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Hazardous Materials: Risk-Based Adjustment of Transportation Security Plan Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 172

[Docket No. PHMSA–06–25885 (HM–232F)]

RIN 2137–AE22

Hazardous Materials: Risk-Based Adjustment of Transportation Security Plan Requirements

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

ACTION: Final rule.

SUMMARY: PHMSA, in consultation with the Transportation Security Administration (TSA) of the Department of Homeland Security (DHS), is modifying current security plan requirements applicable to the commercial transportation of hazardous materials by air, rail, vessel, and highway. Based on an evaluation of the security threats associated with specific types and quantities of hazardous materials, the final rule narrows the list of materials subject to security plan requirements and reduces associated regulatory costs and paperwork burden. The final rule also clarifies certain requirements related to security planning, training, and documentation.

DATES: *Effective date:* This final rule is effective October 1, 2010.

Voluntary compliance date: Voluntary compliance with all the amendments in this final rule is authorized as of April 8, 2010.

FOR FURTHER INFORMATION CONTACT: Susan Gorsky or Ben Supko, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration, 202–366–8553.

SUPPLEMENTARY INFORMATION:

I. Background

A. Current DOT Security Requirements

The federal hazardous materials transportation law (federal hazmat law, 49 U.S.C. 5101 *et seq.*) authorizes the Secretary of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." The Secretary has delegated this authority to PHMSA. Authority to enforce the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) has been delegated to the FAA "with particular emphasis on the transportation or shipment of hazardous materials by air"; the FRA "with particular emphasis on the transportation or shipment of hazardous materials by railroad"; PHMSA "with particular emphasis on the shipment of hazardous materials and the manufacture, fabrication, marking, maintenance, reconditioning, repair or test of multi-modal containers that are represented, marked, certified, or sold for use in the transportation of hazardous materials"; and the FMCSA "with particular emphasis on the transportation or shipment of hazardous materials by highway." 49 CFR Part 1, Subpart C. The United States Coast Guard (USCG) is authorized to enforce the HMR in connection with certain transportation or shipment of hazardous materials by water. This authority originated with the Secretary and was first delegated to USCG prior to 2003, when USCG was made part of the Department of Homeland Security. DHS Delegation No. 0170, Section 2(99) & 2(100); see also 6 U.S.C. 458(b), 551(d)(2). Thus, enforcement of the security plan and training regulations is shared among the DOT operating administrations and the USCG, with each placing particular emphasis on their respective authorities.

The HMR require persons who offer for transportation or transport certain hazardous materials in commerce to develop and implement security plans. The security plan requirements in Subpart I of Part 172 of the HMR apply to persons who offer for transportation or transport:

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

(2) More than 25 kg (55 lbs.) of a Division 1.1, 1.2, or 1.3 (explosive) material;

(3) More than 1 L (1.06 qt.) per package of a material poisonous by inhalation in Hazard Zone A;

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

(5) A shipment in other than a bulk packaging of 2,268 kg (5,000 lbs.) gross weight or more of one class of hazardous materials for which placarding is required;

(6) A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR Part 73 or a select agent or toxin regulated by the U.S. Department of Agriculture under 9 CFR Part 121; or

(7) A shipment that requires placarding under Subpart F of Part 172 of the HMR.

A security plan must include an assessment of possible transportation security risks and appropriate measures to address the assessed risks. Specific measures implemented as part of the plan may vary with the level of threat at a particular time. At a minimum, the security plan must address personnel security, unauthorized access, and en route security. For personnel security, the plan must include measures to confirm information provided by job applicants for positions involving access to and handling of the hazardous materials covered by the plan. For unauthorized access, the plan must include measures to address the risk of unauthorized persons gaining access to materials or transport conveyances being prepared for transportation. For en route security, the plan must include measures to address security risks during transportation, including the security of shipments stored temporarily en route to their destinations.

As indicated above, the HMR set forth general requirements for a security plan's components rather than a prescriptive list of specific items that must be included. The HMR set a performance standard providing offerors and carriers with the flexibility necessary to develop security plans addressing their individual circumstances and operational environments. Accordingly, each security plan will differ because it will be based on an offeror's or a carrier's individualized assessment of the security risks associated with the specific hazardous materials it ships or transports and its unique circumstances and operational environment.

B. Notice of Proposed Rulemaking

On September 9, 2008, PHMSA published a notice of proposed rulemaking (NPRM; 73 FR 52558) to propose modifications to the list of materials for which a security plan is required. The NPRM was based on comments received in response to an ANRPM issued under this docket (71 FR 55156) and in a public meeting we hosted on November 30, 2006, and an evaluation of possible security threats posed by specific types and classes of hazardous materials. In identifying materials to which a security plan should apply, we consulted with the Federal Railroad Administration, Federal Motor Carrier Safety Administration, and the Transportation Security Administration (TSA) in the Department of Homeland Security, to assess the transportation security risks associated with the different classes and quantities of hazardous materials. We evaluated specific transportation scenarios in which a terrorist could deliberately use hazardous materials to cause large-scale casualties and property

damage. In our qualitative risk evaluation, we considered the following factors: (1) Physical and chemical properties of the material or class of materials and how those properties could contribute to a security incident; (2) quantities shipped and mode of transport; (3) past terrorist use; (4) potential use; and (5) availability. One of the most significant security vulnerabilities involves the potential for an individual or group to take control of a conveyance containing a high-risk material and move it to a site where the material could cause maximum physical or psychological damage. For some hazardous materials, the primary security threat involves theft or highjacking of raw materials for use in developing explosive devices or weapons.

As we indicated in the NPRM, one of our goals for this rulemaking is to harmonize to the extent consistent with our security goals the list of materials for which security plans are required with the list of materials designated as high consequence dangerous goods for which enhanced security measures are recommended in the United Nations Model Regulations on the Transport of Dangerous Goods (UN Recommendations). The recommended security measures include security plans and are similar to the requirements in Subpart I of Part 172 of the HMR. The UN Recommendations define high consequence dangerous goods as materials with the "potential for mis-use in a terrorist incident and which may, as a result, produce serious consequences such as mass casualties or mass destruction." The UN Recommendations list the following materials as high consequence dangerous goods:

(1) Division 1.1 explosives;

(2) Division 1.2 explosives;

(3) Division 1.3 compatibility group C explosives;

(4) Division 1.5 explosives;

(5) Bulk shipments of Division 2.1 flammable gases;

(6) Division 2.3 toxic gases (excluding aerosols);

(7) Bulk shipments of Class 3 flammable liquids in Packing Group I or II;

(8) Class 3 and Division 4.1 desensitized explosives;

(9) Bulk shipments of Division 4.2 Packing Group I materials;

(10) Bulk shipments of Division 4.3 Packing Group I materials;

(11) Bulk shipments of Division 5.1 Packing Group I oxidizing liquids;

(12) Bulk shipments of Division 5.1 perchlorates, ammonium nitrate and ammonium nitrate fertilizers;

(13) Division 6.1 Packing Group I toxic materials;

(14) Division 6.2 infectious substances of Category A (UN2814 and 2900);

(15) Class 7 radioactive materials in quantities greater than 3000 A_1 (special form) or 3000 A_2, as applicable, in Type B(U) or Type B(M) or Type (C) packages; and

(16) Bulk shipments of Class 8 Packing Group I materials.

For purposes of the security provisions, the UN defines "in bulk" to mean quantities greater than 3,000 kg (6,614 lbs.) for solids and 3,000 liters (793 gallons) for liquids and gases in portable tanks or bulk containers.

In the NPRM, we proposed the following modifications to the list of materials subject to security plans:

NPRM LIST

Class	Current threshold	Proposed threshold	Change
1.1	Any quantity	Any quantity	None.
1.2	Any quantity	Any quantity	None.
1.3	Any quantity	Any quantity	None.
1.4	A quantity requiring placarding	Any quantity of UN 0104, 0237, 0255, 0267, 0289, 0361, 0365, 0366, 0440, 0441, 0455, 0456, 0500.	Security plan required only for detonators and shaped charges.
1.5	A quantity requiring placarding	Any quantity	Security plan required for all shipments.
1.6	A quantity requiring placarding	Not subject	Security plan not required for any Division 1.6 shipments.
2.1	A quantity requiring placarding	>3,000 L in a single packaging	Security plan not required for 3,000 L (793 gallons) or less.
2.2	A quantity requiring placarding	Not subject except for oxygen and gases with a subsidiary 5.1 hazard (<3,000 L (793 gallons) in a single packaging).	Security plan not required for most non-flammable, non-poisonous compressed gas shipments.
2.3	Any quantity	Any quantity	None.
3	A quantity requiring placarding	>3,000 L (793 gallons) in a single packaging and any quantity of Class 3 desensitized explosives.	Security plan not required for 3,000 L (793 gallons) or less except for desensitized explosives.
4.1	A quantity requiring placarding	Any quantity desensitized explosives	Security plan not required except for desensitized explosives.
4.2	A quantity requiring placarding	PG I and II only in quantities >3,000 kg in a single packaging.	Security plan not required for PG III materials.
4.3	Any quantity	Any quantity	None.
5.1	A quantity requiring placarding	PG I and II liquids, perchlorates, ammonium nitrate (including fertilizers) in quantities >3,000 L (793 gallons) in a single packaging.	Security plan not required for PG III liquids or unlisted solids.
5.2	Any quantity of Organic peroxide, Type B, liquid or solid, temperature controlled.	Any quantity of Organic peroxide, Type B, liquid or solid, temperature controlled.	None.
6.1	A quantity requiring placarding; any quantity of PIH material.	Any quantity of PG I; >3,000 L (793 gallons) for PG II and III.	Security plan not required for 3,000 L (793 gallons) or less of PG II and III.
6.2	Select agents	Select agents	None.

NPRM LIST—Continued

Class	Current threshold	Proposed threshold	Change
7	Shipments requiring Yellow III label; highway route controlled quantity.	For radionuclides covered by the IAEA Code of Conduct, Category 1 and Category 2 sources per package; for all other radionuclides, 3000 A2 per package.	Security plan only required for Class 7 materials that pose transportation security risk.
8	A quantity requiring placarding	PG I only in quantities >3,000 L (793 gallons) in a single packaging.	Security plan not required for PG II and III materials.
9	Capacity >3,500 gallons for liquid/gas; volumetric capacity >468 cubic feet for solids.	Not subject	Security plan not required for Class 9 materials.

II. Coordination With TSA

DHS is the lead federal agency for transportation and hazardous materials security. DOT consults and coordinates on security-related hazardous materials transportation matters to ensure consistency with DHS requirements and broader security objectives. Both departments work to ensure that the regulated industry is not confronted with inconsistent government-issued security guidance or requirements.

Under Section 101(a) of the Aviation and Transportation Security Act (ATSA, Pub. L. 107–71, November 19, 2001) (codified at 49 U.S.C. 114) and 49 CFR 1502.1, TSA has broad responsibility and authority for "security in all modes of transportation * * *" TSA has additional responsibilities for surface transportation security, as specified in 49 U.S.C. 114(f), through delegation by the Secretary of Homeland Security under the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act, Pub. L. 110–53; 121 Stat. 266, August 3, 2007).

In sum, TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of regulations, security directives, security plans, and other requirements. Under this authority, TSA may identify a security threat to any mode of transportation, develop a measure for dealing with that threat, and enforce compliance with that measure. Moreover, in addition to inspecting for compliance with specific regulations, TSA may conduct general security assessments. Under its authority, TSA may assess threats to transportation security; monitor the state of awareness and readiness throughout the various sectors; determine the adequacy of an owner or operator's transportation-related security measures; and identify security gaps. TSA, for example, could inspect and evaluate for emerging or potential security threats based on intelligence indicators to determine whether the owner or operator's strategies and security measures are likely to deter deficiencies.

When PHMSA adopted its security regulations, it was stated that these regulations were "the first step in what may be a series of rulemakings to address the security of hazardous materials shipments." 68 FR 14511. PHMSA noted in the NPRM that TSA "is developing regulations that are likely to impose additional requirements beyond those established in this final rule" and stated that it would "consult and coordinate with TSA concerning security-related hazardous materials transportation regulations * * *" Id.

In this regard, note that under section 1512 of the 9/11 Commission Act and delegated authority from the Secretary of Homeland Security, TSA must promulgate regulations establishing standards and guidelines for developing and implementing vulnerability assessments and security plans for "high-risk" railroad carriers. TSA published a final rule on rail security on November 26, 2008 (73 FR 72131). That rule established security requirements for freight railroad carriers; intercity, commuter, and short-haul passenger train service providers; rail transit systems; and rail operations at certain, fixed-site facilities that ship or receive specified hazardous materials by rail. It codified the scope of TSA's existing inspection program and requires regulated parties to allow TSA and DHS officials to enter, inspect, and test property, facilities, conveyances, and records relevant to rail security. The rule also requires that regulated parties designate rail security coordinators and report significant security concerns. In addition, the rule requires freight rail carriers and certain facilities handling specified hazardous materials to be able to (1) report location and shipping information to TSA upon request and (2) implement chain of custody requirements to ensure a positive and secure exchange of specified hazardous materials. TSA also clarifies and amends the sensitive security information (SSI) protections to cover certain information associated with rail transportation.

TSA intends to promulgate additional regulations for railroad carriers and other modes of surface transportation that will require them to submit vulnerability assessments and security plans to DHS for review and approval, as well as to develop and implement security training programs for employees performing security-sensitive functions to prepare for potential security threats and conditions. The security plan requirements established by the HMR are to be used as a baseline for security planning. When TSA regulations are issued, the PHMSA security plan and security training requirements for regulated parties that will be subject to the TSA regulations will be reevaluated and revised as appropriate.

To this end, we have worked closely with TSA to align our proposed list of materials subject to security plans with ongoing efforts by TSA in identifying Highway Security Sensitive Hazardous Materials (HSSM). TSA has used its HSSM list in conjunction with voluntary security practices (referred to as Security Action Items or SAIs) to increase the security of certain hazardous materials transported by motor vehicle. Minor differences between our proposal and the TSA HSSM list have been resolved and the overall approach taken by the two agencies in identifying materials that should be subject to security based requirements is consistent and supported by industry associations, offerors, carriers, and private citizens, as evidenced by the comments submitted in response to our NPRM.

Finally, as it implements its transportation security authority, TSA may identify a need to review transportation security plans and programs developed and implemented in accordance with Subpart I of Part 172

of the HMR. Under ATSA, TSA has the authority to "ensure the adequacy of security measures for the transportation of cargo" 49 U.S.C. 114(f)(10) and to "oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities." 49 U.S.C. 114(f)(11). Therefore, parties subject to this regulation must allow TSA and other authorized DHS officials, at any time and in a reasonable manner, without advance notice, to enter and inspect and must provide TSA inspectors with a copy of any security related document required by the HMR or pursuant to TSA's statutory or regulatory authorities. This includes security plans and training documents required under 49 CFR Part 172. TSA does not, however, have the authority to directly enforce DOT safety or security requirements established in the HMR. If, in the course of an inspection of a railroad or motor carrier or a rail or highway hazardous material shipper or receiver, TSA identifies evidence of non-compliance with a DOT safety or security regulation, TSA will provide the information to FRA (for rail) or FMCSA (for motor carriers) and PHMSA for appropriate action. Similarly, since DOT does not have the authority to enforce TSA security requirements, if a DOT inspector identifies evidence of non-compliance with a TSA security regulation or identifies other security deficiencies, DOT will provide the information to TSA for appropriate action.

It is important to note that TSA and DOT have established a tiered approach to transportation security that imposes increasingly stringent security requirements for materials that pose more significant transportation security risks. Thus, the DOT security planning requirements established in 2003 and modified in this final rule establish a baseline requirement for materials that have been determined to pose a security risk across all modes of transportation. However, both TSA and DOT have established more stringent security requirements for certain rail shipments of hazardous materials. As explained in the TSA and DOT final rules on rail security published jointly on November 26, 2008 (73 FR 72130 and 73 FR 72181, respectively), the list of designated "security sensitive" materials to which the enhanced safety and security requirements adopted in those final rules apply—certain shipments of Division 1.1, 1.2, and 1.3, PIH, and radioactive materials—is based on specific railroad transportation scenarios. These scenarios depict how hazardous materials could be deliberately used to cause significant casualties and property damage or accident scenarios resulting in similar catastrophic consequences. DOT and TSA determined that the materials specified in the rail security final rules present the greatest rail transportation safety and security risks—because of the potential consequences of an unintentional release of these materials—and are the most attractive targets for terrorists—because of the potential for these materials to be used as weapons of opportunity or weapons of mass destruction. While DOT and TSA agree that other hazardous materials pose certain safety and security risks, the risks are not as great as those posed by the explosive, PIH, and radioactive materials specified in the rail security final rules. TSA, in consultation with DOT, will continue to evaluate the transportation security risks posed by all types of hazardous materials and the effectiveness of current regulations in addressing those risks and will consider revising specific requirements as necessary.

III. Comments and Analysis

A total of 160 persons submitted comments in response to the September 9, 2008 NPRM. The majority of the comments were submitted by companies, but we also received comments from public interest groups; local, state, and federal government agencies; industry associations; and private citizens. The majority of commenters focused on the proposed revisions to security plan requirements for explosives that are used by the special effects and motion picture industries. To review rulemakings, regulatory evaluations, environmental assessments, comments, and letters submitted in response to this regulatory action go to *http://www.regulations.gov* under docket number PHMSA–06–25885. To locate a specific commenter by name simply use the search function provided by Regulations.gov.

Generally, commenters express support for the regulatory reduction efforts proposed by the NPRM although some commenters disagree with some of the types and classes of materials that would be subject to security planning requirements under the NPRM. In this comment summary, we address areas of concern, as expressed by commenters, including the key comments regarding the types and classes of materials that we included in the proposed list of materials subject to security plans. We especially focus on aligning our list of materials requiring security plans and TSA's HSSM list. Commenters emphasize that consistency is very important in this area, and we agree. TSA's HSSM list focused on materials that have the potential to cause significant fatalities and injuries or significant economic damage when released or detonated during a transportation security incident. Materials classed as HSSM fall into one of two tiers and are subject to specific voluntary security measures that should be taken by manufacturers, shippers, and carriers of the listed materials.

In this final rule we are revising the list of materials subject to security planning. We made several changes to the list of materials based on comments and discussions with our federal partners. We consulted with TSA throughout the development of this final rule. Below we list by Class/Division the Hazardous materials and thresholds subject to security planning under this final rule. The phrase "large bulk quantity," as used in the following table, refers to a quantity greater than 3,000 kg (6,614 pounds) for solids or 3,000 liters (792 gallons) for liquids and gases in a single packaging such as a cargo tank motor vehicle, portable tank, tank car, or other bulk container.

Class/ division	PHMSA final rule security plan revisions
1.1	Any quantity.
1.2	Any quantity.
1.3	Any quantity.
1.4	Placarded quantity.
1.5	Placarded quantity.
1.6	Placarded quantity.
2.1	A large bulk quantity.
2.2	A large bulk quantity of materials with an oxidizer subsidiary.
2.3	Any quantity.
3	PG I and II in a large bulk quantity; placarded quantity desensitized explosives.
4.1	Placarded quantity desensitized explosives.
4.2	PG I and II in a large bulk quantity.
4.3	Any quantity.
5.1	Division 5.1 materials in PG I and II, and PG III perchlorates, ammonium nitrate, ammonium nitrate fertilizers, or ammonium nitrate emulsions or suspensions or gels in a large bulk quantity.
5.2	Any quantity of Organic peroxide, Type B, liquid or solid, temperature controlled.
6.1	Any quantity PIH or a large bulk quantity of a material that is not a PIH.
6.2	CDC or USDA list of select agents.
7	IAEA Categories 1 & 2; HRCQ; known radionuclides in forms listed as RAM–QC by NRC; or a quantity of uranium hexafluoride requiring placarding under § 172.505(b).

Class/ division	PHMSA final rule security plan revisions
8	PG I in a large bulk quantity.
9	Not subject.
ORM–D	Not subject.

Any minor differences between the TSA HSSM list and the above list have been discussed with TSA and resolved.

A. Applicable Materials and Thresholds (§ 172.800(b))

As indicated above, the NPRM proposed to narrow the list of materials to which security plan requirements would apply to cover only those materials that pose a significant security risk in transportation. In accordance with § 172.800(b) of the HMR, a security plan is currently required for a quantity of hazardous materials that requires placarding under Subpart F of Part 172. We proposed to remove certain classes of materials from the list and to raise the threshold quantity that would trigger security planning requirements for other classes of materials. Generally, the NPRM proposed to continue the security plan requirement for materials listed in Table 1 of § 172.504, which specifies materials for which placarding is required when any quantity of the material is transported in a bulk packaging, freight container, transport vehicle, or rail car. Thus, we proposed to retain the security plan requirement for any quantity of Division 1.1, 1.2, 1.3 explosive materials; 2.3 poison gases; 4.3 dangerous when wet material; 5.2 Type B organic peroxides, liquid or solid, temperature controlled; and 6.1 materials poisonous by inhalation. We also proposed to require security plans for any quantity of certain Division 1.4 materials, Division 1.5 explosives, Class 3 and Division 4.1 desensitized explosives, and 6.1 materials assigned to Packing Group I.

Several commenters contend that the "any quantity" threshold standard, especially when applied to Table 2 materials (see § 172.504(e)), will present unreasonable and unnecessary compliance challenges for covered persons. We agree that the "any quantity" threshold standard is inappropriate for most Table 2 materials, based on the security risks posed in transportation, and proposed to modify the threshold quantities that would trigger security planning requirements accordingly. The security planning requirement is critical to reducing the security risks associated with a very broad spectrum of hazardous materials. More specific, modal based requirements that apply to larger quantities of material, such as through our rail routing rule, may be required to address specific threats. We are maintaining the "any quantity" threshold because those materials may present a significant security risk under certain modal specific risk-based transportation scenarios even when transported in small amounts.

Dow suggests that we simplify the process of identifying materials for security planning purposes by adding a special provision to the Hazardous Materials Table to identify those materials for which security plans would be required. We disagree with a material-based strategy for identifying high-risk materials. Consistent with our approach to evaluating the safety risks posed by hazardous materials in transportation, we continue to believe that an assessment of hazardous materials security risks should be based on the hazard class and packing group of the material and the quantity or volume transported. In this way, we can ensure that all materials that pose a similar security risk are covered, including mixtures and solutions. Moreover, identifying individual materials through special provisions is inefficient and overly complex.

In the following sections of the preamble we address comments concerning whether specific classes of materials should be subject to security planning requirements.

1. Explosives (Divisions 1.1, 1.2, 1.3, 1.4, 1.5, and 1.6)

The majority of comments received specifically addressed explosives. A total of 125 persons involved with special effects for the motion picture industry submitted comments addressing the proposed threshold for Division 1.4 explosives and desensitized explosives in Class 3 and Division 4.1. Currently, security plans are required for placarded quantities of these materials. In the NPRM, we proposed to require security plans for any quantity of Division 1.4 explosives shipped under certain UN identification numbers and any quantity of desensitized explosives in Class 3 and Division 4.1. Commenters unanimously oppose this provision of the NPRM. The Alliance of Special Effects & Pyrotechnic Operators, Inc. (ASEPO) states that the proposed requirement for security plans to apply to any quantity of Division 1.4 or desensitized explosive materials is unnecessary because secure transportation of the Division 1.4 explosives and desensitized explosives used for special effects has already been achieved under present security measures. ASEPO did not provide details of the security measures currently employed, but stated its belief that the current measures are effective based on the industry's long history of safe and secure transportation of these materials.

The Dangerous Goods Advisory Council (DGAC), Institute of Makers of Explosives (IME), International Society of Explosives Engineers (ISEE), and United Parcel Service of America, Inc. (UPS) suggest that we retain the current threshold for security planning purposes—that is, security plans should be required for explosives, including desensitized explosives, when transported in quantities that require placarding. UPS notes that "shipments are undetectable in commerce unless they reach the level requiring the carrier to apply placards on the vehicle" and suggests that the lack of placards on these shipments enhances their security.

It was not our intent to significantly expand upon current security planning requirements applicable to explosives. In the NPRM, we indicated that most Division 1.4 explosives do not pose a significant transportation security risk and limited security plan requirements to any quantity of a material identified as UN 0104, UN 0237, UN 0255, UN 0267, UN 0289, UN 0361, UN 0365, UN 0366, UN 0440, UN 0441, UN 0455, UN 0456, or UN 0500. Our concern, as expressed in the NPRM, was that Division 1.4 detonators make an attractive target for theft and use as initiating devices for improvised explosive devices (IEDs). In addition, it was our understanding that detonating assemblies and devices such as those listed above were generally shipped with greater quantities of Division 1.1, 1.2, or 1.3 explosives and thus were covered by security plans applicable to those materials. Based on the comments we received, we now understand that the Division 1.4 materials identified in the NPRM are frequently transported in small quantities and in separate shipments from Division 1.1, 1.2, and 1.3 materials.

Because of the strongly adverse comments we received on this issue, and after consulting with TSA, we re-evaluated the proposal to require security plans for shipments of any quantity of Division 1.4 detonators in the specified UN numbers. We agree with commenters that the security risks associated with the transportation of small numbers of these devices are not sufficient to warrant the development and implementation of security plans, particularly given the security measures voluntarily utilized by shippers and carriers. Therefore, in this final rule we are not adopting the proposed revision applicable to Division 1.4 explosives.

Instead, the security planning requirement will apply, as it does now, to all Division 1.4 explosives transported in quantities that require placarding under Subpart F of Part 172 of the HMR.

Currently, a security plan is required for Division 1.5 and 1.6 explosives transported in a quantity that requires placarding. In the NPRM, we proposed to require security plans for any quantity of Division 1.5 materials and remove Division 1.6 explosives from the list of materials for which a security plan is required. Commenters indicate that the proposed revisions to the thresholds for both Division 1.5 materials and 1.6 materials are not necessary. IME and ISEE suggest the inclusion of all explosives at the current level—quantities requiring placarding—has proven to be effective. In regard to Division 1.6 explosives, the Department of Defense Explosives Safety Board (DDESB) does not disagree with our statements in the NPRM regarding the insensitivity of Division 1.6 materials, but indicates that their insensitivity can be overcome by suitable boostering, with results similar to that of a Division 1.2 material. In its comments, DDESB recommends that any quantity of Division 1.6 explosives be included in the list of hazardous materials that require security plans. Though we do not agree that the any quantity threshold is appropriate for Division 1.6 materials, we do agree that security plans should be required for explosives at a given threshold. As a result, this final rule will not eliminate security plan requirements applicable to Division 1.5 and 1.6 materials. Security plans will continue to be required for Division 1.5 and 1.6 materials that are offered for transportation or transported in quantities that require placarding.

We did not propose to change current security planning requirements applicable to Division 1.1, 1.2, and 1.3 explosives in the NPRM. Commenters agree that security plans should be required for these materials when transported in any quantity. In this final rule, we are retaining the current requirement. Thus, without regard to the mode by which the material is transported, shippers and carriers of Divisions 1.1, 1.2, and 1.3 explosives (transported in any quantity) and Divisions 1.4, 1.5, and 1.6 explosives (transported in quantities that require placarding) must develop and implement security plans. Note that the security planning requirements are triggered by the offering or transportation of a hazardous material in a quantity that requires placarding, not by the absence or presence of a placard on a given shipment.

2. Flammable Gases (Division 2.1)

Currently, security plans are required for shipments of Division 2.1 materials when transported in a quantity requiring placarding. In the NPRM, we proposed to raise the threshold trigger for security planning purposes to a quantity greater than 3,000 L (793 gallons). We concluded that shipments of flammable gases in quantities of 3,000 L (793 gallons) or less in a single package do not pose a transportation security risk warranting development and implementation of security plans.

Two commenters address the proposed requirements for compressed gases in Division 2.1. The Gases and Welders Distribution Association supports the proposed changes, suggesting that adopting a threshold that is consistent with security planning provisions in the UN recommendations will facilitate compliance for international transportation and reduce costs for shippers and carriers handling such materials in international commerce. The National Propane Gas Association (NPGA) suggests that propane should not be considered a weapon of mass destruction and it should not be subject to security plans. We disagree. Propane is among the liquefied compressed gases most commonly transported throughout the nation. When liquid propane is released into the atmosphere, it quickly vaporizes into the gaseous form that is its normal state at atmospheric pressure. This happens very rapidly, and in the process, the propane combines readily with air to form fuel air mixtures that are ignitable over a range of 2.2 to 9.5 percent propane by volume. If an ignition source is present in the vicinity of a highly flammable mixture, the vapor cloud ignites and burns very rapidly (characterized by some experts as "explosively"). Based on these characteristics and the frequency with which propane is transported in this country, we believe that propane presents a sufficient security risk to warrant the imposition of security plan and security training requirements when transported in quantities greater than 3,000 L (793 gallons).

In this final rule, we are adopting the proposed threshold for Division 2.1 materials to require security plans for amounts greater than 3,000 L (793 gallons) in a single package or container.

3. Nonflammable Gases (Division 2.2)

Currently, security plans are required for shipments of Division 2.2 materials when offered for transportation or transported in amounts that require placarding. In the NPRM, we proposed to remove most Division 2.2 materials from the list of materials for which security plans are required because the hazard characteristics of these materials do not lend themselves to terrorist or criminal use. However, we proposed to require security plans for oxygen and for other Division 2.2 gases that are oxidizers because they can be used to increase the likelihood and intensity of a fire or other chemical reaction. We also proposed to include any Division 2.2 compressed gas with a subsidiary hazard of Division 5.1 oxidizer for the same reason.

Commenters who addressed this issue oppose the proposal to require security plans for shipments of oxygen and other oxidizing gases. The Compressed Gas Association (CGA) contends that oxygen should be transported without any additional security regulations based on industry experience and its analysis of possible security scenarios. For example, CGA provides an assessment of the impact of firing a shoulder-launched rocket into a large cryogenic oxygen tank. The analysis concludes that the rocket would do nothing more than put a hole in the tank and harmlessly release oxygen into the atmosphere. DGAC on the other hand, supports the inclusion of oxygen, but asserts that the inclusion of other Division 2.2 materials with an oxidizing hazard is not necessary. DGAC contends that it is difficult to imagine how gases such as compressed or liquefied air would be used in an attack.

As discussed in the NPRM, Division 2.2 compressed gases generally do not pose a security threat sufficient to warrant specific security planning measures. However, oxygen and other oxidizers enhance the combustion of other materials, thereby increasing the likelihood and intensity of a fire or other chemical reaction. At least 7 million tons of oxygen are transported by motor carriers each year. Because of its oxidizing characteristics and the volume transported, we continue to believe that large shipments of oxygen should be subject to security planning requirements. Therefore, in this final rule we are requiring shippers and carriers of oxygen and other Division 2.2 compressed gases with a subsidiary hazard of Division 5.1 oxidizer, in quantities greater than 3,000 L (793 gallons) in a single package or container, to develop and implement security plans. A list of Division 2.2 oxidizing gases that are authorized for transportation in large bulk quantities is provided below.

Proper shipping name	Hazard class	Identification Nos.	Label code
Air, refrigerated liquid, (cryogenic liquid)	2.2	UN1003	2.2, 5.1
Air, refrigerated liquid, (cryogenic liquid) non-pressurized	2.2	UN1003	2.2, 5.1
Compressed gas, oxidizing, n.o.s.	2.2	UN3156	2.2, 5.1
Gas, refrigerated liquid, oxidizing, n.o.s. (cryogenic liquid)	2.2	UN3311	2.2, 5.1
Liquefied gas, oxidizing, n.o.s.	2.2	UN3157	2.2, 5.1
Nitrous oxide	2.2	UN1070	2.2, 5.1
Nitrous oxide, refrigerated liquid	2.2	UN2201	2.2, 5.1
Oxygen, compressed	2.2	UN1072	2.2, 5.1
Oxygen, refrigerated liquid (cryogenic liquid)	2.2	UN1073	2.2, 5.1

4. Materials Poisonous by Inhalation (Division 2.3 and 6.1)

Currently, poison-inhalation-hazard (PIH) materials are subject to security planning requirements when offered for transportation or transported in any quantity. We did not propose to change this requirement in the NPRM.

We received several comments regarding the inclusion of anhydrous ammonia as a Division 2.3 material. The Association of American Railroads (AAR), Utility Solid Waste Activities Group (USWAG), and The Fertilizer Institute (TFI) request clarification of the requirements applicable to anhydrous ammonia. In addition, Dominion asks, "Under what circumstances [do] anhydrous ammonia shipments trigger the security plan requirements."

In proposed § 172.800(b)(6) we state that "any quantity of a material poisonous by inhalation, as defined in § 171.8" is subject to security plan requirements (73 FR 52571). Section 171.8 defines a "material poisonous by inhalation" as a:

(1) Gas meeting the defining criteria in § 173.115(c) and assigned to Hazard Zone A, B, C, or D in accordance with § 173.116(a);

(2) Liquid meeting the defining criteria in § 173.132(a)(1)(iii) and assigned to Hazard Zone A or B in accordance with § 173.133(a); or

(3) Material identified as an inhalation hazard in column 7 of the § 172.101 table.

Anhydrous ammonia meets the definition of a PIH material because it is identified as having an inhalation hazard in column 7 of the Hazardous Materials Table (HMT) and, therefore, is subject to security planning requirements when offered for transportation or transported in any quantity. More generally, we note that many materials, such as those identified by a plus sign in column 1 of the § 172.101 table, pose hazards that are not identified as the primary hazard in column 3 of the HMT. While anhydrous ammonia is classed for domestic transportation as a Division 2.2 material, it does pose a significant inhalation hazard and, thus, should be subjected to safety and security requirements that address that hazard. We note further that by requiring security plans for materials that meet the definition for a material poisonous by inhalation, all materials that exhibit PIH characteristics are covered even if they are not specifically identified in column 3 of the § 172.101 table as Division 2.3 or 6.1 materials. Therefore, whether the material is anhydrous ammonia, boron tribromide, ethyl chlorothioformate, phosphorus oxychloride, or sulfuric acid, for example, it is subject to the security plan requirements under proposed section 172.800(b)(6), at any quantity.

In this final rule, we are maintaining the existing any quantity threshold for PIH materials.

5. Desensitized Explosives (Class 3 and Division 4.1)

Desensitized explosive substances are explosive materials that have been rendered non-explosive, according to the UN Manual of Tests and Criteria, by means of adding a diluting liquid or solid. The diluted substances, once tested and found not in Class 1, are regulated under the HMR as Division 4.1 flammable solids or Class 3 flammable liquids, depending on their physical state and hazardous properties. Currently, security plans are required for shipments of desensitized explosives in quantities that require placarding. In the NPRM, we proposed to require security plans for shipments of any quantity of desensitized explosives because many desensitized explosives can be readily reconstituted into explosive materials.

We received well over 100 comments regarding the proposed security plan threshold for desensitized explosives. Generally, persons involved with special effects for the motion picture industry indicate they do not support changing the current placarding requirement to a requirement that applies to any quantity. Similarly, ASEPO, IME, the American Trucking Associations (ATA), UPS, DGAC, and Canadian Trucking Alliance (CTA) all disagree with the proposed requirement to regulate any quantity of desensitized explosives. IME suggests that the "any quantity" threshold should be reserved for materials that would contribute to the consequences of a direct attack on the transportation conveyance. According to IME, desensitized explosives would not be expected to contribute to the consequences of such an incident. ATA, UPS, and CTA indicate if we require security plans for any quantity of desensitized explosives we should identify specific materials to which the security plan requirements would apply.

As we noted in the NPRM, desensitized explosives have been used in terrorist attacks in the United States and overseas. Urea nitrate, for example, has been used in a number of terrorist attacks, most notably the first vehicle-borne improvised explosive device attack on the World Trade Center in 1993. Moreover, requiring a security plan for any quantity of a desensitized explosive in Class 3 or Division 4.1 is consistent with the UN requirements. In addition, TSA's HSSM list for SAIs has included any quantity of desensitized explosives in Class 3 and Division 4.1 in Packing Group I and lists specific Packing Group II desensitized explosives that are also included. However, after discussing our concerns with TSA and reviewing the comments, we agree with commenters that the "any quantity" threshold for a material that needs further processing to be used in a terrorist attack is an unnecessary burden. Just as we concluded with Division 1.4 materials, the existing placarding threshold is commensurate with the security risk associated with desensitized explosives in Class 3 and Division 4.1. Therefore, in light of comments received from explosives manufacturers, shippers, and carriers, and resulting discussions with TSA, we have decided to maintain the current threshold. Accordingly, in this final rule, desensitized explosives in Class 3 and Division 4.1 are subject to the

security plan requirements in a quantity of 454 kg (1,001 pounds) or more in a single transport vehicle or freight container (see exception in § 172.504(c)).

6. Flammable Liquids (Class 3—Other Than Desensitized Explosives)

Currently, the HMR require security plans for both flammable and combustible liquids when offered for transportation or transported in quantities requiring placarding. In the NPRM, we proposed to require security plans for shipments of 3,000L (793 gallons) or more in a single packaging of any Class 3 material. DGAC opposes subjecting Class 3 materials to the security plan requirements because they can be easily acquired outside of transportation.

As we stated in the NPRM, flammable liquids burn vigorously, giving off large quantities of intense heat. Some may produce flammable atmospheres in confined spaces that, when ignited, could cause significant damage through deflagration or detonation. Class 3 materials could be used in a terrorist attack to trigger a large, intense fire that could cause deaths, injuries, and damage to buildings and infrastructure. To be effective, such an attack would necessarily involve a large quantity of flammable liquid. We disagree with DGAC's comment that flammable liquids should be dropped from security planning entirely. Large quantities of flammable liquids pose a significant security risk that can be mitigated through security planning. However, after consultation with TSA, we have concluded that the security risks associated with Class 3 materials are most significant for large quantities in Packing Groups I and II. Therefore, this final rule requires a security plan for Packing Group I and II flammable liquids in amounts greater than 3,000 L (793 gallons) in a single package or container.

7. Flammable Solids (Division 4.1)

In the NPRM, we proposed to eliminate security plan requirements for flammable solids, except for desensitized explosives in Division 4.1, which we discussed above. There were no comments addressing our proposal. In this final rule, we are adopting the proposal to limit the applicability of security plans to Division 4.1 materials that are desensitized explosives.

8. Spontaneously Combustible Materials (Division 4.2)

Currently, security plans are required for quantities of Division 4.2 materials that require placarding. The NPRM proposed to retain the security plan requirement for shipments of more than 3,000 kg (6,614 lbs.) in a single packaging of Division 4.2 materials in Packing Groups I and II and to eliminate the security plan requirement for Division 4.2 materials in Packing Group III. Only one commenter addressed the proposed threshold for spontaneously combustible materials. DGAC does not agree with our decision to include Division 4.2 materials in Packing Group II. Further, DGAC notes that both the UN and TSA's HSSM list for SAIs have set the threshold at the 3,000 kg (6,614 lbs.) level for Packing Group I materials only.

The UN does set the threshold at 3,000 kg (6614 lbs.) for Packing Group I materials, but TSA's HSSM list includes both Packing Group I and Packing Group II materials. Though we would like to harmonize with the UN requirements when at all possible, the goal of this rulemaking is to ensure that security planning requirements apply to materials that pose a security risk in transportation. DGAC did not provide sufficient reasoning as to why we should require security plans at the Packing Group I level only. Based on our consultations with TSA concerning the security risks associated with the transportation of Division 4.2 materials, this final rule requires security plans for more than 3,000 kg (6,614 lbs.) of Division 4.2 materials in Packing Groups I and II in a single packaging.

9. Dangerous When Wet (Division 4.3)

Currently, the HMR require security plans for shipments of Division 4.3 materials in any quantity. We did not propose to change this requirement in the NPRM.

Very few comments address this issue. DGAC supports the inclusion of Division 4.3 in Packing Group I, but not Division 4.3 materials in Packing Groups II and III. According to DGAC, the amount of flammable gas that would evolve from materials in Packing Groups II and III is likely to be significantly less than propane or a similar flammable gas. CTA, ATA, and UPS indicate that the any quantity threshold is inappropriate and urge PHMSA to consider the 3,000 kg (6,614 lbs.) threshold for Division 4.3 materials. Commenters contend that it is not necessary to include such small amounts of materials that are often commercially available.

Division 4.3 materials are water reactive—they emit flammable or toxic gases upon contact with water. Division 4.3 materials may be of interest to terrorists planning a toxic gas attack on crowded venues like subways, buses, shopping centers, or movie theaters. PHMSA, after consulting with TSA, continues to support the current requirement for security plans for shipments of Division 4.3 materials in any quantity. The any quantity threshold provides an appropriate level of security, given the potential vulnerabilities and risks associated with these materials. Therefore, this final rule continues to require security plans for shipments of any quantity of Division 4.3 materials.

10. Oxidizers (Division 5.1)

Currently, the HMR require security plans for shipments of Division 5.1 materials in quantities that require placarding. In the NPRM, we proposed to require security plans for Division 5.1 materials in Packing Groups I and II when transported in quantities greater than 3,000 L (793 gallons) in a single packaging, and for perchlorates and ammonium nitrate when transported in quantities greater than 3,000 kg (6,614 lbs.) for solids and 3,000 L (793 gallons) for liquids in a single packaging.

Three commenters address this proposal. DGAC contends that Division 5.1 materials in Packing Group II will be relatively ineffective in an attack and proposes that they not be included. TFI and IME ask for clarification of the proposed requirement and its applicability to solid and liquid materials and the threshold quantities for each.

We disagree with DGAC's suggestion that Packing Group II materials are ineffective oxidizers and should be removed from the list of materials requiring a security plan. As we indicated in the NPRM, an oxidizer is a material that may cause or enhance the combustion of other materials, generally by yielding oxygen. Some oxidizers may explode when heated. Division 5.1 oxidizing materials are frequently used as components of IEDs.

TFI and IME are correct that the regulatory text proposed in the NPRM was not clear and should be clarified in the final rule. Therefore, in this final rule we clearly indicate in regulatory text that the security plan requirements apply to Division 5.1 materials in Packing Groups I and II; perchlorates; and ammonium nitrate, ammonium nitrate fertilizers, or ammonium nitrate emulsions, suspensions, or gels in a single packaging, in a quantity greater than 3,000 kg (6,614 lbs.) for solids or 3,000 L (793 gallons) for liquids.

11. Organic Peroxides (Division 5.2)

The HMR currently require security plans for liquid or solid Type B, temperature controlled Division 5.2

organic peroxides transported in any quantity. The NPRM did not propose changes to this requirement. DGAC does not support the inclusion of Division 5.2, Type B materials on the list of materials that require a security plan. DGAC contends that as packaged for transportation these materials will not react dangerously.

PHMSA agrees with DGAC that organic peroxides are packaged in a safe manner, but does not agree that safe packaging adequately ensures that a material is secure during transportation. DGAC did not explain how packaging for Division 5.2, Type B materials makes them more secure than other properly packaged materials. PHMSA, after consulting with TSA, agrees that Division 5.2, Type B materials should be subject to security plan requirements when transported in any quantity. As discussed in the NPRM, organic peroxides are temperature sensitive, self-reacting materials that pose both a fire and explosion hazard, and may be both toxic and corrosive. Type B organic peroxides are the most dangerous organic peroxides permitted in transportation. Organic peroxides were used in the July 2005 terrorist bombings in London, and were planned for use by terrorists plotting to destroy aircraft flying from the United Kingdom to the United States. The current security planning requirement provides an appropriate level of security, given the potential vulnerabilities and risks associated with these materials. In this final rule, we are continuing to require a security plan for any quantity of Division 5.2 organic peroxide, Type B, liquid or solid, temperature controlled, as proposed.

12. Poisonous Materials (Division 6.1—Other Than PIH)

Security plans are currently required for shipments of Division 6.1 materials in quantities that require placarding. In the NPRM, we proposed to require security plans for shipments of Division 6.1, Packing Group I materials in any amount and shipments of 3,000L (793 gallons) or more of Division 6.1, Packing Groups II and III materials. DGAC, ATA, UPS, and CTA all suggest that a single packaging threshold of more than 3,000 kg (6,614 lbs.) for solids or 3,000 L (793 gallons) for liquids for all Division 6.1 materials would be more appropriate than the "any quantity" threshold we proposed for Division 6.1 materials in Packing Group I.

After consultation with TSA and based on the comments we received, we agree that a large bulk quantity threshold for Division 6.1 materials in Packing Group I is more appropriate than the "any quantity" threshold proposed in the NPRM. As we indicated in the NPRM, Division 6.1 materials can be used to contaminate food and water supplies; however, the effectiveness of such an attack would depend on the toxicity level of the material and the quantity utilized. The security risks of these materials, therefore, vary based on the quantity transported. In this final rule, we are adopting a security plan threshold trigger of more than 3,000 kg (6,614 lbs.) for solids or 3,000 L (793 gallons) for liquids for poisonous materials (other than PIH) in Packing Groups I, II, and III.

13. Infectious Substances and Select Agents (Division 6.2)

Currently, the HMR require security plans for shipments in any quantity of Division 6.2 materials that are designated as select agents by the Centers for Disease Control and Prevention and the U.S. Department of Agriculture. The NPRM did not propose to change this requirement. We received very few comments concerning this aspect of the NPRM. ATA agrees that the "any quantity" threshold is appropriate for Division 6.2 materials; DGAC suggests that security plans should only be required for Division 6.2 materials transported in bulk quantities. We note concerning the DGAC comment that select agents typically are not transported in bulk quantities and that even small quantities of these materials may be developed as weapons to cause serious and significant outbreaks of disease in humans and animals. The current security planning requirements provide an appropriate level of security, given the potential vulnerabilities and risks associated with these materials. Therefore, as proposed, this final rule continues to require security plans for select agents or toxins regulated by the Centers for Disease Control and Prevention under 42 CFR Part 73 or the United States Department of Agriculture under 9 CFR Part 121.

14. Radioactive Materials (Class 7)

The current security plan requirements apply to a person who offers for transportation or transports a highway route-controlled quantity (HRCQ) of a Class 7 (radioactive) material. The HMR also require security plans for any shipment that requires placarding under Subpart F of Part 172; this includes shipments of packages with radioactive Yellow III labels and exclusive use shipments of low specific activity material and surface contaminated objects. In the NPRM we proposed to adopt security thresholds as established by the International Atomic Energy Agency (IAEA) for radioactive materials in transport. The levels reflect research conducted by the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission (NRC), and the IAEA on the attractiveness of radionuclides for malevolent use. The changes proposed in the NPRM better address security concerns and align the HMR with international and domestic security requirements. Similarly, TSA's HSSMs list for SAIs has included IAEA Code of Conduct Category 1 and 2 materials including HRCQ quantities as defined in 49 CFR 173.403 or known as radionuclides in forms listed as RAM–QC by the Nuclear Regulatory Commission. Both lists are virtually identical.

Commenters propose enhancements to make the requirements clear, but do not oppose the thresholds proposed in the NPRM. In their comments, AAR and Norfolk Southern Railway Company (Norfolk Southern) suggest that we implement a shipping paper notification requirement on rail shippers to enable easy identification of shipments that exceed the threshold quantity. Another commenter, Louisiana Energy Services, LLC (LES), recommends that PHMSA address the requirement in § 172.505(b) involving transportation restrictions on uranium hexafluoride (UF_6).

With regard to the comments from AAR and Norfolk Southern, we note that the information required to determine if a radioactive material meets the proposed security plan requirements is already available. It is the carrier's responsibility to determine if it has accepted for transportation a quantity of radioactive materials that trigger security plan requirements. In accordance with § 172.203(d), the shipper is already required to include the name of the radionuclide and the activity level contained in each package. From that information, the carrier may calculate the "sum of the fractions" as described in 10 CFR, Appendix P to Part 110—Category 1 and 2 Radioactive Material to determine if the threshold limit has been met. If the calculated "sum of the fractions" ratio is greater than 1 then the shipment exceeds the threshold limit. In addition, of course, a carrier may simply ask the shipper of the material whether the shipment exceeds the threshold limit for which security plans are required. Indeed, shippers and carriers should discuss security planning issues when they make arrangements for transporting any hazardous material.

We agree with LES that security plan requirements should continue to apply to 1,001 pounds (454 kg) or more of UF_6. As a result, we have included a

provision to mandate security plans for quantities of UF_6 at or in excess of 1,001 pounds (454 kg), as provided by § 172.505(b). In addition, we believe that TSA's HSSM list more clearly and effectively lists the materials that should be subject to security planning. As such, we have decided to use similar language in this final rule. In addition to the UF_6 requirement, we specifically indicate that security plans are required for IAEA Code of Conduct Category 1 and 2 materials including HRCQ quantities as defined in 49 CFR 173.403 or known as radionuclides in forms listed as RAM–QC by the Nuclear Regulatory Commission.

15. Corrosive Materials (Class 8)

The HMR currently require security plans for placarded shipments of Class 8 materials in all packing groups. In the NPRM we proposed to retain security plan requirements for shipments of Class 8, Packing Group I materials in a single packaging, in a quantity of 3,000 kg (6,614 lbs.) or more for solids or 3,000 L (793 gallons) or more for liquids. As we indicated in the NPRM, lesser amounts pose little, if any, security risk. There were no comments addressing our proposal. Therefore, this final rule adopts a threshold for Packing Group I corrosive materials in a quantity of greater than 3,000 kg (6,614 lbs.) for solids or 3,000 L (793 gallons) for liquids in a single packaging.

16. Miscellaneous Hazardous Materials (Class 9)

Currently, the HMR require security plans for Class 9 materials transported in a bulk packaging with a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or greater than 13.24 cubic meters (468 cubic feet) for solids. In the NPRM, we indicated that the security risks associated with the transportation of these materials are not sufficient to warrant development and implementation of security plans and proposed to eliminate this requirement. Comments were supportive of our decision. As a result, this final rule eliminates existing security plan requirements applicable to Class 9 materials.

B. Revisions to Security Plan Requirements

In addition to the changes to the applicability of security plans, the NPRM proposed a number of amendments to clarify and enhance current security requirements, including requirements for security plans and for training. These proposals and corresponding comments are discussed and finalized below.

1. Site-Specific/Location-Specific (§ 172.802(a))

Security plans must include an assessment of possible transportation security risks for the covered materials. In the NPRM we proposed to clarify this requirement by stating that the required risk assessment must include an assessment of the risks that exist on specific routes or in specific locations. Comments submitted varied. Most commenters suggest that requiring a written route assessment for every route or location is unworkable and would seriously impair a carrier's ability to do business. By contrast, commenters such as the Airline Pilots Association, International (ALPA) and National Association of SARA Title III Program Officials (NASTTPO) indicate that the strengthening of the requirements, to include site-specific or location-specific security risks, is a well-advised addition of specificity. However, NASTTPO questions the omission of a requirement for consultation with local emergency planners, law enforcement, or fire departments.

It was not our intent in the NPRM to propose a revision to § 172.802(a) that would alter existing regulations in such a manner that a written security plan, including the risk assessment, would need to address each site or location along a transportation route. Our intent was to clarify that generic security plans that are not specific to a facility or location or corporate security plans that do not address security risks associated with a particular facility or location may not satisfy the risk assessment requirement. For example, it is our understanding that corporations frequently develop security plan templates for use by facilities or entities within the corporation. To meet the risk assessment requirement in § 172.802(a), each entity would need to adapt the corporate security plan template to address site-specific issues or vulnerabilities. Given the confusion expressed by commenters, we are revising the proposed text in this final rule to more clearly state that shippers and carriers must consider site-specific risks and vulnerabilities at facilities subject to the security planning requirement.

2. Identification, Duties, and Training (§ 172.802(b))

In the NPRM we proposed in § 172.802(b)(1) that the security plan identify, by job title, the senior management official responsible for the overall development and implementation of the plan. We proposed in § 172.802(b)(2) that the security plan include security duties for each position or department that is responsible for the plan's implementation and the process for notifying employees when specific elements of the security plan must be implemented. In addition, to ensure that employees are aware of their training obligation by their employer, we proposed in § 172.802(b)(3) that hazmat employers develop a plan for training hazmat employees in accordance with § 172.704 (a)(4) and (a)(5) of this part. One commenter, ALPA, expressed support for the addition of § 172.802(b)(1) through (3). Specifically, the Association welcomes that the proposed language requires "the identification of job title for the responsible management official, security duties identified for each position or department responsible for implementing the plan, and the specifics of required training procedures."

We agree with the commenter, the language proposed in § 172.802(b)(1) through (3) of the NPRM provides necessary clarity and responsibility for compliance with security plan requirements. In this final rule we are adopting § 172.802(b) as proposed.

3. Security Assessment in Writing (§ 172.802(c))

Section 172.802 of the HMR establishes the components that must be included as part of a hazardous materials transportation security plan. Paragraph (a) of this section requires that a security plan include an assessment of possible transportation security risks associated with the hazardous materials covered by the security plan and appropriate measures to address the identified security risks. This assessment is part of the plan and must be in writing and maintained with the plan in accordance with § 172.802(b). Stakeholders have indicated that there is some confusion as to whether the security risk assessment is part of the security plan and if it must be in writing. To clarify concerns, the NPRM proposed language indicating that the security plan, including the security risk assessment, must be in writing and must be retained for as long as the plan remains in effect. One commenter, DGAC, opposes the requirement for assessments to be written, suggesting that written vulnerability assessments provide little to no security benefit and impose a paperwork burden. We disagree with DGAC. The risk assessment is the foundation of a security plan. If the assessment is not in writing, it will be difficult for a company to match the

components of its security plan to the vulnerabilities identified. Moreover, in the absence of a written risk assessment, it will be difficult—if not impossible—for enforcement personnel to determine whether a security plan conforms to HMR requirements.

We note concerning the proposal in the NPRM that the requirement for a risk assessment to be included in the security plan is not a new requirement. We have addressed this and the requirement for plans to be in writing in guidance issued over the last several years. For example, in a February 27, 2004 letter to Mr. Jim Smith (Ref. No. 04–0293; Docket entry PHMSA–06–25885–0175), we clearly stated that a security plan must include an assessment of possible transportation security risks for shipments of the covered hazardous materials and appropriate measures to address the assessed risks. At a minimum, the security plan must address personnel security, unauthorized access, and en route security issues. Similarly, in a May 16, 2007 letter to Ms. Susan Leith (Ref. No. 07–0086; Docket entry PHMSA–06–25885–0176), we agreed with the requester that the security plan must be in writing. We indicated that posting a security plan on a company's intranet that is accessible to company employees on a need-to-know basis and readily printed if necessary would be considered "in writing." In light of stakeholder concerns, this final rule clarifies existing requirements for including the risk assessment as part of the overall security plan by adopting the language proposed in § 172.802(c).

4. Annual Review (§ 172.802(c))

In the NPRM we proposed a requirement for the security plan to be reviewed at least annually and updated if circumstances change (e.g., acquisitions, mergers, operating rights, materials transported, and expanded or reduced service levels). Dominion, Arkema Inc., USWAG, ATA, and NTTC all indicate that the requirement for security plans to be updated as necessary to reflect changing circumstances is sufficient and that it is unclear how requiring annual review increases the effectiveness.

When we adopted the requirement for security plans to be updated as necessary to reflect changing circumstances, our expectation was that plans would be reviewed at least annually and perhaps more often so that they could be updated to reflect changing circumstances. According to stakeholders and PHMSA enforcement personnel, plans are not being reviewed regularly. As a result, plans are not updated. The addition of a requirement for annual review and update to reflect changing circumstances will ensure that shippers and carriers keep abreast of changing conditions that affect the security of the shipments they handle and ensure that security measures in place are appropriate and effective. By their nature, security considerations are always changing and must be continually evaluated at the ground level by offerors and transporters to be effective. Therefore, in this final rule, we are adopting the proposed requirement for the security plan to be reviewed at least annually and updated to reflect changing circumstances.

5. Risk Assessment and Security Plan Documentation (§ 172.802(c) and (d))

In the NPRM we proposed a requirement for the security plan to be made available to employees. Currently, and as proposed in the NPRM, the security plan must include an assessment of transportation security risks. Commenters expressed concern regarding the vulnerabilities that may develop from broad distribution of the entire security plan, especially the risk assessment. In addition, one commenter, Arkema Inc., requests clarification on what is required for a risk assessment—it asks for an example of the methodology that should be used and what should be maintained at the corporate vs. site-specific level.

We agree with commenters that the distribution of security plans to employees without regard to job function and need-to-know, may not be in the best interest of security. Generally, we believe that employees should be involved in the risk assessment process at the onset. Employees should be given the opportunity to discuss security concerns of which they are aware and recommend measures that may be used to address identified risks. However, consistent with personnel security clearance or background check investigation restrictions and demonstrated need-to-know, it is at the discretion of the hazmat employer as to the extent to which employees are granted access to the completed plan. At a minimum, the employees need to be made aware of security changes and activities for which they are responsible. We believe that the language provided in § 172.802(c) of the NPRM is adequate to allow employers to make employees aware of the overall security posture of the company and of their specific security roles and responsibilities, without requiring them to share the entire plan. As a result, we are adopting the language as proposed.

In response to Arkema's request for clarification regarding the requirements for maintaining documentation, current and proposed security plan requirements indicate that the security plan, which includes the risk assessment, must be maintained in writing and for as long as it remains in effect. Each person must maintain the security plan at its principal place of business. Generally, the principal place of business is the location of the head office of a business where the books and records are kept and/or management works. However, for companies that operate more than one site or facility for which security plans are required, the security plan must be readily available to the employees responsible for implementing the plan and must be provided at a reasonable time and location to an authorized official of DOT or TSA and other authorized DHS officials upon request. Therefore, each facility must have the plan on file or have the capability of accessing or receiving the plan from the principal place of business. This final rule adopts the requirement as proposed in the NPRM. Note that for purposes of compliance with this requirement, a shipper or carrier may maintain its security plan electronically, such as on a secure intranet site or CD, so long as it can be accessed by employees responsible for its implementation, printed and distributed as necessary, and provided expeditiously to enforcement personnel upon request.

In response to Arkema's request for an example of the methodology that should be used when conducting risk assessments, we point to the Risk Management Self-Evaluation Framework (RMSEF) on our website. The framework illustrates how risk management methodology can be used to identify points in the transportation process where security procedures should be enhanced within the context of an overall risk management strategy. The RMSEF is posted on our website at the following URL: *http://www.phmsa.dot.gov/hazmat/risk/rmsef.* Other risk assessment tools are equally valid. This final rule does not require persons subject to the security plan requirement to use a specific risk assessment tool to meet the risk assessment requirement. Using risk assessment methodology, a company will select an appropriate level of detail for its security plan based on the assessed risks identified for such material or materials. Factors that may be considered are the type or types of materials transported, the quantity of material transported, the area from or to

which the material is shipped, and the mode of transportation used.

C. Security Training

In the NPRM we proposed to clarify that the in-depth security training requirements in § 172.704(a)(5) apply only to hazmat employees who are directly involved with implementing security plans. Companies that are subject to the security plan requirements in Subpart I of Part 172 are required to provide in-depth training concerning their security plan and its implementation. Additionally, as discussed above, the NPRM proposed to require security plans to be reviewed at least once each year and updated as necessary to reflect changing circumstances. The in-depth security training requirement must be provided to hazmat employees responsible for the plan's implementation once every three years, in accordance with § 172.704(c). To align these requirements the NPRM proposed to require in-depth security training once every three years or, if the security plan is revised during the recurrent training cycle, within 90 days of implementation of the revised security plan. In this way, those hazmat employees responsible for implementing the security plan will be trained in a timely manner concerning any changes or revisions to the plan.

USWAG does not support the provision in proposed § 172.704(c)(2) requiring recurrent training when the security plan is revised. USWAG suggests that we limit the recurrent training to "changes that affect the critical components of the security plan, namely 'unauthorized access' and 'en route security' as identified by § 172.704(a)(2) and (3) and only for those employees affected." Norfolk Southern states, "PHMSA should provide a distinct break between the foregoing first two categories of hazmat employees (those handling hazmat or performing regulated hazmat function) versus key employees who are responsible for implementing a railroad's security plan." Another commenter, AAR states, "in-depth training is appropriate for employees responsible for implementing a security plan." According to AAR, in-depth training is not appropriate for employees who handle the materials or perform a regulated function.

Current language requires each employee of a hazmat employer that has a security plan to be provided in-depth security training. Similarly, we currently require recurrent training when changes are made that impact the hazmat employee's job function. For example, if we publish a new regulation, change an existing regulation, or if an employer revises a security plan, a hazmat employee must be instructed in those new or revised requirements without regard to the three year training cycle. Therefore, the revisions to the training requirements simply clarify existing requirements. In this final rule we are adopting the requirements in § 172.704 as proposed.

D. Other Comments

1. One Time Shipments

The NPRM did not address the concept of one-time shipments. Various commenters support regulatory relief for one-time or first-time shipments of materials that require security plans. One commenter, Dominion, suggests that PHMSA except facilities with "one-time" shipments or events from the security plan requirements and provide a reasonable period of time for new companies to institute security plans. Another commenter, USWAG, requests that we clarify our expectations for "facilities that are faced with two distinct factual scenarios: (i) Where a facility has triggered a security plan threshold but does not expect to trigger any threshold in the future (i.e., 'one-time' event) and (ii) where a facility has triggered a threshold and will likely trigger a security plan threshold in the future."

The security plan requirements apply to any person who offers and/or transports listed hazardous materials in commerce. They have been established to promote the secure transportation of hazardous materials in commerce. It is not practicable to provide a broad exception that waives security plan requirements simply to accommodate one-time shipments of hazardous materials. Therefore, we are not adopting a procedure for one-time shipments in this final rule.

2. Modal Variations

The NPRM did not elaborate on differences in security plans based on the mode of transportation used. One commenter, Dow, suggests that security plan requirements should vary by mode of transportation because security risks will "differ due to the unique aspects of each mode."

We agree with the commenter that security risks may well differ among different modes of transport. Persons who offer for transportation materials for which a security plan is required must assess and address security vulnerabilities for all the modes of transport utilized. The HMR set forth general requirements for a security plan's components rather than a prescriptive list of specific items that must be included. The HMR set a performance standard providing offerors and carriers with the flexibility necessary to develop security plans addressing their individual circumstances and operational environments. Accordingly, each security plan will differ because it will be based on an offeror's or a carrier's individualized assessment of the security risks associated with the specific hazardous materials it ships or transports and its unique circumstances and operational environment.

In the event that additional requirements are deemed to be necessary for specific modes, we will address those through rulemaking. An example of mode specific security plan requirements is the rail routing regulation in § 172.820 of the HMR, which were adopted in an interim final rule published April 16, 2008 (73 FR 20751) and finalized in a final rule published November 26, 2008 (73 FR 72182). The section requires, for a narrow list of materials, rail carriers to collect data on rail transportation routes, analyze the data collected, assess practicable alternative routes, and select the safest and most secure route.[1]

3. Exceptions and IBCs

Three commenters ask for clarification of the applicability of the security plan requirements to materials shipped under exceptions and to residues. Commenters also asked whether security planning requirements apply to hazardous materials transported in IBCs.

The security plan requirements apply to the materials listed in § 172.800(b) as amended by this final rule. Materials shipped in accordance with an exception authorized under the HMR, such as the materials of trade exception in § 173.6, small quantity exceptions in [list the new sections as established in HM–215J], or limited quantity or consumer commodity exceptions, are not subject to security planning requirements. In accordance with § 172.800(b), listed materials offered for transportation or transported at or above the threshold quantity indicated are subject to security plan requirements, including residue quantities in excess of the established thresholds. Materials for which the established threshold is 3,000 L (793 gallons) or 3,000 kg (6,614 lbs.) that are transported in an IBC or other

[1] TSA also requires freight rail carriers and certain facilities handling specified hazardous materials to implement chain of custody and control requirements to ensure a positive and secure exchange of the specified hazardous materials. 49 CFR 1580.107.

packaging with a capacity that is below the established threshold are not subject to security planning requirements.

4. Shipper's Responsibility

Commenters express concern regarding enforcement actions taken against carriers as a result of errors made by shippers. Specifically, in its comments COSTHA requests that PHMSA add language to protect the carrier from enforcement action when a shipper fails to declare a shipment as being subject to the security plan requirement. Similarly, ATA requests the inclusion of a provision indicating that the "transportation of undeclared hazardous materials is not a violation of the HMR, unless the carrier has knowledge that a specific package contained undeclared security sensitive hazardous materials."

It is the carrier's responsibility to develop and implement security plans for materials that it transports that are in excess of the thresholds established by this final rule. We note that in accordance with § 171.2(f) of the HMR, an offeror and carrier may rely on information provided by a previous offeror or carrier unless it knows, or a reasonable person acting in the circumstances and exercising reasonable care would know, that the information provided to them is incorrect. Under section 5123(a)(1) of the Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*), a person acts knowingly when the person has actual knowledge of the facts giving rise to the violation; or a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. While we consider enforcement actions on a case-by-case basis considering the specific circumstances surrounding non-compliance with the regulations, we can say that it is unlikely that we would pursue an enforcement action against a carrier for failure to have a security plan if the carrier relied on information about the shipment provided by a previous offeror or carrier in the transportation chain and the carrier did not know or have reason to believe that the information provided was incorrect.

5. Implementation Timeline

One commenter, Horizon Lines, Inc, suggests that the proposed changes to the security plan will require modification to plans in existence today and requests that enough time be provided for training to be completed without creating an undue burden and expense for industry.

We disagree that the proposed changes to the security plan will require modification to plans in existence today. This final rule narrows the list of materials subject to security plan requirements and provides clarity in areas where the requirements are often misunderstood (e.g., security planning, training, and documentation). This final rule, taken as a whole, reduces the number of persons subject to the regulatory costs and paperwork burden attributable to PHMSA's security planning requirements. It does not increase the training burden or require modification of existing security plans. However, we understand the concerns expressed by Horizon Lines, Inc. As such, we will allow voluntary compliance 30 days after publication of this final rule and extend the effective date to October 1, 2010. This will provide an opportunity for companies to account for any changes they may choose to implement.

IV. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rulemaking is considered a significant regulatory action under section 3(f) of Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032). This final rule was reviewed by the Office of Management and Budget.

Executive Order 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." Because this final rule narrows the list of materials for which security plans are required, it will reduce the number of shippers and carriers required to develop security plans in accordance with Subpart I of Part 172 of the HMR. It is estimated that about 10,119 entities will no longer be subject to current security plan and associated in-depth training requirements. The annual benefit resulting from this final rule is estimated to be about $3.6 million–$2.8 million in avoided costs related to development of security plans and $0.8 million in costs savings for associated training. Evaluated over a 15-year period at the standard discount rate of 7%, the estimated net present value of the cost savings is approximately $32.6 million. The regulatory impact assessment is accessible by PHMSA docket number (PHMSA–06–25885) through the Federal eRulemaking Portal (*http://www.regulations.gov*).

B. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria set forth in Executive Order 13132 ("Federalism"). This final rule will preempt State, local and Indian tribe requirements but will not have substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

C. Executive Order 13175

This final rule was analyzed in accordance with the principles and criteria set forth in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have tribal implications, and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. PHMSA has determined that, while the requirements of the final rule would apply to a substantial number of small entities, the economic impact on those small entities would not be substantial, though it would be positive.

As indicated above, about 10,119 entities will be provided relief from current security plan and in-depth training requirements as a result of this final rule. These entities are persons who offer for transportation or transport hazardous materials in commerce. Unless alternative definitions have been established by the agency in consultation with the Small Business Administration (SBA), the definition of "small business" has the same meaning as under the Small Business Act. Since no such special definition has been established, the thresholds published by SBA for industries subject to the HMR are utilized. Fewer than 90% of shippers and carriers affected by the changes in this final rule are small businesses.

Based on an analysis of the potential reduction in cost associated with this final rule, PHMSA concludes that, while the rule applies to a substantial number of small entities, it does not have a significant economic impact on those

small entities. For a small business that will no longer be subject to the security plan requirements and associated in-depth training requirements, the cost savings is between $332 and $437 annually.

E. Paperwork Reduction Act

PHMSA currently has an approved information collection under OMB Control Number 2137–0612, "Hazardous Materials Security Plans" with an expiration date of June 30, 2011. This final rule will result in a decrease in the annual burden and costs under OMB Control Number 2137–0612 due to changes adopted in this final rule to revise the list of materials for which hazardous materials transportation security plans are required.

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. This final rule identifies a revised information collection request that PHMSA will submit to the Office of Management and Budget (OMB) for approval based on the requirements in this final rule.

PHMSA has developed burden estimates to reflect changes in this final rule and estimates that the information collection and recordkeeping burden in this rule would be decreased as follows:

OMB Control No. 2137–0612:

Decrease in Annual Number of Respondents: 10,119

Decrease in Annual Responses: 10,119

Decrease in Annual Burden Hours: 55,655

Decrease in Annual Burden Costs: $2,782,750

Requests for a copy of this information collection should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (PHH–11), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, Telephone (202) 366–8553.

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 contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $132 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.

H. Environmental Assessment

The National Environmental Policy Act (NEPA), sections 4321–4375, requires Federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order Federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

Purpose and Need. The current security plan requirements, which became effective on September 25, 2003, apply to shipments of placarded loads of hazardous materials and to select agents. PHMSA has received two petitions for rulemaking requesting a review and reevaluation of the requirements. The petitioners cite several examples of hazardous materials that, based on hazard class and quantity, require placarding under the HMR and, therefore, are subject to security plan requirements. Examples include automobile batteries, inks, paint, and flavoring extracts. Petitioners suggest that it is highly unlikely a terrorist would use such materials to cause loss of life, destruction of property, or damage to the environment.

PHMSA agrees with the petitioners that the list of materials for which security plans are required should be revised. Since 2003, both the industry and the government have had four years of experience in evaluating security risks associated with specific hazardous materials and transportation environments and identifying appropriate measures to address those risks. The revisions made by this final rule are based on an evaluation of possible security threats posed by specific types and classes of hazardous materials and are intended to ensure that the security plan requirement applies only to those materials that present a significant security threat in transportation based on the hazard class and packing group of the material and the quantity or volume transported.

Alternatives. PHMSA considered the following alternatives:

No action—Under this alternative, security plan requirements would continue to apply to shipments of placarded loads of hazardous materials and to select agents, including some materials that do not pose a transportation security risk. This alternative is not risk-based and results in the over-regulation of materials that are not likely to be used in a terrorist or criminal act. This action is not recommended.

Require security plans only for materials subject to FMCSA permit regulations—Under this alternative, security plan requirements would apply only to shipments of hazardous materials subject to safety permit requirements in accordance with FMCSA regulations at 49 CFR Part 385. A safety permit is required for certain shipments of radioactive materials, explosives, PIH materials, and compressed or refrigerated methane or liquefied natural gas. This alternative would not include a number of materials that pose a significant security risk, including flammable gases, flammable liquids, desensitized explosives, dangerous when wet materials, oxidizing materials, organic peroxides, poisons, and select agents. Selection of this alternative could result in significant adverse environmental impacts as a result of a terrorist or criminal action using such materials. This alternative is not recommended.

Adopt UN Recommendations Criteria for Security Plan Requirements—under this alternative, security plans would be required for the materials identified in the UN Recommendations as high consequence dangerous goods—that is, materials with the potential for misuse in a terrorist incident that may produce serious consequences such as mass casualties or mass destruction. The UN list of high consequence dangerous goods includes most of the hazardous materials that pose a significant transportation security risk. The materials that would no longer be subject to security planning requirements are unlikely to be targeted for criminal or terrorist use; therefore, the adverse environmental consequences of this alternative are expected to be minimal. With some modifications, as detailed in this final rule, this is the selected alternative.

Analysis of Environmental Impacts. Hazardous materials are substances that may pose a threat to public safety or the

environment during transportation because of their physical, chemical, or nuclear properties. The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety hazard and reducing the probability and quantity of a hazardous material release. Hazardous materials are categorized by hazard analysis and experience into hazard classes and packing groups. The regulations require each shipper to classify a material in accordance with these hazard classes and packing groups; the process of classifying a hazardous material is itself a form of hazard analysis. Further, the regulations require the shipper to communicate the material's hazards through use of the hazard class, packing group, and proper shipping name on the shipping paper and the use of labels on packages and placards on transport vehicles. Thus the shipping paper, labels, and placards communicate the most significant findings of the shipper's hazard analysis. A hazardous material is assigned to one of three packing groups based upon its degree of hazard—from a high hazard Packing Group I to a low hazard Packing Group III material. The quality, damage resistance, and performance standards of the packaging in each packing group are appropriate for the hazards of the material transported.

Releases of hazardous materials, whether caused by accident or deliberate sabotage, can result in explosions or fires. Radioactive, toxic, infectious, or corrosive hazardous materials can have short or long term exposure effects on humans or the environment. Generally, however, the hazard class definitions are focused on the potential safety hazards associated with a given material or type of material rather than the environmental hazards of such materials.

Under the HMR, hazardous materials may be transported by aircraft, vessel, rail, and highway. The potential for environmental damage or contamination exists when packages of hazardous materials are involved in accidents or en route incidents resulting from cargo shifts, valve failures, package failures, loading, unloading, collisions, handling problems, or deliberate sabotage. The release of hazardous materials can cause the loss of ecological resources and the contamination of air, aquatic environments, and soil. Contamination of soil can lead to the contamination of ground water. For the most part, the adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be reduced or eliminated through prompt clean-up/decontamination of the accident scene.

The security plan requirements in Subpart I of Part 172 of the HMR are intended to reduce the potentially catastrophic consequences, including adverse environmental consequences, of a criminal or terrorist incident involving hazardous materials in transportation. A security plan must include an assessment of possible transportation security risks and appropriate measures to address the assessed risks. Specific measures implemented as part of the plan may vary with the level of threat at a particular time. At a minimum, the security plan must address personnel security, unauthorized access, and en route security. For personnel security, the plan must include measures to confirm information provided by job applicants for positions involving access to and handling of the hazardous materials covered by the plan. For unauthorized access, the plan must include measures to address the risk of unauthorized persons gaining access to materials or transport conveyances being prepared for transportation. For en route security, the plan must include measures to address security risks during transportation, including the security of shipments stored temporarily en route to their destinations.

This final rule narrows the list of materials for which a security plan is currently required. It targets the security plan regulations to those materials that pose a significant transportation security risk. It is possible to envision scenarios in which hazardous materials other than those identified in this final rule could be used to inflict serious damage in a terrorist or criminal incident. However, our assessment of the security risks associated with such materials, detailed elsewhere in this preamble, suggests that they are unlikely to be targeted. PHMSA therefore concludes that there are no significant environmental impacts associated with this final rule.

Consultation and Public Comment. As discussed above, PHMSA published an ANPRM and hosted a public meeting to solicit public comments concerning whether the list of materials for which security plans are currently required should be modified. Commenters were asked to address a number of issues related to the identification of materials that pose a security threat sufficient to justify preparation and implementation of a security plan. Thirty-four comments were received from industry associations, shippers, carriers, and private citizens. In addition, six people made presentations at the public meeting.

List of Subjects in 49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, PHMSA is amending title 49 Chapter I, Subchapter C, as follows:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

■ 1. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.53.

■ 2. In § 172.704, paragraphs (a)(5), and (c)(2) are revised to read as follows:

§ 172.704 Training requirements.

(a) * * *

(5) *In-depth security training.* Each hazmat employee of a person required to have a security plan in accordance with subpart I of this part who handles hazardous materials covered by the plan, performs a regulated function related to the hazardous materials covered by the plan, or is responsible for implementing the plan must be trained concerning the security plan and its implementation. Security training must include company security objectives, organizational security structure, specific security procedures, specific security duties and responsibilities for each employee, and specific actions to be taken by each employee in the event of a security breach.

* * * * *

(c) * * *

(2) *Recurrent training.* A hazmat employee must receive the training required by this subpart at least once every three years. For in-depth security training required under paragraph (a)(5) of this section, a hazmat employee must be trained at least once every three years or, if the security plan for which training is required is revised during the three-year recurrent training cycle, within 90 days of implementation of the revised plan.

* * * * *

■ 3. In § 172.800, paragraph (b) is revised to read as follows:

§ 172.800 Purpose and applicability.

* * * * *

(b) *Applicability.* Each person who offers for transportation in commerce or transports in commerce one or more of the following hazardous materials must

develop and adhere to a transportation security plan for hazardous materials that conforms to the requirements of this subpart. As used in this section, "large bulk quantity" refers to a quantity greater than 3,000 kg (6,614 pounds) for solids or 3,000 liters (792 gallons) for liquids and gases in a single packaging such as a cargo tank motor vehicle, portable tank, tank car, or other bulk container.

(1) Any quantity of a Division 1.1, 1.2, or 1.3 material;

(2) A quantity of a Division 1.4, 1.5, or 1.6 material requiring placarding in accordance with § 172.504(c);

(3) A large bulk quantity of Division 2.1 material;

(4) A large bulk quantity of Division 2.2 material with a subsidiary hazard of 5.1;

(5) Any quantity of a material poisonous by inhalation, as defined in § 171.8 of this subchapter;

(6) A large bulk quantity of a Class 3 material meeting the criteria for Packing Group I or II;

(7) A quantity of a desensitized explosives meeting the definition of a Division 4.1 or Class 3 material requiring placarding in accordance with § 172.504(c);

(8) A large bulk quantity of a Division 4.2 material meeting the criteria for Packing Group I or II;

(9) Any quantity of a Division 4.3 material;

(10) A large bulk quantity of a Division 5.1 material in Packing Groups I and II; perchlorates; or ammonium nitrate, ammonium nitrate fertilizers, or ammonium nitrate emulsions, suspensions, or gels;

(11) Any quantity of organic peroxide, Type B, liquid or solid, temperature controlled;

(12) A large bulk quantity of Division 6.1 material (for a material poisonous by inhalation see paragraph (5) above);

(13) A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 or the United States Department of Agriculture under 9 CFR part 121;

(14) A quantity of uranium hexafluoride requiring placarding under § 172.505(b);

(15) International Atomic Energy Agency (IAEA) Code of Conduct Category 1 and 2 materials including Highway Route Controlled quantities as defined in 49 CFR 173.403 or known as radionuclides in forms listed as RAM–QC by the Nuclear Regulatory Commission;

(16) A large bulk quantity of Class 8 material meeting the criteria for Packing Group I.

* * * * *

■ 4. In § 172.802, revise paragraph (a) introductory text, redesignate paragraph (b) as paragraph (c) and revise it, and add new paragraphs (b) and (d), to read as follows:

§ 172.802 Components of a security plan.

(a) The security plan must include an assessment of transportation security risks for shipments of the hazardous materials listed in § 172.800, including site-specific or location-specific risks associated with facilities at which the hazardous materials listed in § 172.800 are prepared for transportation, stored, or unloaded incidental to movement, and appropriate measures to address the assessed risks. Specific measures put into place by the plan may vary commensurate with the level of threat at a particular time. At a minimum, a security plan must include the following elements:

* * * * *

(b) The security plan must also include the following:

(1) Identification by job title of the senior management official responsible for overall development and implementation of the security plan;

(2) Security duties for each position or department that is responsible for implementing the plan or a portion of the plan and the process of notifying employees when specific elements of the security plan must be implemented; and

(3) A plan for training hazmat employees in accordance with § 172.704 (a)(4) and (a)(5) of this part.

(c) The security plan, including the transportation security risk assessment developed in accordance with paragraph (a) of this section, must be in writing and must be retained for as long as it remains in effect. The security plan must be reviewed at least annually and revised and/or updated as necessary to reflect changing circumstances. The most recent version of the security plan, or portions thereof, must be available to the employees who are responsible for implementing it, consistent with personnel security clearance or background investigation restrictions and a demonstrated need to know. When the security plan is updated or revised, all employees responsible for implementing it must be notified and all copies of the plan must be maintained as of the date of the most recent revision.

(d) Each person required to develop and implement a security plan in accordance with this subpart must maintain a copy of the security plan (or an electronic file thereof) that is accessible at, or through, its principal place of business and must make the security plan available upon request, at a reasonable time and location, to an authorized official of the Department of Transportation or the Department of Homeland Security.

Issued in Washington, DC, on March 1, 2010, under authority delegated in 49 CFR Part 1.

Cynthia L. Quarterman,

Administrator.

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