DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 171

[Docket No. RSPA–97–2133 (HM–225)]

RIN 2137–AC97

Hazardous Materials: Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service; Response To Petitions for Reconsideration; Editorial Revisions; and Rules Clarification

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

ACTION: Final rule; response to petitions for reconsideration; editorial revisions; and rules clarification.

SUMMARY: On August 18, 1997, RSPA published a final rule adopting certain safety standards applicable to cargo tank motor vehicles in liquefied compressed gas service. In response to petitions for reconsideration filed by Farmland Industries, Inc. (Farmland), The Fertilizer Institute (TFI), and AmeriGas Propane, L.P. (AmeriGas), RSPA is revising a requirement concerning the daily pressure testing of transfer hoses on these cargo tank motor vehicles, and the agency is revising § 171.5(a) for consistency with § 178.337–11(a)(1)(i) by removing a hose rupture (*i.e.*, incomplete separation) as a condition that causes the internal self-closing stop valve to function. This action grants certain petitions for reconsideration of the final rule pertaining to effective and practical standards to assure the integrity of transfer hoses used in unloading operations. Also, in this final rule, RSPA is granting the request by Farmland and TFI to extend the expiration of the final rule requirements for four months, to July 1, 1999. RSPA is denying the request by AmeriGas for an immediate stay of the provisions of § 171.5(a)(1)(iii) and the AmeriGas request for reconsideration of: The provision in § 171.5(c) setting forth an expiration date for the final rule requirements; and RSPA's interpretation of the attendance requirements in § 177.834(i) that a qualified person must always maintain an unobstructed view of the cargo tank. Additionally, this action makes editorial revisions and clarifies certain provisions adopted in the final rule.

DATES: This final rule is effective December 10, 1997.

FOR FURTHER INFORMATION CONTACT: Ronald Kirkpatrick, Office of Hazardous Materials Technology, RSPA, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001, telephone (202) 366–4545, or Nancy Machado, Office of the Chief Counsel, RSPA, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001, telephone (202) 366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

On August 18, 1997, RSPA published a final rule under Docket No. RSPA–97–2133 (HM–225) [62 FR 44038]. The final rule revised and extended requirements published in an interim final rule (IFR) on February 19, 1997, concerning the operation of cargo tank motor vehicles (CTMVs) in certain liquefied compressed gas service. The final rule requires a specific marking on affected CTMVs and requires motor carriers to comply with additional operational controls intended to compensate for the failure of passive emergency discharge control systems to function as required by the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180). The operational controls specified in the final rule provide an alternative to compliance with § 178.337–11(a)(1)(i) and are intended to ensure an acceptable level of safety while the industry and government continue to work to develop an emergency discharge control system that effectively stops the discharge of hazardous materials from a cargo tank if any attached hose or piping is separated.

Petitions for reconsideration of the August 18, 1997 final rule were filed by The National Propane Gas Association (NPGA), Farmland Industries, Inc. (Farmland), The Fertilizer Institute (TFI) and jointly by Ferrellgas, L.P., Suburban Propane, L.P., AmeriGas Propane, L.P. (AmeriGas), Agway Petroleum Corporation, Cornerstone Propane Partners, L.P., and National Propane, L.P. On September 26, 1997, Ferrellgas, L.P., Suburban Propane, L.P., Agway Petroleum Corporation, Cornerstone Propane Partners, L.P., and National Propane, L.P. withdrew their names from the jointly-filed petition for reconsideration. Petitioner AmeriGas, however, continues to seek relief through the September 17, 1997 petition for reconsideration. On October 2, 1997, NPGA withdrew its petition for reconsideration. On November 5, 1997, National Private Truck Council (NPTC) filed a petition for reconsideration. Although the petition was filed by NPTC after the close of the petition period, and RSPA has not accepted the petition, all NPTC's issues have been considered since NPTC raised issues identical to those raised by other petitioners.

Petitioners Farmland and TFI seek reconsideration of two provisions of the August 18, 1997 final rule. Specifically, they request reconsideration of the requirement in § 171.5(a)(1)(i) that a transfer hose be subjected to full transfer pressure before commencing the first transfer each day. They also ask RSPA to reconsider the expiration date of the August 18, 1997 final rule requirements; they request a four-month extension of the expiration date to July 1, 1999.

AmeriGas seeks: (1) Reconsideration and an immediate stay of the requirement in § 171.5(a)(1)(iii) that the qualified person unloading a CTMV promptly activate the internal self-closing stop valve and promptly shut down all motive and auxiliary power in the event of an unintentional release of lading to the environment during transfer; (2) immediate withdrawal of RSPA's interpretation of its long-standing attendance requirements in § 177.834(i) pending further rulemaking after notice and comment; (3) withdrawal of the expiration date in § 171.5(c); (4) deletion of the word ''rupture'' as it appears in § 171.5(a); and (5) withdrawal of the requirement in § 171.5(a)(1)(i) that the transfer hose be subjected to full transfer pressure before commencing the first transfer each day.

II. Petitions Granted

A. Daily Pressure Testing of Transfer Hoses

In § 171.5(a)(1)(i), RSPA required that a transfer hose be subject to full transfer pressure before the first unloading of product each day. This provision applied to all CTMVs operating under the terms of the temporary regulation specified in § 171.5.

Petitioners assert that, because most large CTMVs (''transports,'' typically used for bulk plant deliveries) do not have a separate back-to-tank product bypass line, energizing the pump when the receiving tank's liquid shutoff valve is closed may damage the pump vanes, result in failure of the shaft seals and other components, and place high torsional loads on the power take-off (PTO) drive shaft.

In addition, petitioners state that no additional safety measures are needed for small CTMVs (''bobtails,'' typically used for local deliveries) because they are generally equipped with a separate back-to-tank product bypass valve. Petitioners state that, in the process of preparing lines for product transfer from a small CTMV, the full length of transfer hose is charged to pump discharge

pressure, thereby providing an opportunity to prove the integrity of the transfer system prior to each delivery.

Recognizing the merit of the petitioners' comments regarding the transfer hose pressure standard adopted in the final rule, RSPA published an advisory guidance that communicated the agency's agreement with the petitioners' claim that some cargo tank pumping systems are not capable of safely pumping against a closed product valve without being damaged (62 FR 49171; September 19, 1997) . Therefore, § 171.5(a)(1)(i) is revised to allow an operator to determine the leakproofness of a discharge system (including hose) by requiring that the pressure in the discharge system reach at least equilibrium with the pressure inside the cargo tank prior to transfer. After the operator verifies leakproofness of the discharge system, delivery may commence.

RSPA is also amending § 171.5(a)(1)(i) by removing the wording ''and equipment'' from the third sentence to clarify that only the piping, hose and hose fittings must be tested daily. There is no requirement to test the entire cargo tank on a daily basis.

B. Hose Separation Versus Hose Rupture

Petitioner AmeriGas notes RSPA's use of the word ''rupture[d]'' in § 171.5(a) with respect to comparable requirements in § 178.337–11(a)(1)(i) concerning operation of the internal self-closing stop valve. The petitioner states that the word ''rupture[d]'' is more commonly used to denote a ''leak or partial failure'' rather than an actual separation, thus creating an undesirable potential for confusion. Therefore, AmeriGas requests that the word ''rupture[d]'' be stricken from the regulatory language.

RSPA agrees that the word ''ruptured'' could be construed as adding new meaning to requirements pertaining to the emergency operation of the internal self-closing stop valve that was not intended in the development of the final rule. Therefore, § 171.5(a) is amended by removing the wording ''ruptured or'' to make this provision consistent with requirements in § 178.337–11(a)(1)(i).

C. March 1, 1999 Expiration Date of the Temporary Final Rule

Petitioners TFI and Farmland request that RSPA reconsider the March 1, 1999 expiration date of the requirements in § 171.5. The petitioners request a four-month extension of the alternative requirements in § 171.5—until July 1, 1999—to avoid expiration of the requirements at the beginning of the fertilizer industry's peak delivery season.

RSPA is granting a request by TFI and Farmland to extend the expiration date until July 1, 1999. This decision is based on RSPA's understanding that industry will continue to make good faith efforts in developing an emergency discharge control system that offers an equal or higher level of safety as that in longstanding provisions in § 178.337–11(a)(1)(i).

III. Petitions Denied

A. Prompt Activation of the Internal Self-Closing Stop Valve

In its petition, AmeriGas contends that it is impossible to achieve immediate full compliance with the requirement in § 171.5(a)(1)(iii) that a qualified person unloading a small CTMV promptly activate the internal self-closing stop valve and promptly shut down all motive and auxiliary power equipment if there is an unintentional release of lading to the environment during transfer. AmeriGas claims this rule constitutes a new operator attendance requirement that can only be satisfied by using remote-controlled equipment that is not currently in service on more than an experimental basis and that such equipment cannot be put into service in less than a matter of months.

In the February 1997 emergency interim final rule (IFR), RSPA first adopted additional requirements for the person who attends the unloading of a CTMV to be within arm's reach of a means for closure (emergency shut-down device) of the internal self-closing stop valve or other device that will immediately stop the discharge of product from the cargo tank [62 FR 7643, February 19, 1997]. Use of an ''electro-mechanical'' device as a means of closure was discussed in that rule. Based on comments to the IFR, RSPA revised § 171.5(a)(1)(iii)(C), in the August final rule, to set forth three ways to achieve prompt stoppage of lading discharge from the cargo tank by: (1) complying with the requirements in § 178.337–11(a)(1)(i); (2) using a qualified person positioned within arm's reach of the mechanical means of closure of the internal self-closing stop valve throughout the unloading operation, except during the short period necessary to engage or disengage the motor vehicle PTO or other mechanical, electrical, or hydraulic means used to energize the pump and other components of a cargo tank's discharge system; or (3) using a remote-controlled system that is capable of stopping the transfer of lading by use of a transmitter carried by a qualified person unloading the cargo tank.

RSPA notes that the NPGA special task force, organized in part to develop plans to provide for continued safe operation of existing propane cargo tanks, concentrated much of its efforts on development of remote-controlled devices that may be activated by the person attending an unloading operation [comments of Mr. McHenry, NPGA, June 23, 1997 public meeting]. A representative of the NPGA special task force reported progress on the development of remote-controlled devices at a June 23, 1997 public meeting [comments of Mr. McHenry, NPGA]. Petitioner AmeriGas also provided a report on its progress in developing an effective, low-cost remote-controlled system using radio frequency technology [comments of Mr. McEnroe, AmeriGas, June 23, 1997 public meeting transcript, pages 5, 45, 56, and 57]. AmeriGas provided RSPA with an update on its progress in a November 13, 1997 meeting. The NPGA's July 24, 1997 petition for rulemaking (P–1346) calls for RSPA to adopt a new provision in § 178.337–11(a)(1)(iii) for a variety of systems that are capable of closing the internal liquid discharge valve by remote means.

The public record contains favorable accounts by several propane dealers who have installed remote-controlled systems on their fleets of CTMVs [comments of Mr. Schuler, REMTRON, June 23, 1997 public meeting transcript, pages 59 and 60; comments of Mr. Stillwaggon, H.R. Weaver Co.; and comments of Mr. McEnroe, AmeriGas, September 30, 1997 public meeting transcript, pages 42 and 61, respectively].

Industry representatives have stated that they have had good results with using radio-frequency, remote-controlled systems [comments of Mr. McEnroe, AmeriGas, public meeting transcript, June 23, 1997, page 46; Dr. Coady, Hick's Gas, June 23, 1997 public meeting transcript, pages 92 and 102]. A representative of Hicks Gas, one of the larger independent marketers of propane, stated that his company has been developing and refining remote-control shutdown systems on some of its trucks for the past three years [comments of Dr. Coady, Hick's Gas, June 23, 1997 public meeting transcript, page 92].

During two public meetings (June 23, 1997 and September 30, 1997) industry representatives presented information on radio frequency, remote-controlled systems, some with basic features and others with more sophisticated applications, that can be used on most

CTMVs. Additionally, they represented that the installation instructions for these systems are simple enough that a fleet mechanic who has a working knowledge of a vehicle's air and electrical systems generally has the experience and tools necessary to install and proof-test a system within a period of two or three hours.

The advantage of a remote-controlled device has been demonstrated during an incident involving a propane release on November 3, 1997 near Udina, Illinois. The driver, using a remote-controlled device, promptly activated closure of the internal self-closing stop valve without ignition of the propane.

RSPA does not agree that operators of CTMVs have no practical means of compliance. The public record contains information that some operators began installing remote-controlled systems shortly after issuance of the February 19, 1997 interim final rule. In addition, the Federal Highway Administration's (FHWA) compliance policy emphasizes increased awareness about the rule and its safety benefits, as opposed to immediate enforcement. If a company shows good faith efforts to comply with the provisions of § 171.5, FHWA's policy is to not pursue civil penalty enforcement actions.

Therefore, based on the above information, this part of the AmeriGas petition for reconsideration of the final rule is denied.

RSPA believes there is a need to clarify that while the first sentence of § 171.5(a)(1)(iii)(C) allows use of a remote-controlled system to promptly activate the internal self-closing stop valve in the event of an unintentional discharge, the second sentence provides limited relief from the attendance requirements in § 177.834(i)(3). Specifically, § 177.834(i)(3) requires a qualified person who is attending the unloading of a cargo tank to be awake, have an unobstructed view of the cargo tank, and be within 25 feet of the cargo tank at all times during unloading. Therefore, the second sentence in § 171.5(a)(1)(iii)(C) is revised to clarify that where a remote-controlled system is used, the attendance requirements in § 177.834(i)(3) are satisfied when the qualified person attending is awake, is carrying a transmitter that can activate the closure of the internal self-closing stop valve, remains within the operating range of the transmitter, and maintains an unobstructed view of the cargo tank when the internal self-closing stop valve is open.

Also, § 171.5(a)(1)(iii)(B) is revised to clarify that a qualified person must be positioned within arm's reach of a mechanical means of closure for the internal self-closing stop valve *only* when this valve is open, except for the short duration necessary to engage or disengage the motor vehicle PTO or other mechanical, electrical or hydraulic means used to energize the pump and other components of a cargo tank motor vehicle's discharge system. All of these functions occur at or immediately adjacent to the cargo tank in proximity to a means for closure of the internal self-closing stop valve.

B. RSPA Has Not Developed a ''New Interpretation'' of Its Long-Standing Attendance Requirement in § 177.834(i)

In its petition, AmeriGas states that, in the August 18, 1997 final rule, RSPA announced a new interpretation of the long-standing attendance requirements set forth at § 177.834(i). AmeriGas contends that this interpretation should be withdrawn because it: (1) is inconsistent with the regulatory language; (2) was announced without notice or opportunity to comment, in violation of the Administrative Procedure Act (APA) (*see* 5 U.S.C. 553); and (3) is inconsistent with normal industry practice that has been ''accepted for decades without question.''

AmeriGas's arguments are invalid because RSPA's position with regard to the meaning of § 177.834(i) is consistent with the regulatory history and plain language of that requirement. Furthermore, the public was given notice of the rulemaking that gave rise to the attendance requirements and an opportunity to comment. Indeed, comments to that rulemaking reflect that industry understood that restrictions on the person attending the unloading of hazardous materials from CTMV's were being proposed. Additional notice and an opportunity to comment are, therefore, not required under the APA. Finally, there is no validity to the assertion that, for decades, the Department has accepted widespread industry non-compliance with the attendance requirements. For these reasons, AmeriGas's petition for reconsideration of RSPA's position regarding the § 177.834(i) attendance requirements is denied.

1. RSPA's Position Is Consistent With the Regulatory History and Plain Language of the Attendance Requirements in § 177.834(i)

AmeriGas argues in favor of an industry interpretation that compliance with § 177.834(i) can be achieved by having a single operator remain in proximity to, and maintain an unobstructed view of, any part of the *delivery hose.*

The position that RSPA has taken with regard to the meaning of the attendance requirements in 49 CFR 177.834(i) is not only consistent with the plain language of the regulation but the regulatory history of the regulation as well. Section 177.834(i) states:

* * * * *

(2) *Unloading.* A motor carrier who transports hazardous materials by a cargo tank must ensure that the cargo tank is attended by a qualified person at all times during unloading. . . .

(3) A person ''attends'' the loading or unloading of a *cargo tank* if, throughout the process, he is awake, has an unobstructed view of the *cargo tank,* and is within 7.62 meters (25 feet) of the cargo tank.

* * * * *

(5) A delivery hose, when attached to the cargo tank, is considered a part of the *vehicle* (Emphasis added.)

RSPA's position consistently has been that the plain language of § 177.834(i) requires an attendant to maintain an unobstructed view of the *cargo tank* and be within 25 feet of the *cargo tank* during the unloading process.[1] Contrary to AmeriGas's assertion, the term ''cargo tank'' means the cargo tank itself and does not mean the hose or CTMV. The language of § 177.834(i)(5) plainly states that the hose is part of the vehicle not the cargo tank.

AmeriGas contends that there is support for industry's interpretation of the § 177.834(i)(3) requirements in the regulatory history of these requirements. Specifically, AmeriGas relies on language that appeared in a republication of 49 CFR Parts 71–90 by the Interstate Commerce Commission (ICC) on December 29, 1964 (29 FR 18652). (The ICC regulated hazardous materials transportation by highway and rail prior to 1967, the year the Department of Transportation (DOT) was established). The regulatory text AmeriGas relies on reads, ''Under no circumstances shall a tank motor vehicle be left unattended during the loading or unloading process. For the purpose of this part, the delivery hose, when attached to the motor vehicle, shall be deemed a part thereof.'' (December 29, 1964; 29 FR 18801). RSPA believes this regulatory language makes it clear that a CTMV operator must attend the CTMV and any delivery hose attached to the motor vehicle

[1] RSPA's position is supported by National Fire Protection Association publication ''Standard for the Storage and Handling of Liquefied Compressed Gases'' (NFPA 58), reported as adopted by 49 of 50 states. Section 4–2.3.3 requires, during unloading into storage containers, that ''the shutoff valves on both the truck and the container are readily accessible.''

during loading and unloading. The intent of this provision was to ensure that the operator took responsibility for the entire delivery system which, for purposes of Part 77, included not only the motor vehicle itself but also the delivery hose when attached to the motor vehicle. However, the 1964 language in § 77.834(i) was not specific as to what actions constituted ''attendance.''

Realizing that the word ''attendance'' was vague and that there was industry confusion regarding what was required under the attendance regulation, the Hazardous Materials Regulations Board (the Board), the predecessor to RSPA's Office of the Associate Administrator for Hazardous Materials Safety, initiated a rulemaking in Docket HM–110 to clarify the attendance requirement. Language in the notice of proposed rulemaking (NPRM) and the final rule in Docket HM–110 serves as the basis for RSPA's interpretation of the current attendance requirement. Specifically, in the preamble to the HM–110 NPRM, the Board stated:

> The Board has found that several dangerous incidents have occurred during the loading or unloading of tank motor vehicles which could have been avoided, if there had been someone *near the cargo tank* to take corrective action or precautionary action. The Board feels that there may be some confusion as to the intent of the term ''attendance'' as it is used in § 177.834(i). (Emphasis added).

38 FR 22901, August 27, 1973.

Based on this concern, the Board proposed to revise the regulation to include a requirement that an operator remain within 25 feet of the cargo tank motor vehicle. The Board also proposed to delete the limiting language ''for the purpose of this part'' from the hose provision of the attendance requirements, thereby making the delivery hose part of the tank motor vehicle not only for loading and unloading purposes, but for other regulatory purposes as well (*e.g.*, incident reporting). Specifically, the Board proposed to revise the attendance requirements in § 177.834(i) to state:

> (1) A tank motor vehicle is attended when the person in charge of the vehicle is awake and not in a sleeper berth, and is within 25 feet of the tank motor vehicle and has it within his unobstructed field of view. . . . (3) The delivery hose, when attached to the tank motor vehicle, is a part of the vehicle.

Id. at 22902.

In its January 11, 1973 comments to the Board's proposed revision to § 177.834(i), the National LP-Gas Association (NLPGA) (now NPGA) proposed to revise the language to reinsert the limiting language ''for the purpose of this part'' with regard to the hose provision of the attendance requirements. Specifically, the NLPGA proposed to revise § 177.834(i)(3) to read ''For the purposes of this part the delivery hose, when attached to the tank motor vehicle, is a part of the vehicle.'' In explaining the proposed reinsertion of limiting words ''for the purposes of this part,'' the NLPGA stated: ''*We have no objection to a requirement that the motor vehicle operator or motor vehicle attendant be expected to attend the unloading hose as well as the vehicle* since in most cases he will provide the hose and will have connected it to the unloading equipment. We don't feel the delivery hose should be considered as a part of the motor vehicle.'' (Emphasis added). Industry's comments on the HM–110 NPRM indicate that industry fully understood that the Board proposed to require an attendant to remain within 25 feet of the cargo tank motor vehicle and hose, and maintain an unobstructed view of the cargo tank motor vehicle and hose. It is apparent from the NLPGA's comments to the proposed changes to § 177.834(i) that it understood the Board's concerns and its intent.

In the HM–110 final rule, the language that currently appears at § 177.834(i)(3), other than the addition of metric conversion of 25 feet, was adopted by the Board. Section 177.834(i)(3) currently reads, ''A person 'attends' the loading or unloading of a cargo tank if, throughout the process, he is awake, has an unobstructed view of the cargo tank, and is within 7.62 meters (25 feet) of the cargo tank.'' Section 177.834(i)(5) currently reads, ''A delivery hose, when attached to the cargo tank, is considered a part of the vehicle.'' In the final rule, the Board adopted the language in § 177.834(i)(3) that refers to the ''*cargo tank*'' and not the ''tank motor vehicle,'' as proposed in the NPRM. The language in § 177.834(i)(5), however, continues to refer to the hose as part of the *vehicle*. The final rule requires a qualified person attending the loading or unloading of a cargo tank to remain within 25 feet of the cargo tank, maintain an unobstructed view of the cargo tank, and to attend the hose to the same extent that the qualified person attends to the cargo tank motor vehicle under the HMR.

AmeriGas also cites Shell Oil Company's October 26, 1973 comments to the Board's proposed revision of the attendance requirements in Docket HM–110 as support for its interpretation of the attendance requirements and evidence that the agency was aware of the industry's interpretation of the attendance requirements. Specifically, AmeriGas points to Shell Oil's comment that ''Section 177.834(i)(1) requiring an attendant within 25 feet of the tank motor vehicle *or* its hose is over restrictive in cases where tight fill connections are used which are now in the majority.'' (Emphasis added.) AmeriGas places great weight on the fact that Shell used the word ''or'' rather than ''and'' to describe the proposed requirements. AmeriGas states that the word ''or'' put DOT on notice that the proposed language was being interpreted to allow an operator to comply with the attendance requirements by remaining within 25 feet of any part of the hose and maintaining an unobstructed view of any part of the hose.

AmeriGas, however, did not recognize or discuss the next sentence in Shell's comments which reads, ''*This restriction* prohibits performance of other duties and would unnecessarily increase delivery costs.'' (Emphasis added). AmeriGas's interpretation of the attendance requirements would allow an operator to be within 25 feet of and have an unobstructed view of, any part of the CTMV including, any part of its hose. Under AmeriGas's interpretation, there is virtually no restriction on an operator's ability to perform other duties—an operator can be virtually anywhere between the cargo tank motor vehicle and the receiving tank—and a single operator can always satisfy the industry interpretation of the attendance requirements. The preceding regulatory history indicates that the Board intended to restrict the movement of the person unloading a cargo tank by requiring the operator to remain within 25 feet of the cargo tank and maintain an unobstructed view of the cargo tank, resulting in a limitation on the attendant's ability to perform other duties or activities. The type of precautionary action the Board contemplated when it initiated HM–110 cannot be taken if a cargo tank attendant is more than 25 feet away from the cargo tank, out of sight behind a building or other obstruction, or both. This sentence indicates that Shell understood that the Board was proposing new restrictions on unloading operations.

RSPA squarely rejected industry's interpretation of the attendance requirements during public meetings and workshops, in written correspondence,[2] and in the preamble to

[2] *See* October 3, 1997 letter to Barton Day, Esq., counsel for Ferrellgas, L.P., Suburban Propane, L.P., AmeriGas Propane L.P., Agway Petroleum Corporation, Cornerstone Propane Partners, L.P.,

Continued

the August 18, 1997 final rule.[3] Specifically, the preamble to the final rule states:

RSPA rejects the industry's interpretation of the long-standing operator attendance rules in § 177.834(i)(3) that a single operator satisfies requirements for an unobstructed view of the cargo tank, and is within 25 feet of the cargo tank, merely by being in proximity to, and having an unobstructed view of, any part of the delivery hose, which may be 100 feet or more away from the cargo tank motor vehicle, during the unloading (transfer) operation. The rule clearly requires an operator be in a position from which the earliest signs of problems that may occur during the unloading operation are readily detectable, thereby permitting an operator to promptly take corrective measures, including moving the cargo tank, actuating the remote means of automatic closure of the internal self-closing stop valve, or other action, as appropriate. RSPA contends the rule requires that an operator always be within 25 feet of the cargo tank. Simply being within 25 feet of any one of the cargo tank motor vehicle's appurtenances or auxiliary equipment does not constitute compliance.

62 FR at 44044.

Because RSPA's position is consistent with the regulatory history and plain language of 49 CFR 177.834(i), petitioner's request that RSPA withdraw its interpretation is denied.

2. Additional Notice and Comment Are Not Required Under the APA.

AmeriGas alleges that RSPA's ''new interpretation'' was announced without notice or opportunity to comment, in violation of the APA.

Section 553 of the APA requires that Federal agencies give the public an opportunity to participate in the rulemaking process by giving notice, in the **Federal Register**, of either the terms or substance of a proposed rule or a description of the subjects and issues involved, and an opportunity to submit written data, views, or arguments. As discussed above, the Board realized that the word ''attendance'' was vague, as used in the original ICC attendance regulations, and that there was industry confusion regarding what was required. Consequently the Board issued an NPRM, in docket HM–110, proposing to clarify the attendance requirements. In issuing the NPRM, the Board specifically noted that there had been several dangerous incidents during the loading or unloading of cargo tank motor vehicles that the Board felt could have been avoided had someone been near the cargo tank to take corrective or precautionary action.

The Board's clearly specified reasons for undertaking the HM–110 rulemaking, in conjunction with the proposed regulatory language, NLPGA's and Shell Oil's comments on that language, and the language of the final regulatory requirements all demonstrate that: (1) the public was given notice of the Board's intent to require an operator to be near the cargo tank during unloading, and an opportunity to comment; and (2) RSPA's position on the § 177.834(i) attendance requirement is long-standing and reflects industry understanding of the requirements at the time they were proposed and adopted. Therefore, RSPA's statements concerning the attendance requirements in § 177.834(i) do not in any way change the regulations or constitute rulemaking. Consequently, further notice and comment under the APA is not necessary.

3. DOT Was Not Aware of Widespread Non-Compliance.

AmeriGas claims that in the decades before—and 22 years since—the attendance requirements in § 177.834(i) were adopted, small CTMVs typically carried delivery hoses of 100 feet or more in length and were attended during at least a substantial portion of the unloading process from the position of the customer tank. AmeriGas states that these vehicles have operated openly and have been inspected by DOT officials on hundreds of occasions over the years without any suggestion that the routine operation of these vehicles under the industry's interpretation of § 177.834(i)(3) was improper. AmeriGas thus asserts that DOT has accepted for decades without question industry's long-standing practice of not remaining within 25 feet of the cargo tank and not maintaining an unobstructed view of it.

Although, FHWA inspectors occasionally inspect small CTMVs at roadside inspection facilities, they do not inspect the hose to determine its length as part of their routine inspection procedures. Neither the HMR nor the Federal Motor Carrier Safety Regulations, 49 U.S.C. Parts 350–399, restrict hose length. Additionally, neither FHWA nor RSPA inspectors routinely inspect small CTMV unloading operations. Thus, the Department was not aware that small CTMV deliveries of propane were being made in violation of the HMR. The fact that FHWA inspectors may have observed small CTMVs with hose lengths in excess of 100 feet does not support the argument that DOT knew that deliveries were being made in violation of the HMR.

The National Fire Protection Association (NFPA) publication ''Standard for the Storage and Handling of Liquefied Compressed Gases'' (NFPA 58) reported by NFPA as adopted by 49 of 50 states (with Texas preparing to adopt NFPA 58 next year), has unloading requirements that are consistent with and provide support to the HMR requirement that a qualified person maintain an unobstructed view of the cargo tank, and be in a position to promptly effect emergency procedures should there be a line separation or other problem requiring immediate attention. Specifically, at Section 4–2.1.1, NFPA 58 states:

Transfer operations shall be conducted by qualified personnel meeting the provisions of Section 1–5. *At least one qualified person* shall remain in attendance at the transfer operation from the time connections are made until the transfer is completed, shutoff valves are closed, and lines are disconnected. (Emphasis added).

In addition, Section 4–2.3.3 of NFPA–58 requires:

Cargo vehicles (see Section 6–3) unloading into storage containers shall be at least 10 feet (3.0 m) from the container and so positioned *that the shutoff valves on both the truck and the container are readily accessible.* (Emphasis added).

The fourth edition of the LP Gases Handbook, published by the NFPA interprets Section 4–2.3.3 as follows: ''* * * The unloading cargo vehicle should be a distance from the container receiving the product so that if something happens at either point, the other will not be involved to the extent that it would be if it were in close proximity. Also, it is important to have the cargo vehicle so located that it is easy to get to the valves on both the truck and the container so that they can quickly be shut off if there is an emergency need to do so. * * * ''[4] NFPA recognizes the importance of attending both the receiving tank and the cargo tank. RSPA believes that both warrant attention during unloading and that it is important to position these tanks so that this safety objective is achievable.

The importance of having a qualified person in a position to promptly effect closure of the internal valve and to shut down all motive and auxiliary power has been re-affirmed by two recent unloading incidents that resulted in the death of one operator and injury to

and National Propane, L.P. (item no. 188 in RSPA docket 97–2133).

[3] Because of industry's concerns about the attendance requirements, RSPA indicated in a June 9, 1997 notice [62 FR 31363] that it would initiate a new rulemaking to review and possibly revise the attendance and other regulatory requirements (*see* Docket No. RSPA–97–2718).

[4] Theodore C. Lemoff, ed., *LP–GASES Handbook*, 4th ed. (Quincy: National Fire Protection Association, 1995), p. 307.

another.[5] These incidents did not involve the separation of hose or piping, which emergency discharge control system requirements are meant to address, but were the result of equipment failures, which the attendance requirements in § 177.834(i) are meant to address. The CTMV was the suspected source of ignition in both of these incidents. Based on initial reports, had a qualified person been in attendance within 25 feet of the CTMV, he would have had a better chance of closing the internal self-closing stop valve prior to ignition.

Therefore, based on the above information, RSPA denies that part of AmeriGas's petition for reconsideration concerning the attendance requirements. The attendance requirement is intended to address a number of potentially serious threats to safety that may arise during the course of unloading, including failure of a parking brake to prevent movement of a motor vehicle; equipment failures (*e.g.*, pump leaks and leaks at a hose reel); and entry into the vicinity of the motor vehicle by persons who are carrying smoking materials. In all such instances, the qualified person attending the unloading operation must be aware of potential and actual threats to safety and be prepared to implement emergency procedures intended to minimize or eliminate those threats.

C. Need for Additional Operational Controls

AmeriGas states that RSPA's central basis for the interim requirements imposed under the August rule is that there is a need to address safety concerns that exist due to the inability of the emergency discharge control system currently in service on ''bobtail vehicles'' in compressed gas service to function in accordance with the HMR as specified under § 178.337–11(a)(1)(i). The petitioner then states that the record does not demonstrate the need for new requirements because the record does not include even a single documented incident involving the failure of the emergency discharge control system on a bobtail vehicle. Further, the petitioner states that the risk of such an event is extraordinarily remote and that there is no safety threat sufficient to warrant the imposition of burdensome interim operator attendance requirements for bobtails. Finally, the petitioner claims that RSPA's decision to impose burdensome interim operator attendance requirements for small CTMVs reflects a disregard of the evidence before it and arbitrarily fails to consider less burdensome regulatory alternatives.

In response, RSPA's underlying purpose of alternative operational controls adopted in the current requirements is to assure that persons who are dependent upon propane, anhydrous ammonia, and other liquefied compressed gases continue to receive those essential materials in a manner that does not impose unacceptable threats to public health and safety. The challenge was to develop rules for approximately 25,000 pump-equipped cargo tank motor vehicles (estimated to comprise the universe of specification MC–330, MC–331, and related non-specification cargo tanks) that industry determined may not conform to the long-standing requirements in § 178.337–11(a)(1)(i) for an emergency discharge control system (*see* emergency exemption applications filed by Mississippi Tank, National Tank Truck Carriers, NPGA and TFI; December 1996).

In developing the temporary alternative requirements, RSPA first determined there must be an effective means of providing for prompt closure of the internal self-closing stop valve under emergency conditions until industry could develop a system that provides a level of safety equal to that provided by § 178.337–11. The risks posed by an uncontrolled release of propane from a cargo tank motor vehicle are so great that, while RSPA sought to minimize the cost of compliance with the alternative requirements, safety was RSPA's primary concern. Additional training and hose testing requirements adopted in § 171.5 may reduce the risks of a release, but such measures do not provide a means of stopping the flow of propane once a release occurs.

The petitioner relies on a small number of incidents cited in the public docket to support its contention that the safety concern with regard to small CTMVs is minuscule. However, RSPA notes that: (1) industry is not required to report to DOT the occurrence of propane incidents or accidents that occur in intrastate commerce—which encompasses the vast majority of small CTMV deliveries; and (2) the small number of incidents in the record are not representative of the entire universe of incidents of which RSPA is aware. Federal hazardous materials transportation law at 49 U.S.C. 5103 directs the Secretary of Transportation to prescribe regulations for the safe transportation of a hazardous material when the Secretary determines that transporting a material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property. In developing safety regulations, RSPA must consider potential hazards posed by a material and may not base its regulatory decisions solely on the number of reported incidents.

For the reasons discussed above, RSPA denies this element of the petitioner's request for reconsideration of the final rule.

D. March 1, 1999 Expiration Date of the Temporary Final Rule Requirements

AmeriGas states that the legal effect of the expiration clause in the final rule is to require operators of small CTMVs to have in place passive emergency discharge control systems that will meet RSPA's requirements under § 178.337–11(a)(1)(i) by March 1, 1999. AmeriGas requests that the expiration date specified in § 171.5(c) be stricken pending completion of the rulemaking proceeding under Docket RSPA–97–2718 (HM–225A) that addresses long-term compliance issues.

On August 18, 1997, RSPA published an advance notice of proposed rulemaking (ANPRM) in Docket HM–225A (62 FR 44059) requesting comments regarding jurisdiction, emergency discharge controls, qualification and use of delivery hoses, and attendance requirements. The questions posed in the ANPRM are indicative of the range of options RSPA is considering, this includes various retrofit schedules for installation of new equipment. RSPA is mindful of industry's concerns and will take them into consideration in formulating a long-term compliance plan under HM–225A. Additionally, affected parties may choose to install systems that meet the

[5] Initial reports from the Fire Marshall of Burke County, North Carolina indicate that on September 23, 1997, in Morganton, North Carolina, a Piedmont Natural Gas operator was at the receiving tank (approximately 80 feet from the cargo tank motor vehicle) when the hose nozzle became clogged with a foreign object believed to be part of the meter, thus preventing the operator from closing the nozzle when the customer tank became full. Consequently, the receiving tank overfilled and propane continued to flow from the hose at full pressure when the operator disconnected the hose from the receiving tank. The operator began to approach the cargo tank motor vehicle in order to manually shut the internal self-closing stop valve, but there was an explosion and fire before he could take emergency action. The operator received second-and third-degree burns over most of his body and died shortly thereafter.

On June 6, 1997, in Fayetteville, North Carolina, an AmeriGas operator stopped product transfer and was in the process of disconnecting the transfer hose from the receiving tank when he observed white fog escaping from under the truck. He immediately dropped the transfer hose and ran toward the truck (approximately 60 feet) to activate the engine kill switch and the emergency internal self-closing stop valve. When he was within 10 to 12 feet of the truck, the escaped gas vapors ignited, causing second degree burns to the operator's face and right thigh.

current requirements in § 178.337–11(a)(1)(i). For these reasons, RSPA denies AmeriGas's request for reconsideration of that part of the final rule concerning the expiration date of § 171.5.

IV. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. This rule is not considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034; February 26, 1979). This rule revises a safety standard for verifying the integrity of transfer hoses on cargo tank motor vehicles in liquefied compressed gas service and makes other minor, non-substantive changes.

The final rule published on August 18, 1997, was a significant regulatory action under section 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget. The rule also was considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

RSPA did not prepare a regulatory evaluation for this final rule addressing the issue of revising the transfer hose pressure requirement. However, a final regulatory evaluation was prepared in support of the final rule published on August 18, 1997. The final regulatory evaluation is available for review in the public docket.

B. Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(1) The designation, description, and classification of hazardous materials;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

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

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

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

This rule addresses covered subject item (5) above and preempts State, local, and Indian tribe requirements not meeting the ''substantively the same'' standard. Federal hazardous materials transportation law provides at § 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA has determined that the effective date of Federal preemption for these requirements will be March 10, 1996. Thus, RSPA lacks discretion in this area, and preparation of a federalism assessment is not warranted.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (Act), as amended, 5 U.S.C. 601–612, directs agencies to consider the potential impact of regulations on small business and other small entities. The Act, however, applies only to rules for which an agency is required to publish a notice of proposed rulemaking pursuant to § 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553. *See* 5 U.S.C. 603(a) and 604(a). Because of the emergency nature of the final rule published on August 18, 1997, RSPA was authorized under sections 553(b)(B) and 553(d)(3) of the APA to forego notice and comment and to issue the final rule with an immediate effective date. Nevertheless, RSPA was concerned about the effect the final rule would have on small businesses and, in preparing preliminary and final regulatory evaluations under Executive Order 12866, analyzed the impact of the interim final rule and final rule on all affected parties, including small businesses. Consequently, RSPA is not required under the Act to do a regulatory flexibility analysis for this final rule.

D. Unfunded Mandates Reform Act

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

E. Paperwork Reduction Act

This rule does not impose any new information collection burdens. The information collection and recordkeeping requirements contained in the final rule were submitted for renewal to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995. The requirement has been approved under OMB Control Number 2137–0595.

F. Regulation Identifier Number (RIN)

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

List of Subjects in 49 CFR Part 171

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

In consideration of the foregoing, 49 CFR part 171 is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

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

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

2. In § 171.5, paragraphs (a)(1)(i), (a)(1)(iii)(B) and (a)(1)(iii)(C)(*3*) are revised to read as follows:

§ 171.5 Temporary regulation; liquefied compressed gases in cargo tank motor vehicles.

(a) * * *

(1) * * *

(i) Before initiating each transfer from a cargo tank motor vehicle to a receiving system, the person performing the function shall determine that each component of the discharge system (including hose) is of sound quality and free of leaks and that connections are secure. This determination shall be made after the pressure in the discharge system has reached no less than equilibrium with the pressure in the cargo tank.

* * * * *

(iii) * * *

(B) A qualified person positioned within arm's reach of a mechanical means of closure of the internal self-

closing stop valve at all times the internal self-closing stop valve is open; except, that person may be away from the mechanical means only for the short duration necessary to engage or disengage the motor vehicle power take-off or other mechanical, electrical, or hydraulic means used to energize the pump and other components of the cargo tank motor vehicle's discharge system; or

(C) * * *

(3) Is awake throughout the unloading process, and has an unobstructed view of the cargo tank at all times that the internal self-closing stop valve is open.

* * * * *

§ 171.5 [Amended]

3. In addition, in § 171.5 the following changes are made:

a. In paragraph (a) introductory text, in the first sentence, ''ruptured or'' is removed.

b. In paragraph (a)(1)(ii), in the third sentence, ''and equipment'' is removed.

c. In paragraph (c), the date ''March 1, 1999'' is revised to read ''July 1, 1999''.

Issued in Washington, DC on December 5, 1997, under authority delegated in 49 CFR part 1.

Kelley Coyner,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 97–32385 Filed 12–8–97; 9:40 am]

BILLING CODE 4910–60–P