off-route because of a lack or delay of contact from the

driver, or for other reasons, then the company should contact the Transportation Security Administration's (TSA) Transportation Security Coordination Center at (703) 563–3236 or (703) 563–3237.

We are also requiring that a record of communications be kept, by either the driver (for example, recorded in the logbook) or the company, containing the time of the call and the shipment location. These records must be kept, either physically or electronically, for at least six months at the company's principal place of business and must be readily available to employees.

Pre-Trip Inspections

We are adopting the proposal requiring that shipments containing highway route-controlled Class 7 (radioactive) materials undergo a pre-trip inspection. The standards for this inspection are contained in the North American Standard (NAS) Level VI Inspection for Radioactive Shipments. The pre-trip inspection must be performed by a Federal, State, or local government inspector, or an inspector under contract with a Federal, State, or local government. The inspector must have completed an appropriate training program of at least 104 hours, including at least 24 hours of training in conducting radiological surveys on inspecting vehicles transporting highway route-controlled quantity (HRCQ) radioactive materials. The inspection must cover all applicable requirements in the HMRs; the FMCSRs—including 49 CFR parts 383 (commercial driver's license), 391 (driver qualifications), 395 (hours of service), 393 and 396 (vehicle condition)—or compatible State regulations; and provisions in the HMRs on the transportation of radioactive materials (49 CFR parts 171, 172, 173 and 178) and registration (49 CFR part 107, subpart G).

Denial, Suspension, or Revocation of a Safety Permit

We are implementing a process to deny, suspend, and revoke safety permits in this final rule. A safety permit will be denied if the carrier does not have a ''Satisfactory'' safety rating, or if any of the criteria for suspension or revocation are discovered in the application process. A safety permit will be suspended or revoked when the carrier: (1) Does not have a ''Satisfactory'' safety rating; (2) fails to submit a renewal application or provides false or misleading information on a required application form; (3) fails to maintain a satisfactory security plan; (4) fails to comply with an out-of-service order; (5) fails to comply with the FMCSRs, with the HMRs or compatible State requirements, or with an order issued under any of these regulations showing the carrier is not fit to transport the permitted hazardous materials; (6) loses its operating rights; or (7) has its registration suspended for failure to pay a civil penalty or abide by a payment plan. The decision to suspend or revoke a permit will be based on the severity of the violations.

The first time a motor carrier is found to be in violation of any of these requirements, the permit will be suspended until the problems are rectified. The next time a company is found to be in violation of these requirements, the permit will be revoked for 365 days.

III. Analysis of Comments

In response to the SNPRM, FMCSA received 27 written comments from State governments, motor carriers, associations, a public interest group, and individuals. These comments have been considered in the preparation of this final rule, as discussed below. The comments have been arranged by topic.

A. General Comments

Several commenters, including American Chemistry Council (ACC), Air Products and Chemicals, Inc. (Air Products), American Trucking Associations (ATA), American Pyrotechnics Association (APA), and Baker Petrolite Corporation (BPC), praise the agency for the intended effect of the SNPRM to promote the safe and secure transportation of the designated hazardous materials and thereby enhance motor carrier safety. However, none of the commenters believe the proposal should be finalized without further changes. Most of these comments are focused on the additional burden the proposed rules would place on the industry. Air Products and Department of California Highway Patrol (CHP) argue that the safety permit itself will not improve public safety. Air Products states it is the implementing requirements necessary to satisfy the intent of the safety permit that are important, and that these requirements must be clearly defined, effective, and workable for the motor carrier. The Michigan Department of Environmental Quality (Michigan DEQ) questions whether the proposed safety permit rule would have a significant impact on the safe transportation of hazardous materials.

FMCSA Response: We agree that the supporting requirements, and the ability to suspend, revoke, or deny a permit for companies found negligent in their responsibilities to transport hazmat safely and securely, provide the foundation for an effective permit program. We recognize the importance of constructing a permit program that minimizes complexity and maximizes security and safety benefits. FMCSA disagrees with the assertion that the permit by itself will not improve safety. The issuance of a permit is tied to a company's safety performance. Companies with a record of excessive safety concerns will not be issued a permit.

The Michigan DEQ, the National Small Shipments Traffic Conference (NASSTRAC), the Institute of Makers of Explosives (IME), APA, and CHP believe that an additional permitting program will only add to the burden on the industry by duplicating the existing permit efforts by the States without providing any appreciable risk reduction or security benefit. The Conference on Safe Transportation of Hazardous Articles (COSTHA) states that the regulated community may find it extremely difficult, if not impossible, to meet the minimum requirements of the proposed permit program necessary for obtaining and holding a permit.

FMCSA Response: FMCSA believes that we have been responsive to the specific concerns raised by commenters, and that, with the proposals adopted for this final rule, the regulated community will be able to meet the requirements to obtain and hold safety permits. We have analyzed commenters' concerns and adopted a balanced program that maximizes benefits while attempting to minimize burden on the regulated industry.

Advocates for Highway and Auto Safety (Advocates) states that this and similar recent rulemaking actions by FMCSA have been forged in a vacuum, without acknowledging recent research into transportation security. Advocates says that even though the SNPRM provides an opportunity for FMCSA to adopt aggressive safety and security measures, the agency ignores the realities of the potential threats that hazardous materials pose to people, institutions, and the environment.

FMCSA Response: While FMCSA appreciates Advocates' suggestion to adopt aggressive safety and security measures and has striven to create an aggressive safety program, we note that the development of these regulations has occurred over many years, involving dialog between not-for-profit organizations, States, and industry representatives through a number of notices in the rulemaking process. In addition, these rules were created in consultation with a number of

government agencies having jurisdiction over and particular interest in hazmat safety and security, and we have made a concerted effort to coordinate and unify efforts. The requirements for obtaining and maintaining a permit are commensurate with the level of safety appropriate to the high hazards posed by the materials covered under the program. The permit program is one piece of a comprehensive security and safety strategy including RSPA's security rulemaking, FMCSA's own research into security technologies, and the collaborative HM–232A rulemaking addressing multimodal security concerns.

Six commenters (ATA, COSTHA, CGA, IME, Advocates, and NASSTRAC) raise the issue that, rather than submit to the proposed permit requirements, carriers may refuse to ship hazardous materials. COSTHA and IME state that if legitimate carriers refuse to carry hazardous materials, then the transportation of these products may shift to noncompliant carriers or other modes of transportation. IME points to the example of the recent impact of security regulations issued by the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) on the commercial transportation of explosives.

Fisher Scientific Company LLC (Fisher Scientific) states that some of its carriers have already indicated they will not be securing permits for transporting hazardous materials. As a shipper of many types of hazardous materials, Fisher Scientific tries to leverage its transportation costs by having one carrier satisfy all of its transportation needs. If carriers refuse to transport hazardous materials, Fisher Scientific's costs will increase because it will need to hire multiple carriers.

FMCSA Response: While we understand the possible effects a permitting program may have on the hazardous materials transportation industry, we also recognize that many factors play a role in a company's decision to carry hazardous materials. Permits are already required in 40 States, and recent security measures by RSPA, TSA, and other agencies may have a greater influence than today's final rule on a company's decision to carry hazmat. We believe commenters may have overestimated the impact this permitting rule will have on hazardous materials carriers. FMCSA has observed the development of companies specializing in hazardous materials transportation that handle all aspects of a hazmat shipment, including routing, tracking, and regulatory compliance. While it is possible that the nature of hazardous materials shipping may change due to new security awareness, FMCSA believes the market is well equipped to meet the ever-present demand for the transportation of hazardous materials in the United States.

In any case, FMCSA took these comments into consideration in developing the final rule and believes that the safety permit program adopted does not present the same burden as that which the SNPRM may have presented. FMCSA has also considered the effects on the industry in its cost-benefit evaluation for this rulemaking.

National Tank Truck Carriers (NTTC) and Overnite Transportation (Overnite) request that shippers be included as active participants in the permit program. NTTC and Overnite are concerned that only the carrier bears responsibility and liability under the proposed permit requirements, while in fact the shipper plays an integral role. NTTC points out that Section 5109 of the Hazardous Materials Transportation Act (HMTA) includes a direct reference to ''Shipper Responsibility'' and gives the Secretary unfettered discretion to determine the scope of the permit program.

FMCSA Response: FMCSA's direct jurisdiction is over carriers rather than shippers. Although Section 5109 references shipper responsibility and gives the Secretary discretion to determine the scope, our jurisdiction cannot reach shippers (unless the company is also a carrier). This authority was specifically delegated to RSPA.

In comments concerning the security aspects of this rule, ATA states, ''* * * it is important to recognize that there has never been a terrorist attack in the United States using a registered motor carrier transporting one of the designated hazardous materials.''

FMCSA Response: FMCSA points out that before the 9/11 attacks, terrorists had not attempted an attack of this magnitude. Airport and airline security had been identified prior to 9/11 as issues needing action, but it was only after 9/11 that cockpit doors were fully secured. We cannot limit our actions to prevent only the type of terrorist attacks that have already occurred. FMCSA strongly believes it is appropriate for the agency to address the transportation of these high-hazard materials in a proactive manner. Through this permitting program, FMCSA believes it is reducing the possibility of ''bad actors'' carrying high-hazard materials, and thereby helping to avoid accidental and purposeful releases.

B. Preemption of State Programs

Five commentors (IME, Advocates, ATA, NASSTRAC, and an individual) state that the proposed rule should preempt State permitting programs and eliminate the burden placed on hazardous materials motor carriers by dissimilar, redundant, non-Federal permitting programs unilaterally imposed by States. One commenter, the Alliance for Uniform Hazmat Transportation Procedures (Alliance), generally agrees with FMCSA's analysis of limited preemption and supports the continuing role of State permit programs as outlined in the SNPRM. The Alliance believes that the State Uniform Program could accomplish the objectives of the proposed Federal safety permit. The Alliance requests that FMCSA specifically name Alliance's uniform program as not preempted by the proposed regulations, and as a ''safe haven'' for States wishing to regulate hazardous materials transportation.

An individual commenter asserts that the State permit programs are ''really just a superficially legal means to gather revenue (taxation) from out of state hazmat carriers.'' This commenter says that if DOT refuses to preempt State programs, it should at least ''make them uniform in nature, limit the fees to the cost of administration, and to eliminate totally the county permit programs.''

IME states that the current state of hazmat motor carrier permitting requirements does not look much different than it did in 1990, when Congress enacted 49 U.S.C. 5109 and 5119 on permit authority, and that the proposed regulations do nothing to improve the situation. IME, Advocates, and the NASSTRAC point out that Congress expressly gave DOT authority to preempt State hazardous materials laws to ensure State laws achieve greater uniformity. The NASSTRAC states that, to the extent similar or other excessively burdensome or counterproductive requirements exist at the State level, it is a misguided form of federalism to forgo the opportunity to address them in this proceeding.

ATA and Advocates assert that the agency's decision in the SNPRM not to move forward with a uniform permitting system for intrastate transportation amounts to an unsubstantiated statement that such a program would be impossible to administer.

ATA and Advocates also point out that DOT has exercised its preemption authority in the past, through RSPA's final rule requiring that all intrastate shippers and carriers comply with RSPA's implementing regulations for hazardous material motor carrier

transport (62 FR 1208, Jan. 8, 1997). RSPA's final rule expressly preempts State laws, regulations, and other administrative mechanisms that conflict with prevailing Federal hazmat law and regulation. Both commenters noted RSPA is clearly fulfilling the congressional direction of the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) by applying the broad authority granted to the Secretary to achieve more intrastate-interstate hazmat transportation uniformity. ATA and Advocates argue that FMCSA has the same statutory authority to establish more uniformity in the area of motor carrier hazardous materials transportation in this rulemaking.

IME asserts that FMCSA's summary of the background on this rulemaking is incomplete and misleading. IME states:

> In 1990, Congress directed the Secretary of Transportation to implement a motor carrier safety permit for motor carriers of certain hazardous materials and, at the Secretary's discretion, to expand the list of materials triggering a permit by November 1991—the ''§ 5109'' permit * * * FMCSA did not even release a proposed rulemaking until 1993.

IME states that the proposal was criticized as inadequate by the regulated community, States and safety advocates, and that, in the meantime, a congressionally mandated working group of States was convened to develop uniform forms and procedures for States to use to register and permit hazmat motor carriers—the ''§ 5119'' or ''uniform'' permit. According to IME, the working group met its 1993 statutory deadline to submit a report to Congress on the feasibility of a Uniform Permit. IME states that the working group recommendations supported a Uniform Program, and that Congress directed the Secretary to ''prescribe regulations to carry out the recommendations contained in the report.'' According to IME, all that remained to implement this section was for the Secretary to identify those ''recommendations with which the Secretary agrees.'' IME asserts that, as with ''the § 5109 permit, including the § 5105 inspection requirement for certain vehicles carrying radioactive material, the § 5119 permit has languished at FMCSA.''

ACC, Minnesota Department of Transportation, CVSA, and the Alliance also support a uniform program. The Alliance comments:

> States belonging to the Uniform Program urge the FMCSA to more closely consider the Uniform Program as an alternative to the proposed federal permit. The Uniform Program is an established, demonstrated program that could achieve the same goals as the proposed federal permit in a more cost-effective and efficient manner. Seven states are already successfully using this program and, with a few minor modifications which the Alliance is prepared to make, it could easily be extended to cover all shipments of the four types of materials covered under the federal safety permit. The Alliance proposes a consultation with FMCSA to work out the details of such an approach.

In view of its comments, the Alliance ''requests that FMCSA defer any decision relating to a uniform program until misunderstandings related to the Alliance Uniform Program is alleviated through consultation with Alliance members (sic) states and the Alliance Governing Board.''

ATA states that the most efficient way to ''* * * harmonize the myriad of existing hazardous materials permits and relieve the trucking industry of a significant administrative burden * * *'' is to incorporate any new Federal requirements into the existing Uniform Permitting Program, authorized by 49 U.S.C. 5119. COSTHA also urges that a ''uniform program be applied nationally and to preempt a myriad of state and local permitting systems.''

FMCSA Response: FMCSA recognizes the authority of States to implement hazardous materials permits. For the materials covered by FMCSA's safety permitting program, States are preempted only if implementing a program with more stringent operational requirements than prescribed in this final rule. This addresses commenters' concerns for a nationwide uniform program for the materials covered by the Federal safety permit. However, this does not prevent States from permitting other materials, such as hazardous wastes. This approach is similar to RSPA's administration of its registration program, which preempts State registration programs for the list of materials covered by the RSPA registration program while allowing States to implement other types of registration programs.

A uniform permit program for these identified materials is essential to provide for ease of interstate transportation. FMCSA acknowledges the Alliance program is not currently identical to the program required in this final rule. However, FMCSA has been assured by the Alliance that its program will mirror the FMCSA program in the future, thus aligning States currently working on a State-by-State uniform program with the Federal permit program. If a State's program is equivalent to the Federal program, then FMCSA will issue a safety permit based on the successful issuance of the comparable State permit.

C. Qualification Based on State Permit

Proposed § 385.411 would allow FMCSA to issue a Federal safety permit, without further inspection or investigation, when it can verify that a State has a safety permit program that is equivalent to the requirements in 49 U.S.C. 5109. Air Products and the Alliance both support this proposal. Short of adopting the Alliance Uniform Program, the Alliance supports the FMCSA proposal to ''issue a federal safety permit to a carrier without further inspection or investigation when FMCSA is able to verify that the carrier holds a safety permit issued by a State under a program that is equivalent to the federal safety permit program.'' The Alliance believes this is efficient and that it recognizes existing expertise in State programs. The Alliance also believes that the FMCSA proposal cuts the burden on carriers and recognizes the dual nature of State-Federal regulation of hazardous materials transportation.

ATA comments that the proposed rule states that where a motor carrier participates in an equivalent State program, the carrier must still apply for the Federal safety permit, and FMCSA will immediately issue the permit without further inspection or investigation. ATA points out that at this time there are no ''equivalent'' State permit programs.

Advocates states it is not completely averse to FMCSA's proposed reliance on prior State safety permits. However, Advocates comments that the preamble does not explaining how the agency will ensure that State permits are in fact equivalent to the Federal program requirements, and how often determinations of equivalence will be performed through frequent reevaluations of State permitting practices.

Alliance comments that, to work cooperatively with FMCSA, it is considering an upgrade to its program to cover elements of the new Federal permit that it currently lacks. This would consist primarily of adding questions related to a carrier's security plan and shipment tracking system. Once this program revision is in place, motor carriers with permits from Alliance member States and that transport hazmat in Alliance member States would have received scrutiny equivalent to the Federal permit. Alliance believes its program could substitute for the Federal safety permit.

FMCSA Response: FMCSA agrees with ATA that there are no current equivalent State programs. However, we have been assured by the Alliance that

it is dedicated to cooperating with FMCSA in developing equivalent programs. FMCSA will identify State programs that match the Federal safety permit program. These programs must have the same requirements as set forth in this final rule. If a carrier is issued a permit by a State identified as having the same requirements as the Federal requirements, FMCSA will automatically issue the carrier a Federal permit. Thus, individual States (including those in the Alliance) will be able to administer their registration programs, as long as the State program is identical to the requirements in this final rule for the materials covered by this final rule. FMCSA looks forward to the Alliance's adjusting its program to facilitate compliance and uniformity between State and Federal programs.

D. List of Materials (Applicability)

Twelve comments address the issue of applicability. Six commenters (Air Products, NTTC, ATA, Distilled Spirits Council of the United States (DISCUS), NASSTRAC, and ACC) agree with FMCSA's proposal not to expand the statutory mandated list of hazardous materials for which a permit is required. Three commenters (Advocates, IME, and Onyx Environmental Services (Onyx)) believe that FMCSA should address the need to permit coverage beyond the minimum mandated in 49 U.S.C. 5109.

IME states, ''FMCSA's determination to simply go with the section 5109 statutory list is not dictated by current realities.'' IME adds that in developing an appropriate list of materials for a safety/security permit and accompanying operational restrictions, FMCSA could consider ''the predictability of shipments, the volume per shipment or package, the population centers traversed, the number and distance of trips, the proximity of significant landmarks or public events, and the level of security risk as determined by the Department of Homeland Security.''

ATA believes that FMCSA should ''raise the threshold quantities used to trigger a motor carrier's obligation to obtain a federal safety permit.'' It states, ''* * * for example, it is unlikely that 55 lbs. of explosives or 1 liter of PIH material will cause damage approaching that of the Oklahoma City bombing.''

APA, Salt River Valley Water Users' Association, and Salt River Project Agricultural Improvement and Power District (SRP) state that the scope of the proposed safety permit program is unwarranted and unfair. SRP proposes that the rule be modified to apply only during transportation of hazardous materials in excess of 500 gallons or more than 75 road miles in a 12-hour period.

Advocates states that ''* * * unfortunately, the FMCSA has chosen to cover only the lowest possible number of motor carriers by limiting the regulation essentially to only the statutory minima specified by Congress.'' Advocates cites the 13-year period since the passage of the legislation, and in particular the two years since September 11, 2001, as reasons to urge FMCSA ''in the strongest possible terms to reconsider this unrealistic abbreviation of its oversight, approval, and enforcement role.'' Advocates also recommends that ''FMCSA should parallel at least the requirements of the RSPA security plan final rule with identical coverage for the federal safety permit program.'' Onyx mirrors these comments by suggesting that FMCSA adopt the list in § 172.800(b).

FMCSA Response: A number of considerations went into the development of the list adopted by FMCSA in this final rule. Indeed, in determining this list for applicability to the safety permit requirements, FMCSA analyzed the risks and potential damage various hazardous materials in different quantities could inflict if used maliciously or as a consequence of an accidental release. We used information from different sources to piece together a coherent picture on the possible risks these quantities of hazardous materials pose. For example, FMCSA disagrees with ATA about the effects one liter of a TIH, Hazard Zone A, could have on a population in an enclosed environment, or that 55 pounds of some Division 1.1 explosives would not produce significant damage to vital structures.

We also note that tying permits to distance traveled and time in transit (in addition to the basic criteria concerning amounts and types of materials) could pose significant logistical challenges to the implementation and enforcement of a permit requirement.

FMCSA reviewed risk analysis for hazardous materials safety, and developed risk assessments for accidents and terrorist strikes using hazardous materials. In addition, FMCSA considered the list of materials that Congress specifically mentioned in the statutory requirements for the permitting rule. The list developed for this final rule is the result of identifying not only materials that present the highest hazards in transportation, but also materials that pose the largest risks for human casualties and damage to property and the environment if used by a terrorist or militant. These materials also generally face a higher level of regulation in the HMRs and FMCSRs. In addition, the list of materials was developed in consultation with RSPA officials. The FMCSA safety permitting program materials list is a subset of those materials identified by RSPA's security requirements. Every effort has been made to fit the permit program into the larger realm of hazardous materials safety and security regulations.

E. Duplication of Other Agency Programs

NTTC, ATA, APA, Onyx, ACC, Alliance, and Minnesota Department of Transportation recommend that program duplication could be substantially eliminated if the FMSCA permitting program were somehow combined with the RSPA registration program. As referenced above, Alliance's ''first recommendation is for FMCSA to use the existing Alliance program to achieve the purposes of the proposed federal safety permit.'' Alternatively, Alliance agrees with commenters who suggest using the existing RSPA annual registration program rather than creating a new and separate system.

NTTC states that, with certain amendments, the FMCSA permitting program can prove a marginal improvement to the Administrator's comprehensive regulatory program despite its inherent redundancy with State programs and its overlap with the current ''hazmat carrier/shipper registration program'' (administered by RSPA).

Alliance, IME, Air Products, the Compressed Gas Association (CGA), Onyx, and ACC state that the proposed new form MCS–150B is unnecessary because it largely duplicates existing form MCS–150. Most of these commenters recommend that any additional information necessary could be obtained by adding to the current form. For example, IME states, ''* * * only nine of the 28 data elements on the proposed form MCS–150B require information that is not already reported on Form MCS–150.'' In addition to questioning the need for two separate application forms, Onyx requests that the term ''HM incidents'' be defined because item 20 on form MCS–150B requests information on any hazardous materials listed in question 18.

FMCSA Response: It was FMCSA's intent in the SNPRM to propose that the MCS–150B be completed in place of the MCS–150. Those entities seeking a safety permit would complete MCS–150B instead of MCS–150. This way, entities that do not transport permitted materials would not be presented with the fields on the form pertaining to the

permit application process, and carriers seeking a permit would only have to complete one form for FMCSA. In addition, the question asking about incidents over the last 2 years was eliminated because that information could be determined within DOT.

We disagree with commenters that the safety permit program administered by FMCSA should be combined with the RSPA registration program. The two programs serve completely different purposes and require significantly different types of information from motor carriers. A combined application form could confuse applicants and result in serious data and financial management problems. In addition, the registration program does not involve a safety or security evaluation of the covered carriers, and thus provides no enforcement mechanism for companies that do not comply with safety and security requirements.

There are several barriers to combining this permitting application process with RSPA's registration process, including the differences in entities applying for registration and the safety permit. However, FMCSA, RSPA and other DOT agencies are committed to reducing the paperwork burden resulting from the application process under the ''e-commerce'' initiative. FMCSA, along with other government agencies including RSPA, attempts to ease the burden by providing on-line application procedures. FMCSA was able to reduce the paperwork internally by replacing the MCS–150 with the MCS–150B. Future efforts to streamline related application processes are constantly being considered.

F. Obtaining a Safety Rating

Under proposed § 385.407(a), a motor carrier must have a ''Satisfactory'' safety rating in order to obtain a safety permit. CGA, Air Products, ATA, Advocates, NASSTRAC, CVSA, and Alliance, while generally supportive of the Satisfactory rating concept, raise questions as to how the concept will work in practice.

CGA, Air Products, Alliance, and NASSTRAC question FMCSA's ability to act promptly either to determine a carrier's initial eligibility for a Satisfactory safety rating or to reestablish that rating when it has been lost and the carrier has taken steps to remedy the problem.

Advocates opposes the proposed issuance of a temporary safety permit for up to 270 days. Advocates ''believes that this proposed feature of the supplemental proposed rule has numerous pitfalls both for safety and security, and that it would be unwise public policy to allow a carrier without a compliance review and ''Satisfactory'' safety rating nevertheless to secure a permit that would be valid for 9 months * * *.''

FMCSA Response: FMCSA agrees that 270 days is too long for a temporary permit. Carriers requiring a safety permit will receive a compliance review over the two-year phase in period within 180 days of initial application instead of the proposed 270 days. If a safety permit is revoked or suspended because of problems with the safety rating, procedures are in place to reinstate the suspended or revoked permit when the problems with the safety rating have been resolved.

G. Pre-Trip Inspections

GE Nuclear Energy expressed several concerns with the pre-trip inspection requirements. It appears that GE Nuclear Energy did not understand that the pre-trip requirement of this rule would be met by performing a NAS Level VI inspection developed by CVSA. GE Nuclear Energy also argued that the proposed regulation states that if ''any violation of requirements * * * is discovered, the vehicle must be placed ''out of service'' and may not be moved * * *.'' GE Nuclear Energy points out that certain radioactive materials shipments, such as irradiated fuel, are required to be moved to safe havens, as defined in 10 CFR part 73, for security reasons without delays. Therefore, GE Nuclear Energy requests that the proposed regulations in part 385 and any other necessary section be clarified to allow limited vehicle movement to safe havens.

Advocates and CVSA fully support the agency's proposals concerning pre-trip inspections, pursuant to 49 U.S.C. 5105(e), that the inspections be conducted by trained government inspectors using standards similar to the NAS Level VI protocol developed by CVSA. However, Advocates strongly supports extending inspection criteria similar in stringency to those required by CVSA Level VI to all hazmat carried under Federal safety permit. CVSA believes it should be stated explicitly that inspections will continue in the current manner, which would allow only CVSA certified officers and inspectors to conduct the inspections.

FMCSA Response: In response to GE Nuclear Energy's concerns about a vehicle with certain radioactive materials shipments being placed out of service because of the pre-trip inspection, FMCSA notes that this is a requirement for pre-trip inspections. Thus, if a vehicle did not comply with the requirements, it would remain at the shipper facility and not be allowed to enter transportation. In the unlikely event a vehicle were found in violation of any of the pre-trip inspection requirements while in transportation and placed out of service, the vehicle would be escorted to a safe haven or other suitable place.

In 49 U.S.C. 5105(e), FMCSA is required to implement a pre-trip inspection for route-controlled radioactive shipments, and this was proposed in the SNPRM. The North American Standard (NAS) Level VI pre-trip inspection is specifically referenced in the regulations as meeting the requirements for the permit pre-trip inspection process. In response to Advocates' suggestion to apply the pre-trip inspection to all permitted materials, we cannot consider this at present as it was not proposed in the SNPRM.

H. Route Plans

Most commenters are critical of and disagree with the proposal that a carrier prepare and provide its drivers with a written route plan covering any shipment designated in the rulemaking. Commenters have two general criticisms. First, they fail to see the security benefits of this proposal. For example, ATA writes:

> The SNPRM states that adherence to route plans will increase safety. Aside from this conclusory statement, FMCSA has not explained the safety benefits associated with maintaining written route plans. Based upon the FMCSA's historical experience with the use of route plans for radioactive substances, we believe that the Administration has the tools at its disposal to quantify the safety benefits that have been attributable to the use of route plans.

The second general criticism is that there are many instances in which a driver must alter the route. For example CGA writes:

> A vehicle transporting time sensitive deliveries may be forced to abandon a specific route due to a major traffic tie up. The carrier may, in the performance of a delivery of one shipment covered by this rulemaking, be required to pick-up a container of similarly regulated material in excess of the minimum for return. No written route plan would be available to the driver in this instance.
>
> On many city deliveries drivers need to adjust their route based on the customers receiving hours or congestion at the customer. The driver, rather than waste time in line to make a delivery, may opt to proceed to the next customer and then return to make the delivery at a later time. In addition to it being a good productivity practice it would be especially important when considering the Hours of Service regulations.

Most commenters argue that this proposal would curtail the legitimate

movement of materials and create a significant economic burden without a real increase in security.

Several commenters also are concerned about the requirement that drivers amend the written route plan to show any deviations from the original plan. Air Products requests clarification about when a driver must amend the written route plan and what constitutes a deviation requiring an amendment. NTTC writes:

> Even under totally legitimate circumstances, vehicle drivers should be free to make acceptable route changes to avoid extraordinary congestion, accidents, detours, etc. without having to make handwritten notations on documents while driving and without the permission (or direction) of local law enforcement.

Finally, commenters are critical about the requirement that carriers (not drivers) develop and maintain the written route plans. Advocates strongly supports this proposal and states:

> Advocates strongly supports the FMCSA's proposal for a prepared, written routing plan to be in the possession of the driver at all times for carrying Hazard Zone B materials * * * We also strongly support the requirement for alternate routing to be allowed only at the behest of enforcement authorities or *bona fide* emergency conditions. Advocates also supports the additional feature of this section of the supplemental proposed rule that prohibits the driver from preparing the written route plan.

However, Advocates believes that FMCSA needs to make it clear that amendments of the written route plan by the driver must be confined solely to alternate routes by reason of enforcement authority direction or because of verified emergency conditions, such as road and bridge closures, forest fires, and hazmat spills.

FMCSA Response: FMCSA recognizes the difficulties in developing route plans for a range of hazardous materials. Less-than-truckload (LTL) carriers, in particular, could face significant logistical problems. Thus, FMCSA will not adopt additional route plan requirements in this final rule. Instead, the route plan requirements will apply only to materials that currently require a route plan (highway route-controlled radioactive Class 7 and Division 1.1, 1.2, and 1.3 explosive materials). The requirements for route plans, which address any changes that the driver encounters en route, are specified in § 397.101 and § 397.67 of this subchapter.

The agency believes it is important to require the phone number aboard the vehicle, so that when called, it is answered by a company employee or representative of the company to confirm that the vehicle is within an expected route for that shipment. FCMSA believes that, although the phone-contact requirement is less comprehensive than a written route plan, it does provide an increased level of security. This provides enforcement officials with a mechanism to check that the vehicle has not deviated too far from its intended path. For example, if a shipment of a permitted material is in Ohio while it should be going from Baltimore, Maryland, to Atlanta, Georgia, an enforcement official would want to confirm with the company that this shipment is ''off course,'' and could be stolen or misdirected. The only way an enforcement official would be able to confirm the destination and origin of a material would be to contact the carrier company, since hazardous materials shipping papers do not require the destination address.

I. Communications Plan

The proposed rule included a provision that a communications system be installed on each motor vehicle used to transport a hazardous material listed in § 385.403(a), to enable the vehicle operator to immediately contact the motor carrier during the course of transportation of the hazardous material. The proposed rule also provided that each operator must be trained in the use of the communications system. All but one commenter on this issue opposed these requirements. Several commenters submit that neither cell phone nor satellite tracking devices will comply with this provision. Commenters state that cell phones are not ''installed'' in the vehicle as required by the provision, and there are vast regions of the country where cell phone use is limited or unavailable. Similarly, they note that satellite tracking devices only function when there is a direct ''line of sight'' between the vehicle's antenna and the relay satellite.

The proposed rule included new requirements for a driver to communicate with the motor carrier once every two hours while transporting a material for which a safety permit is required. Most commenters oppose this new requirement, citing three criticisms. First, several commenters discuss concerns about the driver using a cell phone while driving or needing to pull off the driving lines in order to make the required phone call. Second, several commentors mentioned the burden on motor carriers that the call-in procedure would create. The third criticism of the two-hour notification is that the proposal conflicts with driver hours-of-service requirements.

In addition, FMSCA proposed that a motor carrier must contact law enforcement authorities if more than three hours have elapsed between driver communications. Commenters call this proposal unreasonable, burdensome, confusing, and potentially unworkable. Nine of the ten comments received on this issue asked FMCSA to clarify what law enforcement authorities should be contacted. For example, several commentors submit that a vehicle could travel through various jurisdictions in a short time, so that there are many law enforcement choices (Federal, State, and local) for a motor carrier to contact.

Advocates strongly supports the FMCSA Field Operational Test initiative to test a wide variety of safety and security technologies for use within the hazmat supply chain from offerors to consignees. Advocates applauds this vigorous investigation of supplementary safety and security technologies and the agency's willingness to consider modifying the contours of its safety permitting system in light of the findings of these trial technologies. Advocates also emphasizes that the use of remote tracking technologies to ensure adherence to route plans, and to ensure that drivers do not violate hours-of-service limits, is crucial to advancing hazmat safety and security.

Along with the proposal to make these calls, FMCSA proposed a recordkeeping requirement. IME, Air Products, and ACC object to the proposal that motor carriers create and then retain for six months records of driver-carrier communications. IME comments that companies with larger numbers of drivers and carrier personnel may be overwhelmed by the demands of keeping and consolidating written records that include routine communications. Air Products would like to know the frequency for updating the communications log; in some instances it may be a considerable time before the facts or conditions that prevented communication from the driver are known. ACC states that maintaining a log of this nature would require substantial personnel resources and yield little security benefit.

FMCSA Response: FMCSA agrees with commenters that the communications requirements proposed in the SNPRM could present logistical problems. Further, we are working with RSPA on an ongoing security rulemaking under docket HM–232A. FMCSA does not want to create requirements in this rulemaking prior to completion of the Field Operational Test initiative and the HM–232A

rulemaking. Essentially, FMCSA's original proposal was an effort to develop a ''low-tech'' tracking system of permitted materials through the use of communication with the driver of the shipments. However, if the system is too cumbersome, it will fail to achieve this goal. Therefore, the requirements in this final rule create a basic tracking system that allows for flexibility. With a basic framework in place, FMCSA will work with RSPA in its security rulemaking process to develop further security measures.

The requirement in today's final rule for companies to develop a communications plan requiring at least two calls per day is an effort to minimize the burden on industry, while creating a basic structure for tracking vehicles. It is probably current practice with many drivers to check in with their company twice a day (or at the pickup and delivery of a load), and FMCSA believes this is a minimum requirement to assure that high-hazard shipments undergo some type of tracking and monitoring. FMCSA does not intend drivers to meet this requirement by using a cell phone while operating a motor vehicle, or to make an additional stop. The agency believes that the twice-a-day requirement is consistent with current practice and can be met without making additional stops. Due to the decrease in the number of required calls, maintaining a record of these calls does not present the same burden as maintaining a record of the number of calls proposed in the SNPRM.

In addition, providing in the final rule the TSA's Transportation Security Coordination Center phone number, and recommending, rather than requiring, that companies or drivers call the center if notification is late or absent, will reduce the number of ''false calls.'' FMCSA also believes it will provide more flexibility to companies inaccurately tracking shipments, while also providing an avenue to report missing or stolen shipments.

FMCSA notes that the reduced number of required calls in today's rule greatly diminishes the paperwork burden. In addition, the flexibility provided for this requirement should address commenters' concerns about the paperwork requirements. FMCSA allows for flexibility by requiring companies to have a system in place to track the calls made under the communications plan. Either the driver or the company may keep a record of when and where the calls are made. However a company wishes to keep this information, it must be made available to an enforcement official upon request.

J. Permit Documentation

CGA, Air Products, NASSTRAC, and ACC support FMCSA's proposal not to require the carrier's safety permit number to appear on shipping papers, but state that the carrier would still be required to maintain a copy of the safety permit or have another document showing the permit number in the vehicle transporting a designated hazardous material. These commenters suggest that if the registration application for the hazardous materials Certificate of Registration were used for issuing the safety permit, one document could contain both the registration and safety permit number(s), thereby reducing administrative effort and the driver's paperwork burden. ATA states that, to the extent evidence of the permit is required in the vehicle, that document should be combined with the RSPA registration certificate or Uniform Program document and FMCSA should not pursue the creation of a new, separate motor vehicle certificate.

NASSTRAC also supports FMCSA's decision to leave to another occasion implementation of the statutory requirement that shippers may offer a designated commodity ''only if the carrier has a safety permit.'' NASSTRAC suggests this requirement may be met in less burdensome ways, such as attaching permits to contracts with a requirement that the carrier notify the shipper immediately of any change in its status. Or it may be met in more burdensome ways, such as requiring that shippers confirm carrier permit status every time a shipment of a designated commodity is tendered. NASSTRAC would not support the latter approach.

Alliance asks about the statement in the SNPRM preamble that ''A state or local law enforcement officer would be able to confirm the validity of this number (safety permit number) through real-time or close to real-time information made readily accessible by FMCSA.'' Alliance wants to know what system would provide this information and how it would be used.

FMCSA Response: It is essential for enforcement purposes that a carrier's permit number or a copy of its permit be on board the vehicle for which the permit is required. Otherwise, it would be impossible for a roadside inspector to determine if the company held a current, valid permit. Using a computer system database or calling into a facility with access to these systems allows for real-time or close to real-time tracking of permit numbers through current FMCSA systems.

Since this program is not being combined with RSPA's registration program, FMCSA will not require the permit number to be on the RSPA registration statement. However, a carrier that wishes to present all its required registration or permit numbers together will have the flexibility to display the permit number on any document the carrier desires.

K. Enforcement

Advocates strongly supports the criteria under which a safety permit will be subject to denial, suspension, or revocation, but asks for clarification on the terms of each of the three actions. Since the hazmat safety permit addresses a specific subset of hazmat deemed especially dangerous and worthy of additional Federal approval and oversight, the agency should specify a minimum period that must elapse before the carrier can reapply for a hazmat permit after the permit was suspended or revoked. Advocates strongly suggests establishing a minimum suspension period of 30 days and a minimum revocation period of 90 days before a carrier could attempt to regain its safety permit status.

FMCSA Response: Any violation of the permitting rule falls under the HM statute penalty provision found in 49 U.S.C. 5123. We have modified the title of paragraph (e) in Appendix B to Part 386 to reflect this. FMCSA has compiled a list of critical and acute violations that could affect a company's safety rating, leading to the suspension or revocation of a safety permit, along with a listing of other actions that could lead to revocation or suspension of a permit.

For the first instance of violating these requirements, the permit will be suspended until the problems are addressed. The second time a motor carrier is found in violation of these requirements, the permit will be revoked for one year. The decision to deny a permit is outlined in §§ 385.405 and 385.407.

Although we did not receive comments concerning this issue, FMCSA removed the SafeStat listing as a reason for denying a permit because the SafeStat listing is redundant in view of the crash rate, out-of-service rate, and security requirement criteria for denial.

L. Cost-Benefit Analysis

The 10 commenters addressing cost and benefit issues question virtually all of FMCSA's assumptions and estimates, with respect to costs, benefits, or both. These commenters are IME, CGA, ATA, COSTHA, NASSTRAC, Motor Freight Carriers Association (MFCA), Alliance,

Fisher Scientific, BPC, and an individual.

ATA, COSTHA, MFCA, BPC, and Fisher Scientific question FMCSA's assumption that currently 90 percent of carrier vehicles or drivers are equipped with cell phones or some kind of communications equipment. MFCA estimates that the costs of communication devices to the industry would be ''10 times the FMCSA total industry estimate of $125,000.''

IME, ATA, Alliance, COSTHA, and Fisher Scientific all question FMCSA's estimate of a 25 percent reduction in the number of hazardous materials accidents as a result of this rulemaking.

NASSTRAC, IME, and ATA question the use of September 11 as a basis for estimating the costs of an intentional hazardous materials incident and the potential benefits from avoiding such an incident. ATA states:

> Using the September 11, 2001, incident cost estimates is inappropriate in the context of discussing the cost of a truck bomb with some quantity of regulated hazardous materials. First, the September 11th attack was not one terrorist attack; it was the coordination of four separate attacks. Second, the instruments used in the attacks were airplanes, not trucks. Third, the damage from the attacks was not caused by the release of hazardous materials that are subject to this Proposed Rule. As such, the cost estimates used do not comply with DOT'S data quality guidelines and are otherwise arbitrary and capricious.

ATA further states that based on FMCSA's own assumption that the SNPRM will thwart one of the next thousand terrorist attempts, ''we would expect this rule to stop one terrorist attack over the next 5,000 years.''

FMCSA Response: The cost of communications equipment was partially responsible for FMCSA's reducing the number of phone calls required and for allowing the calls to be placed at times where access to a payphone or customer phone would be available. FMCSA has addressed many comments concerning the use of terrorist events in the cost-benefit analysis for this final rule. For example, instead of using a set probability that this rule would prevent a terrorist attack, we have performed a simple sensitivity analysis to show the possible range of benefits depending on the probability the rule will prevent a terrorist attack. Readers are encouraged to refer to the full cost-benefit analysis in the docket for further discussion of these issues.

IV. Rulemaking Analyses and Notices

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

FMCSA has determined that this rulemaking is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979) because of significant public interest in the issues related to hazardous materials permitting.

FCMSA's analysis determined that first-year costs to implement the permit program established in the final rule are $5.3 million. The estimated annual costs to HM carriers and FMCSA are $4.8 million, resulting in total discounted costs over a 10-year period of $33.9 million. The estimated annual benefits resulting from improved safety derived from reduced accidental HM releases alone are $3.6 million, which results in total discounted safety benefits over a 10-year period of $25.3 million. Additional security benefits are also gained because the rule's provisions will hamper terrorists. Although we cannot predict the actual security benefits or the number and size of future terrorist acts, the security benefits clearly would be immense if the rule prevented a terrorist act even a fraction of the size of the Twin Towers calamity. Further, based on the sensitivity analysis performed for the security benefits of the rule, using terrorism costs assumed in a recent RSPA rule establishing requirements for security plans, if the permitting program has at least a one-in-ten-thousand chance of stopping a terrorist attack annually, then security benefits would total $2.5 million annually, or $17.5 million discounted over 10 years. This results in a total net benefit to society. FMCSA also did not quantify the rule's secondary benefits of avoiding property damage, environmental damage, clean-up costs, and evacuations, because of the uncertainty associated with these estimates.

The intent of this rulemaking is to enhance the safety and security of HM shipments. This rule includes requirements for motor carriers of certain HM to obtain a safety permit from FMCSA. In order to obtain a permit, motor carriers must comply with safety and security standards and establish a system for communicating with drivers either telephonically or via electronic device. FMCSA will conduct carrier assessments to ensure compliance with operational, safety, and security standards. Carriers with less-than-Satisfactory safety ratings will be prohibited from transporting HM materials requiring a permit.

The analysis presented in this regulatory evaluation focuses on benefits and costs for a permit program covering only a certain group of highly hazardous materials. The final rule adopts a slightly expanded list comprised of the statutory list and additional explosive and toxic by inhalation (TIH) materials in certain quantities as appropriate. The list of materials requiring a permit in this final rule is as follows:

1. Radioactive Materials—A highway route-controlled quantity of Class 7 materials.

2. Explosives—More than 25kg (55 pounds) of a Division 1.1, 1.2 or 1.3 material, or an amount of a Division 1.5 material requiring a placard under part 172, subpart F of Title 49 CFR.

3. Toxic by Inhalation (Division 2.3 and 6.1) Materials—Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.

4. A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

The first-year costs to implement the permit program established in the final rule are $5.3 million. These include the one-time costs for the permit application and, if needed, a compliance review. The estimated annual costs to HM carriers and FMCSA are $4.8 million. The total discounted costs over a 10-year period are $33.9 million.

The major driver of HM carrier costs is the cost to record and maintain communication records. This cost item represents about 99 percent of the total annual costs to HM carriers to comply with the permit program requirements.

The safety benefits were derived from the projected crash reductions resulting from the permitting program. These total estimated benefits are large because of the number of conventional crashes that may be prevented.

Determining exact benefits of preventing a terrorist attack is difficult. Those that are available offer only inexact comparisons. For example, the benefit-cost analysis for RSPA's HM–232 final rule indicates that the cost of

the attack on the Murrah Federal Building in Oklahoma City amounted to approximately $1.5 billion. Clearly, the costs from the attacks of September 11, 2001, are far greater than the attack on the Murrah Federal Building.

FMCSA derived a scaled estimate of $25 billion as the cost of a malicious hazardous materials incident. This figure is based upon the lowest estimate reported of the most costly terrorist attack ever—the September 11th attacks; the estimated cost of the Oklahoma City attack; and the costs of other recent terrorist attacks occurring in the past ten years. Based on this information, FMCSA prepared a simple sensitivity analysis to produce a range of benefits for the security portion of this rule. FMCSA uses a range of probability that the permitting program would prevent a terrorist event using hazmat regulated under the final rule. FMCSA uses the estimate of $25 billion as the cost of an intentional release of hazardous materials covered by the rule.

This sensitivity analysis shows that if the permitting rule has a one-in-one-million chance of preventing a terrorist attack, then that benefit is worth $25,000. If the rule has a one-in-one-hundred chance of preventing a terrorist attack, the benefit falls to $250 million. While it is difficult to determine the chance that the permitting program would prevent or deter an intentional release, this type of analysis demonstrates that because of the potential high cost of a terrorist attack, efforts that may present even a small chance of averting a terrorist attack can provide security benefits.

As shown in Table ES–1 below, the one-time costs for the carrier, representing the costs of permit application and compliance review, are $0.5 million. The estimated annual cost to HM carriers is $2.8 million. The estimated annual cost to FMCSA is $2 million. These costs total $5.3 million.

The annual safety benefit is $3.7 million. If we conservatively estimate that the rule has a one-in-ten-thousand chance of stopping a terrorist attack, we add an annual security benefit of $2.5 million. This provides a total benefit of $6.2 million.

TABLE ES–1.—SUMMARY OF BENEFITS AND COSTS

Annual cost to FMCSA	Cost to HM carriers		Annual benefits	
	Initial one-time costs	Annual costs	Accidental releases	International releases
$2 million	$0.5 million	$2.8 million	$3.7 million	$25,000–$250 million

The total discounted cost to both FMCSA and HM carriers over a 10-year period to implement the permit program is $33.9 million. The total discounted safety benefit over a 10-year period is $26 million from accidental releases alone. An additional amount of security benefit is also gained but was not included in this ten-year estimation.

Despite the *potential* for benefits to exceed costs, there is a significant difference in how benefits and costs are allocated. The costs are assumed primarily by thousands of carriers, while most of the benefits accrue to the general public. Furthermore, the analysis does not account for some of the benefits that would flow from avoiding or preventing major HM incidents. Major HM incidents may result in long-term psychological and economic effects that are costly to a society and economy. Although avoidance of these effects is a benefit that can be measured in monetary terms, this analysis has not attempted to calculate these benefits because of the great uncertainty associated with estimating them.

FMCSA has prepared an in-depth regulatory analysis that further explains the basis for determining the costs and benefits of this rule. This cost-benefit analysis is available in the public docket (Docket No. FMCSA–97–2180; formerly FHWA–97–2180) for this rule. The public docket is located on the Docket Management System Web site: *http://dms.dot.gov/search/searchFormSimple.cfm.*

Executive Order 13175 (Tribal Consultation)

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

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

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

Unfunded Mandates Reform Act of 1995

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

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires FMCSA to evaluate the potential impacts of its HM permitting rule on small businesses, organizations, and governmental jurisdictions. Whenever FMCSA publishes a final rule, it must make available to the public for comment the flexibility analysis that evaluates the impact of the proposed rule on small entities. Section 603(b) of the Act specifies that the contents of the Regulatory Flexibility Analysis (RFA) include the following five requirements:

1. Description of the reasons why action by the agency is being considered;

2. Statement of the objectives of, and legal basis for, the final rule;

3. Description of and, where feasible, an estimate of the number of small entities to which the final rule will apply;

4. Description of the projected reporting, recordkeeping and other

compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the final rule.

In addition to the above requirements, a description of any significant alternatives to the final rule, which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the final rule on small entities, is also included in the analysis. The following sections discuss the various elements of the regulatory flexibility analysis outlined above.

(1) *Reasons why action by the agency is being considered.* FMCSA has initiated a rulemaking mandated by Congress for a new HM truck transportation permit system. The intent of the final rulemaking is to enhance the safety and security of high-hazard HM shipments. FMCSA is taking this action because certain high-hazardous materials, if released either accidentally or intentionally during transportation, have the potential to be used in terrorist attacks or present a greater hazard in the event of an accident.

(2) *Objectives of and legal basis for the final rule.* The objective of FMCSA's permit program is to provide oversight of the safety and security of carriers transporting selected high-hazard HM. The permitting program will impose additional requirements and provide additional oversight of these carriers. Oversight will include imposing operational security requirements, setting minimum safety and security standards, and making safety and security assessments of carriers to ensure compliance with operational, safety, and security standards. The permit program is intended to improve the safety and security of HM shipments and thus reduce deaths, injuries, and related damages stemming from accidental and intentional incidents involving these commodities.

Motor Carrier Safety Permits (49 U.S.C. 5109) requires that FMCSA permit carriers that transport Divisions 1.1, 1.2, or 1.3 explosives, liquefied natural gas, extremely toxic by inhalation hazardous materials, and highway route-controlled quantities (HRCQ) of radioactive materials. Section 5109 allows FMCSA to permit other HM if appropriate. Section (E), part (2), of 49 U.S.C. 5109 enables the Secretary of Transportation to determine the standards for deciding the duration, terms, and limitations of a safety permit.

(3) *Description and estimate of the number of small entities.* The final rule affects intrastate and interstate carriers of HM. The number of small carriers is determined based on the Small Business Administration (SBA) definition used for the RSPA registration file. RSPA flags the small carriers using the SBA definition to indicate if they are qualified based on the number of employees and business dollars. The number of small carriers that could potentially be affected by the new permit system is determined by the implementation of the amounts and types of materials covered. This list is described below.

List of Covered Materials

The permitting program covers the statutory or congressionally required list of HM under 49 U.S.C. 5109. This legislation requires FMCSA to permit carriers that transport these types and amounts of HM. In addition to this statutory list, FMCSA has modified the list to include bulk quantities of Division 1.5 materials and toxic—by-inhalation materials that include Zone B, C, or D materials in bulk quantities. The list of covered materials is as follows:

- More than 25 kg (55 pounds) of Division 1.1, 1.2, or 1.3 explosives, or an amount of a Division 1.5 material requiring a placard under 49 CFR part 172, subpart F.
- Radioactive Materials—A highway route-controlled quantity of Class 7 materials.
- Toxic-by-Inhalation (Division 2.3 and 6.1) Materials—Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.
- A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

Table 1 shows the number of small carriers that could potentially be affected. Small carriers are defined as carriers with 20 power units or less. About 78 percent of the carriers included for this list of materials are designated as small carriers.

TABLE 1.—NUMBER OF SMALL CARRIERS

Carriers	Number of small carriers	Total carriers
Total Number of Carriers for List of Materials Covered	2,436	3,131
Number of Interstate Carriers	1,664	2,139
Number of Intrastate Carriers	772	992

In addition to small carriers, other small businesses and small entities could potentially be affected by the permitting system. Small businesses that provide services to small carriers, supply product for shipment, or receive shipments also could be affected by the rule. The customers and suppliers of small carriers could be adversely affected if a carrier were prohibited from shipping certain HM because a permit had been denied or revoked. Similarly, local government entities such as police could be affected by the proposed HM permitting requirements. The police could be notified by TSA anytime a planned communication was not received from the driver of a permitted HM vehicle. This probably would require the expenditure of law enforcement resources to investigate the communication lapse. The number of local police entities that would be involved is difficult to estimate before the permit program is implemented. The number of small businesses that potentially could be affected by the new permit rule is also difficult to estimate without further research.

(4) *Description of reporting, recordkeeping, and other compliance requirements.* The compliance requirements include an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for

preparation of the report or record. The reporting, recordkeeping and other compliance requirements of the final rule are addressed in the following discussion.

The initial application for the permit will include the following elements:

1. Submitting a new MCS–150B form. This form contains all fields on the current MCS–150 form, which will need to be updated, and additional fields unique to the MCS–150B form.

2. Certifying that all HM incidents have been reported to DOT.

3. Certifying the carriers have the required security plan and training.

4. Certifying compliance with the communication requirements.

5. Ensuring the carrier's safety and security records are adequate.

Carriers will need to devote some effort to completing a permit application. Each interstate carrier, whether small or large, will have to spend about six additional minutes preparing the permit application (for the fields that are not on the existing MCS–150 form). This amounts to approximately $2.10 of clerical labor. For an intrastate carrier, the expenditure is approximately $9.10, because the carrier will not previously have been required to complete the MCS–150B form (26 minutes for the form). These expenditures apply to the first year. However, much of the effort in the permit application will be performed by FMCSA. FMCSA will check accident reporting and safety facts by using the MCMIS and Hazardous Materials Information System (HMIS) databases. FMCSA will also determine that the application is complete and that safety records are adequate.

If safety records are not adequate, then an on-site Compliance Review (CR) will be performed to determine if a permit should be issued. This activity is likely to result in additional paperwork for carriers rated either Unsatisfactory or Conditional, as these carriers will be required to undergo a new CR. The Benefit-Cost Analysis of Permitting Options report estimates that each carrier requiring a new CR will have to spend at least $182 of clerical time for completion of paperwork.

In addition to completing a permit application, the applicable HM carriers in the HM permit program will have to do the following:

- Develop a ''plan'' to meet the HM permit requirements that drivers be able to easily contact the carrier and/or law enforcement agencies in emergencies. Document required communications between the driver and dispatcher, and maintain written communication records. The cost per shipment was estimated at about $1.75 each trip.
- Carriers in the HM permitting program will be required to renew their permit application biennially. This will require about 6 minutes of clerical time for an interstate carrier and 16 minutes of clerical time for an intrastate carrier. The actual permit renewal will consist of checking the necessary boxes on the application for renewal.

In summary, the HM permitting rules will create additional responsibilities for small carriers. These responsibilities will also produce additional labor costs. However, FMCSA believes that the great majority of small carriers will use existing staff to handle the permit program duties.

For this Regulatory Flexibility Analysis, costs are cited for the small carriers identified in Table 1. The cost profile for small carriers should be different from that for large carriers. This is because large carriers have more trucks, and consequently move a greater volume of shipments. Data for fleet size and number of miles traveled in the Vehicle Inventory and Use Survey (VIUS) were used to estimate the proportion of shipment volume moved by small carriers. In VIUS, carriers with fleets of greater than 25 trucks accounted for about 56 percent of the mileage traveled. Based on assumptions that the number of miles traveled approximates shipment volume, and that large carriers may make more long-distance trips than small carriers, the cost analysis assigns 50 percent of all trips to small carriers.

Table 2 summarizes the first-year and annual costs for a small carrier.

TABLE 2.—COST SUMMARY PER SMALL CARRIER

Permit-related activity	Unit cost	Cost per carrier for first year	Cost per carrier for successive years
Permit application:			
Interstate carrier	$21/hour [1] [2]	$1.05	N/A
Intrastate carrier	$21/hour	9.10	N/A
Permit renewal:			
Interstate carrier	$21/hour	N/A	1.05
Intrastate carrier	$21/hour	N/A	2.80
Safety record compliance	$182/carrier [3]	182	N/A
Communication recordkeeping requirements	$1.75/trip	1,129	1,129
Worst Case Total Cost per Small Carrier [4]		1,321	1,133

[1] Unit cost is assumed as clerical hourly pay of $15/hour plus fringe benefits (40%) for a total of $21/hour.
[2] Assumes that one-half of interstate small carriers will require permit for the first year.
[3] Applies to all small carriers without a SafeStat rating.
[4] Assumes an intrastate carrier that requires a compliance review.

A small carrier could face two major negative impacts. First, the carrier could be prohibited from shipping certain HM because a permit was denied or revoked. Aside from the loss of contracts and income, this action would likely force the carrier to expend considerable effort in addressing and correcting problem areas and successfully completing the permit application process. The second impact would be financial, related to compliance with the HM permit process. For all but the most marginal small-carrier operations—that is, those already suffering from poor cash flow and a small profit margin—an initial impact of about $1,300 or an annual impact of about $1,100 would not be significant. This added expenditure is unlikely to prevent the overwhelming majority of small carriers from participating in the HM trucking business.

(5) *Relevant Federal rules which may duplicate, overlap, or conflict with the final rule.* Two statutory provisions, 49 U.S.C 5119 and 5105(e), could conflict with the HM permit rule if the rule did not specifically reference the provisions.

First, section 5119 authorizes States to participate in the Alliance for Uniform HM Transportation program (Alliance). FMCSA intends to automatically issue a Federal permit to a carrier that obtains a permit from a State having a program equivalent to the Federal permit program. Therefore, a comparable State program will be deemed equivalent to the Federal HM Permit Program and no statutory conflict will exist. However, the motor carrier must still possess at least a Satisfactory safety rating. If a carrier's rating is less than Satisfactory, the permit may be suspended or revoked until a Satisfactory rating is achieved.

The second potential conflict is the Point of Origin Inspections for Highway Route-Controlled Quantities (HRCQ) shipments required by 49 U.S.C. 5105(e). These inspections are currently required to be conducted via the CVSA Level VI Enhanced Radioactive Materials Inspection Program, which fulfills the requirements of 49 U.S.C. 5105(e). Today's final rule explicitly cites this requirement for HRCQ and thus prevents any statutory conflict.

Conclusion

The final rule is not anticipated to have any significant impact on the great majority of small carriers transporting HM covered by the proposed HM permit. As discussed above, the approximately 2,400 small carriers will incur some additional costs to implement the permitting program. A small carrier transporting HM would incur an annual cost of about $1,100 to comply with the rule. This added expenditure is unlikely to prevent the overwhelming majority of small carriers from participating in the HM trucking business. For these small carriers, the cost increase will not be reflected in significantly lower carrier profits or higher charges to suppliers, shippers, or other customers.

Small businesses that work with the small carriers would not ordinarily be affected by the permit rules during the course of normal business operations. These small businesses would experience a negative impact only if a small carrier they dealt with were seriously harmed by the permit program and forced either to cut back its business volume or cease operations entirely. Since HM permit holders are unlikely to experience consequences of this nature if a required permit is rejected or suspended, small businesses that work with the carriers are also unlikely to be affected.

Small governmental entities such as local police departments may receive some additional calls and may need to prepare some reports if the permit system's communications requirements mandate that a particular truck be traced and/or investigated. These calls and reports are not anticipated to significantly affect the workload or staffing of these local entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), a Federal agency must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. FMCSA analyzed this final rule and determined that its implementation will increase the existing information collection (IC) burden on motor carriers, both interstate and intrastate. The final rule adopts a slightly expanded list of HM requiring a permit, comprised of the statutory list and additional explosive and toxic by inhalation (TIH) materials in certain quantities as appropriate. Specifically, a permit will be required for:

1. Radioactive Materials—A highway route-controlled quantity of Class 7 materials.

2. Explosives—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 material requiring a placard under title 49 CFR, part 172, subpart F.

3. Toxic-by-Inhalation (Division 2.3 and 6.1) Materials—Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.

4. A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

The burden on industry was determined for this option and is described in detail in the Regulatory Flexibility Analysis report.

Change to Current Collection

One currently approved information collection is affected by this final rule: OMB Control No. 2126–0013, titled ''Motor Carrier Identification Report,'' which is approved for 74,250 burden hours. This final rule would increase the IC burden hours for OMB Control No. 2126–0013 by extending the data collection to 992 intrastate motor carriers (both small and large) that transport the permitted hazardous materials. FMCSA estimates that interstate motor carriers that have already completed MCS–150 forms will require about 6 minutes to complete and file an application for registration, and that intrastate carriers that have not completed MCS–150 forms will require about 26 minutes (0.43 hours). Using RSPA's registration database to obtain the number of affected intrastate carriers, the burden hour increase for this collection is 430 hours (992 intrastate carriers × 26 minutes/60 minutes per hour = 430 hours).

Thus, for existing OMB Control No. 2126–0013, the burden hours would be increased to 74,680 (74,250 current + 430 additional), and the number of respondents would increase to 549,992 (549,000 current + 992 additional).

The permitting program requires carriers to maintain written records of communication between drivers and their carriers. This communication must take place at least twice a day. The types of information required include time and location of communication. The communication recordkeeping requirements were assumed to take 5 minutes per trip of a clerk's time at an hourly pay of $15 (plus 40 percent for fringe benefits). The total burden hours were based on 1,570,391 estimated annual trips for carriers. This annual burden is 41.80 hours per carrier (5 minutes/60 minutes per hour × 1,570,391/3,131 carriers).

The estimated IC burden hours are summarized in Table 3 below. These values reflect the additional burden that the final rule will place on the affected carriers and are derived from MCMIS and RSPA data as mentioned above.

TABLE 3.—BURDEN CALCULATIONS

	Carriers			Burden hours	
	Intrastate	Interstate	Total	Per carrier [1]	Total
Increased reporting under OMB Control No. 2126–0013 ...	992	N/A	992	0.43	430

TABLE 3.—BURDEN CALCULATIONS—Continued

	Carriers			Burden hours	
	Intrastate	Interstate	Total	Per carrier [1]	Total
Maintaining communications records	992	2,139	3,131	41.80	130,866
Total					131,296

[1] Figures are rounded to the nearest hundredth; unrounded numbers are used in calculations.

As shown in Table 3, the total estimated first-year burden is 131,296 hours.

It is estimated that burden hours in subsequent years would primarily be the time to provide shipment estimates and communication records, as also indicated in Table 3.

New Information Collection Activity

This final rule will also establish a new data collection for all motor carriers that transport any of the permitted hazardous materials. Three provisions of the final rule would *not* require any substantive increase in the reporting burden:

1. To certify that all hazardous materials incidents have been reported to RSPA;

2. To certify that the communication requirements of this rule have been met; and

3. To certify that the security plan and training requirements have been met.

All carriers of hazardous materials requiring a permit under this rule are subject to RSPA's registration requirements and should already have a valid registration number. The certifications required under this rule are simple affirmations that the requirements have been met, without the need for providing supporting documentation. The affirmation is included in the permit application form.

For purposes of calculating the burden hours, RSPA registration data were used for estimating the number of HM carriers, both interstate and intrastate, that transport the listed types of HM under each permitting option.

The biennial permit renewal requires carriers only to check off a few additional boxes (relative to the existing MCS–150 form) on the MCS–150B form. The burden hours to check off the additional boxes on the MCS–150B form are small—about 6 minutes. Interstate carriers already must complete the MCS–150 and will only incur an additional 6-minute burden; however, intrastate carriers have never completed an MCS–150 and will need about 16 minutes (0.27 hours) to complete the permit renewal.

The burden hours for the communication records will be the same for all years. The annual burden hour estimate of 131,105 is shown in Table 4. As only one-half of all carriers will be required to renew their permit application each year, the per-carrier burden hours shown have been divided by two to compute the annual average. The annual burden hours are the sum of the burden hours for permit renewals ([992 intrastate carriers × 16 minutes + 2,139 interstate carriers × 6 minutes]/60 minutes per hour × ½ of all carriers each year = 239 hours) and communication records.

TABLE 4.—ANNUAL BURDEN CALCULATIONS

	Carriers		Burden hours		
	Intrastate	Interstate	Per carrier [1]		Total
			Intrastate	Interstate	
Increased reporting under OMB Control No. 2126–xxxx	992	2,139	0.13	0.05	239
Maintaining communications records	992	2,139	41.80	41.80	130,866
Total					131,105

[1] Figures are rounded to the nearest hundredth; unrounded numbers are used in calculations.

The first-year and annual burden hours are summarized together in Table 5.

TABLE 5.—SUMMARY OF BURDEN HOURS

Burden hours	
First-year	Annual
131,296	131,105

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

Motor Carrier Identification Report

[OMB No. 2126–0013]

Total Annual Number of Respondents: 549,992.

Total Annual Burden Hours: 74,680.

Hazardous Materials Permit

[OMB No. 2126–xxxx]

Total Annual Number of Respondents: 3,131.

Total Annual Burden Hours: 130,866.

As noted above, the Paperwork Reduction Act requires that Federal agencies obtain approval from OMB for each collection of information they conduct, sponsor or require through regulations. We are coordinating this final rule with a submission to OMB in accordance with the Act. Thus, comments on the additional Motor Carrier Identification Reports, specifically the MCS–150B, and permit applications should go to the Office of Management and Budget. Send comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW, Washington, DC 20503, *Attention:* DOT Desk Officer. We particularly request your comments on whether the collection of information is useful; the accuracy of the estimated

burden for the information collected; ways to enhance the quality, utility, and clarity of the information collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

National Environmental Policy Act

FMCSA analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined under the agency's National Environmental Policy Act Implementing Procedures, FMCSA Order 5610.1C (published at 69 FR 9680 [Mar. 1, 2004] with an effective date of March 30, 2004) that this action is categorically excluded (CE) under Appendix 2, paragraph 6.d of the Order from further environmental documentation. That CE relates to establishing regulations and actions concerning the training, qualifying, licensing, certifying, and managing of personnel. The agency believes that the action includes no extraordinary circumstances that will have any effect on the quality of the environment.

Nevertheless, because the rulemaking concerns hazardous materials transportation, the agency prepared an Environmental Assessment pursuant to Appendices 5 and 6 of the Order, and placed it in the public docket for this rulemaking. You may access the EA on the DMS Web site at *http://dms.dot.gov.* We received no comments on the EA in response to the August 19, 2003, supplemental notice of proposed rulemaking. Based on the findings of the EA, FMCSA has determined that this rulemaking does not pose any significant negative impacts to the environment and may result in a net benefit from increased protection and monitoring of hazardous materials shipments. Thus, the action does not require an environmental impact statement.

We have also analyzed this rule under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. We performed a conformity analysis of the CAA according to the procedures outlined in appendix 14 of FMCSA Order 5610.1C. This rule will not result in any emissions increase, nor will it have any potential to result in emissions that are above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable that the rule change will not increase total CMV mileage, change the routing of CMVs, change how CMVs operate, or change the CMV fleet-mix of motor carriers. This action merely establishes that a carrier desiring to transport certain hazardous materials in commerce must obtain a safety permit from the Department and adhere to additional communication standards.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999.

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

FMCSA may preempt some State permitting programs for materials covered in this final rule. This preemption is necessary to conform to the statutory requirements, but it will have a small overall effect on State permit programs. For these reasons, FMCSA has determined this rule does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor will it limit the policymaking discretion of the States.

Executive Order 13045 (Protection of Children)

FMCSA has analyzed this action under Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 1985, Apr. 23, 1997). The rule will not present an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12372 (Intergovernmental Review)

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

Executive Order 13166 (Limited English Proficiency)

Executive Order 13166, ''Improving Access to Services for Persons with Limited English Proficiency'' (LEP), requires each Federal agency to examine the services it provides and to develop reasonable measures to ensure that persons seeking government services but limited in their English proficiency can meaningfully access these services, consistent with, and without unduly burdening, the fundamental mission of the agency. Its purpose is to clarify for Federal fund recipients the steps those recipients can take to avoid administering programs in a way that results in discrimination on the basis of national origin. FMCSA believes that this action complies with the principles enunciated in the Executive Order.

List of Subjects

49 CFR Part 385

Administrative practice and procedure, Highway safety, Incorporation by reference, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 390

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

■ Accordingly, FMCSA amends parts 385, 386, and 390 of title 49, Code of Federal Regulations, as follows:

PART 385—SAFETY FITNESS PROCEDURES

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

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

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

§ 385.1 Purpose and scope.

* * * * *

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

* * * * *

■ 3. Amend § 385.3 by revising the definition of the terms ''applicable safety regulations or requirements'' and ''commercial motor vehicle'' and adding a new acronym ''RSPA'' in alphabetical order to read as follows:

§ 385.3 Definitions and acronyms.

Applicable safety regulations or requirements means 49 CFR chapter III, subchapter B—Federal Motor Carrier Safety Regulations or, if the carrier is an intrastate motor carrier subject to the hazardous materials safety permit requirements in subpart E of this part, the equivalent State standards; and 49 CFR chapter I, subchapter C—Hazardous Materials Regulations.

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Commercial motor vehicle shall have the same meaning as described in § 390.5 of this subchapter, except that this definition will also apply to intrastate motor vehicles subject to the hazardous materials safety permit requirements of subpart E of this part.

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RSPA means the Research and Special Programs Administration.

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■ 4. Add a new § 385.4 to read as follows:

§ 385.4 Matter incorporated by reference.

(a) *Incorporation by reference.* Part 385 includes references to certain matter or materials, as listed in paragraph (b) of this section. The text of the materials is not included in the regulations contained in part 385. The materials are hereby made a part of the regulations in part 385. The Director of the Federal Register has approved the materials incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For materials subject to change, only the specific version in the regulation is incorporated. Material is incorporated as it exists on the date of the approval and a notice of any changes in these materials will be published in the **Federal Register**.

(b) *Matter or materials referenced in part 385.* The matter or materials in this paragraph are incorporated by reference in the corresponding sections noted.

(1) ''North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,'' January 1, 2004. Information and copies may be obtained from the Commercial Vehicle Safety Alliance, 1101 17th Street, NW, Suite 803, Washington, DC 20036. Phone number (202) 775–1623.

(2) All of the materials incorporated by reference are available for inspection at: The Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 400 Seventh Street, SW, Washington, DC 20590; and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

■ 5. In § 385.5 revise the introductory text to read as follows:

§ 385.5 Safety fitness standard.

The Satisfactory safety rating is based on the degree of compliance with the safety fitness standard for motor carriers. For intrastate motor carriers subject to the hazardous materials safety permit requirements of subpart E of this part, the motor carrier must meet the equivalent State requirements. To meet the safety fitness standard, the motor carrier must demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

* * * * *

■ 6. Add a new subpart E to part 385 to read as follows:

Subpart E—Hazardous Materials Safety Permits

Sec.

Subpart E—Hazardous Materials Safety Permits

§ 385.401 What is the purpose and scope of this subpart?

(a) This subpart contains the requirements for obtaining and maintaining a safety permit to transport certain hazardous materials. No one may transport the materials listed in § 385.403 without a safety permit required by this subpart.

(b) This subpart includes:

(1) Definitions of terms used in this subpart;

(2) The list of hazardous materials that require a safety permit if transported in commerce;

(3) The requirements and procedures a carrier must follow in order to be issued a safety permit and maintain a safety permit;

(4) The procedures for a motor carrier to follow to initiate an administrative review of a denial, suspension, or revocation of a safety permit.

§ 385.402 What definitions are used in this subpart?

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

(b) As used in this part,

Hazardous material has the same meaning as under § 171.8 of this title: A substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under Sec. 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see § 172.101 of this title), and materials that meet the defining criteria for hazard classes and divisions in part 173 of this title.

Hazmat employee has the same meaning as under § 171.8 of this title: A

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

(1) Loads, unloads, or handles hazardous materials;

(2) Manufactures, tests, reconditions, repairs, modifies, marks, or otherwise represents containers, drums, or packaging as qualified for use in the transportation of hazardous materials;

(3) Prepares hazardous materials for transportation;

(4) Is responsible for the safe transportation of hazardous materials; or

(5) Operates a vehicle used to transport hazardous materials.

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

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

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

§ 385.403 Who must hold a safety permit?

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

(a) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in § 173.403 of this title;

(b) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material or an amount of a Division 1.5 (explosive) material requiring placarding under part 172 of this title;

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

(d) A ''material poisonous by inhalation,'' as defined in § 171.8 of this title, that meets the criteria for ''hazard zone B,'' as specified in § 173.116(a) or § 173.133(a) of this title in a bulk packaging (capacity greater than 450 L [119 gallons]);

(e) A ''material poisonous by inhalation,'' as defined in § 171.8 of this title, that meets the criteria for ''hazard zone C,'' or ''hazard zone D,'' as specified in § 173.116(a) of this title, in a packaging having a capacity equal to or greater than 13,248 L (3,500) gallons; or

(f) A shipment of compressed or refrigerated liquefied methane or liquefied natural gas, or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons).

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

(a) *Application form(s).* To apply for a new safety permit or renewal of the safety permit, a motor carrier must complete and submit Form MCS–150B, Combined Motor Carrier Identification Report and HM Permit Application.

(1) The Form MCS–150B will also satisfy the requirements for obtaining and renewing a DOT identification number; there is no need to complete Form MCS–150, Motor Carrier Identification Report.

(2) A new entrant, as defined in § 385.3, must also submit Form MCS–150A, Safety Certification for Application (Safety Certification for Application for USDOT Number) (see subpart D of this part).

(b) *Where to get forms and instructions.* The forms listed in paragraph (a) of this section, and instructions for completing the forms, may be obtained on the Internet at *http://www.fmcsa.dot.gov*, or by contacting FMCSA at Federal Motor Carrier Safety Administration, MC–RIS, Room 8214, 400 7th Street, SW, Washington, DC 20590, Telephone: 1–800–832–5660.

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

(d) *Updating information on Form MCS–150B.* A motor carrier holding a safety permit must report to FMCSA any change in the information on its Form MCS–150B within 30 days of the change. The motor carrier must use Form MCS–150B to report the new information (contact information in paragraph (b) of this section).

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

(a) *Motor carrier safety performance.* (1) The motor carrier must have a ''Satisfactory'' safety rating assigned by either FMCSA, pursuant to the Safety Fitness Procedures of this part, or the State in which the motor carrier has its principal place of business, if the State has adopted and implemented safety fitness procedures that are equivalent to the procedures in subpart A of this part; and,

(2) FMCSA will not issue a safety permit to a motor carrier that:

(i) Does not certify that it has a satisfactory security program as required in § 385.407(b);

(ii) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

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

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

(2) A communications plan that allows for contact between the commercial motor vehicle operator and the motor carrier to meet the periodic contact requirements in § 385.415(c)(1); and

(3) Successful completion by all hazmat employees of the security training required in § 172.704(a)(4) and (a)(5) of this title.

(c) *Registration with the Research and Special Programs Administration (RSPA).* The motor carrier must be registered with RSPA in accordance with part 107, subpart G of this title.

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

(a) *Temporary safety permit.* If a motor carrier does not meet the criteria in § 385.407(a), FMCSA may issue it a temporary safety permit. To obtain a temporary safety permit a motor carrier must certify on Form MCS–150B that it is operating in full compliance with the HMRs; with the FMCSRs, and/or comparable State regulations, whichever is applicable; and with the minimum financial responsibility requirements in part 387 of this chapter or in State regulations, whichever is applicable.

(b) FMCSA will not issue a temporary safety permit to a motor carrier that:

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

(2) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA's MCMIS; or

(3) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

(c) A temporary safety permit shall be valid for 180 days after the date of issuance or until the motor carrier is assigned a new safety rating, whichever occurs first.

(1) A motor carrier that receives a Satisfactory safety rating will be issued a safety permit (see § 385.421).

(2) A motor carrier that receives a less than Satisfactory safety rating is ineligible for a safety permit and will be subject to revocation of its temporary safety permit.

(d) If a motor carrier has not received a safety rating within the 180-day time period, FMCSA will extend the effective date of the temporary safety permit for an additional 60 days, provided the motor carrier demonstrates that it is continuing to operate in full compliance with the FMCSRs and HMRs.

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

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

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

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

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

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

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

(1) A copy of the safety permit or another document showing the permit number, provided that document clearly indicates the number is the FMCSA Safety Permit number;

(2) A written route plan that meets the requirements of § 397.101 of this chapter for highway route-controlled Class 7 (radioactive) materials or § 397.67 of this chapter for Division 1.1, 1.2, and 1.3 (explosive) materials; and

(3) The telephone number, including area code or country code, of an employee of the motor carrier or representative of the motor carrier who is familiar with the routing of the permitted material. The motor carrier employee or representative must be able to verify that the shipment is within the general area for the expected route for the permitted material. The telephone number, when called, must be answered directly by the motor carrier or its representative at all times while the permitted material is in transportation including storage incidental to transportation. Answering machines are not sufficient to meet this requirement.

(b)(1) *Inspection of vehicle transporting Class 7 (radioactive) materials.* Before a motor carrier may transport a highway route controlled quantity of a Class 7 (radioactive) material, the motor carrier must have a pre-trip inspection performed on each motor vehicle to be used to transport a highway route controlled quantity of a Class 7 (radioactive) material, in accordance with the requirements of the ''North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,'' January 1, 2004, which is incorporated by reference. The Director of the Federal Register has approved the materials incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Information and copies may be obtained from the Commercial Vehicle Safety Alliance, 1101 17th Street, NW, Suite 803, Washington, DC 20036. Phone number (202) 775–1623.

(2) All materials incorporated by reference are available for inspection at the Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 400 Seventh Street, SW., Washington, DC 20590; and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) *Additional requirements.* A motor carrier transporting hazardous materials requiring a permit under this part must also meet the following requirements:

(1) The operator of a motor vehicle used to transport a hazardous material listed in § 385.403 must follow the communications plan required in § 385.407(b)(2) to make contact with the carrier at the beginning and end of each duty tour, and at the pickup and delivery of each permitted load. Contact may be by telephone, radio or via an electronic tracking or monitoring system. The motor carrier or driver must maintain a record of communications for 6 months after the initial acceptance of a shipment of hazardous material for which a safety permit is required. The record of communications must contain the name of the driver, identification of the vehicle, permitted material(s) being transported, and the date, location, and time of each contact required under this section.

(2) The motor carrier should contact the Transportation Security Administration's Transportation Security Coordination Center (703–563–3236 or 703–563–3237) at any time the motor carrier suspects its shipment of a hazardous material listed in § 385.403 is lost, stolen or otherwise unaccounted for.

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

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

§ 385.419 How long is a safety permit effective?

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

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

(b) An existing safety permit will remain in effect pending FMCSA's processing of an application for renewal if a motor carrier submits the required application (Form MS–150B) in accordance with the schedule set forth

in § 390.19(a)(2) and (a)(3) of this chapter.

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

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

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

(2) A motor carrier provides any false or misleading information on its application (Form MCS–150B), on Form MCS–150A (when required), or as part of updated information it is providing on Form MCS–150B (see § 385.405(d));

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

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

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

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

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

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

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

(10) A motor carrier loses its operating rights or has its registration suspended in accordance with § 386.83 or § 386.84 of this chapter for failure to pay a civil penalty or abide by a payment plan.

(b) *Determining whether a safety permit is revoked or suspended.* A motor carrier's safety permit will be suspended the first time any of the conditions specified in paragraph (a) of this section are found to apply to the motor carrier. A motor carrier's safety permit will be revoked if any of the conditions specified in paragraph (a) of this section are found to apply to the motor carrier and the carrier's safety permit has been suspended in the past for any of the reasons specified in paragraph (a) of this section.

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

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

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

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

(4) A motor carrier whose safety permit has been revoked will not be issued a replacement safety permit or temporary safety permit for 365 days from the time of revocation.

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

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

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

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

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

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

(i) FMCSA Chief Safety Officer, Federal Motor Carrier Safety Administration, c/o Adjudications Counsel (MC–CC), 400 Seventh Street, SW., Washington, DC 20590.

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

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

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

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

rules in part 386 of this chapter that are considered appropriate).

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

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

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

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

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

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

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

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

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

Appendix B to Part 385—Explanation of Safety Rating Process

■ 7. Amend Appendix B to part 385 by adding, to the introductory text before Paragraph I, a new paragraph (e) to read as follows:

* * * * *

(e) The hazardous materials safety permit requirements of part 385, subpart E apply to intrastate motor carriers. Intrastate motor carriers that are subject to the hazardous materials safety permit requirements in subpart E will be rated using equivalent State requirements whenever the FMCSRs are referenced in this appendix.

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■ 8. Amend Appendix B to part 385 by adding to the List of Acute and Critical Regulations under Paragraph VII the following information in numerical order after § 397.67(d):

* * * * *

VII. List of Acute and Critical Regulations

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§ 397.101(d) Requiring or permitting the operation of a motor vehicle containing highway route-controlled quantity, as defined in § 173.403, of radioactive materials that is not accompanied by a written route plan.

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■ 9. Amend Appendix B to part 385 by adding to the List of Acute and Critical Regulations under Paragraph VII the following information in numerical order after § 171.16:

* * * * *

VII. List of Acute and Critical Regulations

* * * * *

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

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

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

§ 172.800(b) Transporting HM without a security plan (acute).

§ 172.800(b) Transporting HM without a security plan that conforms to Subpart I requirements (acute).

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

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

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

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

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

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

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

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

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

* * * * *

■ 10. Amend Appendix B to part 385 by adding to the List of Acute and Critical Regulations under Paragraph VII the following information in numerical order after § 177.800(c):

* * * * *

VII. List of Acute and Critical Regulations

* * * * *

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

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

§ 177.835(c) Accepting for transportation or transporting Division 1.1, 1.2, or 1.3 (explosive) materials in a motor vehicle or combination of vehicles that is not permitted (acute).

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

* * * * *

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 11. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 31132–31133, 31136, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 217, Pub. L. 105–159, 113 stat. 1748, 1767; and 49 CFR 1.73.

Appendix B to Part 386—Penalty Schedule; Violations and Maximum Monetary Penalties

■ 12. Amend Appendix B to part 386 by revising the introductory text to paragraph (e) to read as follows:

* * * * *

(e) Violations of the Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations found in subpart E of Part 385. This paragraph applies to violations by motor carriers, drivers, shippers and other persons who transport hazardous materials on the highway in commercial motor vehicles or cause hazardous materials to be so transported.

* * * * *

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 13. The authority citation for part 390 continues to read as follows:

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

■ 14. Amend § 390.3 by adding a new paragraph (g) to read as follows:

§ 390.3 General applicability.

* * * * *

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

(1) Part 385, subparts A and E, for carriers subject to the requirements of § 385.403 of this chapter.

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

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

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

* * * * *

■ 15. Amend § 390.19 by revising paragraphs (a) introductory text, (b), (c) introductory text, (c)(2), (d), (e), and (f) to read as follows:

§ 390.19 Motor carrier identification report.

(a) Each motor carrier that conducts operations in interstate commerce (or intrastate commerce if the carrier requires a Safety Permit as per § 385.400 of this chapter) must file a Motor Carrier Identification Report, Form MCS–150, or the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B for permitted carriers, at the following times:

* * * * *

(b) The Motor Carrier Identification Report, Form MCS–150, and the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B, with complete instructions, are available from the FMCSA Web site at: *http://www.fmcsa.dot.gov* (Keyword ''MCS–150'' or ''MCS–150B''); from all FMCSA Service Centers and Division offices nationwide; or by calling 1–800–832–5660.

(c) The completed Motor Carrier Identification Report, Form MCS–150, or Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B, must be filed with FMCSA Office of Information Management.

(1) * * *

(2) A for-hire motor carrier should submit the Form MCS–150, or Form MCS–150B, along with its application for operating authority (Form OP–1 or OP–2), to the appropriate address referenced on that form, or may submit it electronically or by mail separately to the address mentioned in this section.

(d) Only the legal name or a single trade name of the motor carrier may be used on the motor carrier identification report (Form MCS–150 or MCS–150B).

(e) A motor carrier that fails to file a Motor Carrier Identification Report, Form MCS–150, or the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B, or furnishes misleading information or makes false statements upon Form MCS–150 or Form MCS–150B, is subject to the penalties prescribed in 49 U.S.C. 521(b)(2)(B).

(f) Upon receipt and processing of the Motor Carrier Identification Report, Form MCS–150, or the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B, the FMCSA will issue the motor carrier an identification number (USDOT Number). The motor carrier must display the number on each self-propelled CMV, as defined in § 390.5, along with the additional information required by § 390.21.

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Issued on: June 22, 2004.

Annette M. Sandberg,

Administrator.

[FR Doc. 04–14654 Filed 6–29–04; 8:45 am]

BILLING CODE 4910–EX–P