

hazardous materials and to comply with the applicable laws, regulations, and financial responsibility requirements. Section 5109 requires DOT to issue a Federal safety permit to a motor carrier that meets these requirements, rather than simply allow the carrier to operate under an equivalent State permit, so FMCSA proposes to issue a Federal permit, without further inspection or investigation, when it can verify that this condition exists. FMCSA encourages States to have or implement a HM Permit program equivalent to a Federal permit that will ultimately prevent duplication of a State and Federal requirement.

To the extent that a State permit program is equivalent to the Federal requirements, no preemption issues would arise. It is only differences between Federal and non-Federal requirements that should raise issues of preemption. In this regard, FMCSA and RSPA consider that the preemption criteria set forth in 49 U.S.C. 5125 will continue to apply to non-Federal permit requirements, just as those criteria have applied in the past, and that the impact on States of a Federal permit program should be "minimal." (58 FR at 33423)

Preemption would not necessarily arise simply if a State applies its permit requirements to a smaller, larger, or different group of hazardous materials, than those to be covered by a Federal safety permit. In a recent determination, RSPA noted that it "has considered numerous challenges to non-Federal requirements without finding that the specific requirements were preempted because they did not apply to all hazard classes and all materials listed in the Hazardous Materials Table in 49 CFR 172.101," although there are circumstances in which "a specific non-Federal requirement that applies only to one hazardous material may, indeed, be an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR." PD-13(R) (Nassau County), decision on petition for reconsideration, 65 FR 60238, 60241 (Oct. 10, 2000). As already discussed, in assessing a differing State (or local) permit requirement, the issue will be whether the underlying requirements that must be fulfilled in order to obtain the permit conflict with Federal hazardous materials law or the HMR. The preemption criteria set forth in 49 U.S.C. 5125 will continue to apply to State permits, and it is not considered necessary to repeat those criteria in the regulatory text of this final rule.

Related Regulations and Rulemaking Projects

As discussed above, in this SNPRM, we are proposing to require an applicant for a safety permit to certify compliance with the HMR security plan and training requirements adopted in a final rule published by the Research and Special Programs Administration (RSPA) on March 25, 2003 (68 FR 14509). That final rule, published under RSPA's docket HM-232, requires persons who offer for transportation or transport certain hazardous materials in commerce to develop and implement security plans. The security plan requirement, codified in a new subpart I of part 172 of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180), applies to shipments of the following classes and quantities of hazardous materials:

(1) A highway route-controlled quantity of a Class 7 (radioactive) material in a motor vehicle, rail car, or freight container;

(2) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material in a motor vehicle, rail car, or freight container;

(3) More than one L (1.06 qt) per package of a material poisonous by inhalation that meets the criteria for Hazard Zone A;

(4) A shipment of a quantity of hazardous materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more 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 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required;

(6) A select agent or toxin regulated by the Centers for Disease Control and Prevention; and

(7) A quantity of hazardous material that requires placarding.

A security plan must include an assessment of possible transportation security risks for shipments of the hazardous materials listed above 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 cover personnel security, unauthorized access to shipments, and en route security.

In addition, the HM-232 final rule requires all hazmat employees (as defined in § 171.8 of the HMR) to receive security awareness training that provides an awareness of security risks associated with hazardous materials transportation and methods to enhance transportation security. This training must also include a component covering

how to recognize and respond to possible security threats.

As part of DOT's effort comprehensively to enhance hazardous materials transportation security, FMCSA is conducting a field operational test (FOT) to quantify the security costs and benefits of an operational concept that applies technology and improved enforcement procedures to hazardous materials transportation by motor carriers. The FOT will demonstrate an approach that enhances the safety and security of hazardous materials shipments from origin to destination by examining possible vulnerabilities in the transportation system. In parallel with the FOT, FMCSA will also conduct an independent evaluation to ascertain whether the FOT met the objective of ensuring the safety and security of hazardous materials shipments. This evaluation will also include a benefit-cost analysis on the security technologies tested, including remote vehicle tracking systems, remote vehicle disabling systems, off-route alert systems, and electronic ignition locks. We expect to begin the FOT in the fall of 2003 and complete the FOT and evaluation by September 2004.

In a related action, on July 16, 2002, RSPA and FMCSA jointly published an advance notice of proposed rulemaking (ANPRM) under docket HM-232A to examine the need for enhanced security requirements for hazardous materials transportation that would be in addition to the security requirements adopted under HM-232 (67 FR 46622). The ANPRM sought comments on the feasibility of specific security enhancements and the potential costs and benefits of deploying such enhancements. Security measures under consideration include escorts, vehicle tracking and monitoring systems, emergency warning systems, remote shut-offs, direct short-range communications, and pre-notification of shipments to state and local authorities.

RSPA is currently evaluating comments received in response to the HM-232A ANPRM to determine if additional security rulemaking is necessary. This evaluation will include an examination of the security threats posed by specific classes and quantities of hazardous materials and an assessment of the effectiveness of specific operational or technological measures in reducing security threats. Persons who may be affected by the proposals in this NPRM should be aware that the ongoing research and rulemaking projects described above may result in modifications to the proposals in this NPRM.