

**DEPARTMENT OF TRANSPORTATION****Pipeline and Hazardous Materials Safety Administration****49 CFR Parts 107, 130, 171, 173, and 174**

[Docket No. PHMSA–2014–0105 (HM–251B)]

RIN 2137–AF08

**Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains (FAST Act)**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** PHMSA, in consultation with the Federal Railroad Administration and pursuant to the Fixing America's Surface Transportation Act (FAST Act) of 2015, issues this final rule to revise and clarify requirements for comprehensive oil spill response plans (COSRPs) and to expand their applicability based on petroleum oil thresholds that apply to an entire train consist. Specifically, this final rule: Expands the applicability for COSRPs; modernizes the requirements for COSRPs; requires railroads to share information about high-hazard flammable train (HHFT) operations with State and tribal emergency response commissions to improve community preparedness; and incorporates by reference a voluntary standard. The amendments in this final rule will provide regulatory flexibility and improve response readiness to mitigate effects of rail accidents and incidents involving petroleum oil and HHFTs.

**DATES:**

*Effective date:* This final rule is effective as of April 1, 2019.

*Voluntary compliance date:* PHMSA is authorizing voluntary compliance beginning February 28, 2019.

*Delayed compliance date:* Unless otherwise specified, compliance with the amendments adopted in this final rule is required beginning August 27, 2019.

*Incorporation by reference:* The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 1, 2019.

**ADDRESSES:** Information about this rulemaking (Docket Number PHMSA–2014–0105) is available at the Federal eRulemaking Portal: <http://www.regulations.gov>, or at DOT's Docket Operation Office: Room W12–

140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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**SUPPLEMENTARY INFORMATION:****Abbreviations and Terms**

AAR Association of American Railroads  
 ACP Area Contingency Plan  
 AFPM American Fuel & Petrochemical Manufacturers  
 ANPRM Advance Notice of Proposed Rulemaking  
 ANSI American National Standards Institute  
 API American Petroleum Institute  
 ASLRRRA American Short Line and Regional Railroad Association  
 ASTM ASTM International  
 BSEE Bureau of Safety and Environmental Enforcement  
 CFR Code of Federal Regulations  
 COSRP Comprehensive Oil Spill Response Plan  
 Crude Oil Petroleum crude oil  
 CWA Clean Water Act (*see* Federal Water Pollution Control Act)  
 DHS U.S. Department of Homeland Security  
 DOE U.S. Department of Energy  
 DOI U.S. Department of the Interior  
 DOT U.S. Department of Transportation  
 E.O. Executive Order  
 EPA Environmental Protection Agency  
 EPCRA Emergency Planning and Community Right-to-Know Act  
 ESA Environmentally Sensitive/Significant Area  
 FAST Act Fixing America's Surface Transportation Act of 2015  
 FEMA Federal Emergency Management Agency  
 FMCSA Federal Motor Carrier Safety Administration  
 FR Federal Register  
 FRA Federal Railroad Administration  
 FRP Facility Response Plan  
 FRSFA Federal Railroad Safety Act  
 FWPCA Federal Water Pollution Control Act (*see* Clean Water Act)  
 GIUE Government Initiated Unannounced Exercises  
 GRP Geographic Response Plan  
 HHFT High-Hazard Flammable Train  
 HMR Hazardous Materials Regulations (*see* 49 CFR parts 171–180)  
 HMT Hazardous Materials Table (*see* 49 CFR 172.101)

HMTA Hazardous Materials Transportation Act  
 IAFC International Association of Fire Chiefs  
 IBP Initial Boiling Point  
 ICS Incident Command System  
 ICP Integrated Contingency Plan  
 IMT Incident Management Team  
 LEPC Local Emergency Planning Committee  
 MPMS API Manual of Petroleum Measurement Standards  
 NASTTPO National Association of SARA Title III Program Officials  
 NCP National Contingency Plan  
 NFPA National Fire Protection Association  
 NIMS National Incident Management System  
 NPRM Notice of Proposed Rulemaking  
 NTSB National Transportation Safety Board  
 OMB Office of Management and Budget  
 OPA 90 Oil Pollution Act of 1990  
 OSC Federal On-Scene Coordinator  
 OSRO Oil Spill Removal Organization  
 OSRP Oil Spill Response Plan  
 PG Packing Group  
 PHMSA Pipeline and Hazardous Materials Safety Administration  
 PREP National Preparedness for Response Exercise Program  
 RCP Regional Contingency Plan  
 RFA Regulatory Flexibility Act  
 RIA Regulatory Impact Analysis  
 RP Recommended Practice  
 RSPA Research and Special Programs Administration  
 SACP Sub-Area Contingency Plans  
 SERC State Emergency Response Commission  
 SSI Sensitive Security Information  
 TERC Tribal Emergency Response Commission  
 TRANSCAER Transportation Community Awareness and Emergency Response  
 TSA Transportation Security Administration  
 TTCI Transportation Technology Center Inc.  
 U.S.C. United States Code  
 USCG United States Coast Guard  
 USFA United States Fire Administration

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**I. Executive Summary**

The Pipeline and Hazardous Materials Safety Administration (PHMSA), in consultation with the Federal Railroad Administration (FRA), issues this final rule to improve oil spill response readiness and mitigate effects of rail accidents and incidents involving petroleum oil and high-hazard flammable trains (HHFTs). See 49 CFR 171.8 for definition. This final rule is necessary due to expansion in U.S. energy production having led to significant challenges for the country's transportation system. PHMSA is finalizing this rule in accordance with sections 7302 and 7307 of the FAST Act, Public Law 114-94, and the Consolidated Appropriations Act of

2018, division L, title I, Public Law 115-141.

On July 29, 2016, PHMSA, in consultation with FRA, published a Notice of Proposed Rulemaking (NPRM) under the same title as this final rule (81 FR 50068). The NPRM proposed regulations in three areas: Comprehensive oil spill response plans (COSRPs), HHFT information sharing, and incorporation of an initial boiling point test for determination of light hydrocarbons in stabilized petroleum crude oils. Overall, this final rule adopts the requirements proposed in the NPRM with minor changes for plain language or clarification in consideration of the comments received to the NRPM. The estimated costs and benefits for this final rule are described in Table 1 below:

**TABLE 1—10 YEAR AND ANNUALIZED COSTS (IN MILLIONS) AND BENEFITS BY STAND-ALONE REGULATORY PROPOSAL**

Provision	Benefits (7%)		Costs (7%)
	Qualitative	Breakeven	
Oil Spill Response Planning and Response.	<ul style="list-style-type: none"> <li>• Improved Communication/Defined Command Structure may improve response.</li> <li>• Pre-identified Access to Equipment and Staging of Appropriate Equipment for Response Zones.</li> <li>• Trained Responders.</li> </ul>	Cost-effective if this requirement reduces the consequences of oil spills by 6.7%.	10-Year: \$21.4. Annualized: \$3.1.
Information Sharing .....	<ul style="list-style-type: none"> <li>• Improved Communication .....</li> <li>• Enhanced Preparedness.</li> </ul>	Cost-effective if this requirement reduces the consequences of oil spills by 1.2%.	10-Year: \$3.7. Annualized: \$0.53.
IBR of ASTM D7900 .....	<ul style="list-style-type: none"> <li>• Regulatory Flexibility .....</li> <li>• Enhanced Accuracy in Packing Group Assignments.</li> </ul>	N/A .....	No Cost Estimated.
Total .....	.....	Cost-effective if this requirement reduces the consequences of oil spills by 7.8%.	10-Year: \$25.2. Annualized: \$3.6.

**A. Comprehensive Oil Spill Response Plans**

This final rule adopts the requirements for COSRPs as proposed in the NPRM. The COSRP requirements are promulgated under the authority of the

Oil Pollution Act of 1990 (OPA 90), Public Law 101-380, which amended the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act (CWA), at 33 U.S.C. 1321. Table 2 below summarizes the

applicable statutory requirements for COSRPs, the requirements adopted in this final rule, and the differences between the requirements adopted in this final rule and the proposals of the NPRM:

**TABLE 2—COSRPs**

OSRP statutory requirements	HM-251B final rule COSRP requirements	HM-251B NPRM differences
<p><i>33 U.S.C. 1321(j)(5)(A)(i)</i></p> <p>The President shall issue regulations which require an owner or operator of a tank vessel or facility described in paragraph (j)(5)(C) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst-case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.</p>	<p><i>49 CFR part 130</i></p> <p>Restructures part 130 to create subpart C for COSRPs.</p> <p>Responds to commenter requests to better align COSRPs with minimum requirements for other federally mandated (Oil Spill Response Plans) OSRPs, especially those for pipelines in 49 CFR part 194. Requires PHMSA to approve COSRPs.</p> <p><i>§ 130.105</i></p>	<p><i>49 CFR part 130</i></p> <p>Minimal clarification and plain language wording changes between NPRM and final rule throughout all sections in response to comments.</p> <p>NPRM proposed that FRA would be responsible for approving COSRPs, and final rule consolidates DOT's OSRP approval under PHMSA.</p> <p><i>§ 130.104 renumbered as § 130.105</i></p>

TABLE 2—COSRPs—Continued

OSRP statutory requirements	HM-251B final rule COSRP requirements	HM-251B NPRM differences
<p><i>33 U.S.C. 1321(j)(5)(C)(iv)</i></p> <p>An onshore facility [e.g. rolling stock]<sup>1</sup> that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.</p>	<p>Provides general requirements for record-keeping, plan format, and information about response structure.</p> <p>Permits use of Integrated Contingency Plan (ICP) and State plans providing equivalent level of coverage.</p> <p><i>§ 130.100</i></p> <p>Expands current applicability (42,000 gallons of oil in a single package) to also include route segments which are used for:</p> <ul style="list-style-type: none"> <li>• At least 20 cars of liquid petroleum oil in a continuous block or 35 cars of liquid petroleum oil in a train consist.</li> <li>• For example, tank cars containing crude oil, fuel oil, petroleum distillates, diesel, or gasoline must be included when counting cars in the consist. Mixtures that do meet the criteria for Class 3 flammable or combustible material in § 173.120, or containing residue as defined in § 171.8 of subchapter C, are not required to be included when determining the number of tank cars transporting liquid petroleum oil. Examples of petroleum oils which may not meet the definition of a Class 3 flammable or combustible liquid include diluted waste water and certain mineral oils.</li> </ul>	<p>Minimal. Clarifies COSRPs with only one response zone do not need to include separate “core plan” section.</p> <p>Adds greater flexibility by permitting use of State plans that provide equivalent protection.</p> <p><i>§ 130.101 renumbered as § 130.100</i></p> <p>Minimal. Clarifies COSRP are only required for routes used to transport applicable quantities of oil.</p>
<p><i>33 U.S.C. 1321(j)(5)(D)(i)</i></p> <p>Be consistent with the requirements of the National Contingency Plan (NCP) and Area Contingency Plans (ACP).</p>	<p><i>§§ 130.105 and 130.110</i></p> <p>Requires certification that the plan is consistent with a list of specific NCP/ACP requirements for “minimum compliance” to clarify the elements of NCP/ACP applicable to rail shipments.</p> <p><i>§§ 130.120 and 130.125</i></p>	<p><i>§ 130.103 renumbered as § 130.110</i></p> <p>Minimal. Clarifies railroads are identifying Environmentally Sensitive Areas (ESAs) from existing Area or Regional Contingency Plans.</p> <p><i>§§ 130.104 and 130.105 renumbered as §§ 130.120 and 130.125, respectively</i></p>
<p><i>33 U.S.C. 1321(j)(5)(D)(ii)</i></p> <p>Identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause.</p>	<p>Requires identification of Qualified Individual for each response zone in quickly accessible information summary. Requires immediate communication between Qualified Individual and appropriate Federal official and the persons providing personnel and equipment.</p> <p>Requires plan include a checklist of necessary notifications, contact information, and necessary information to clarify procedures.</p> <p><i>§§ 130.105 and 130.130</i></p>	<p>Minimal. Clarifies that communication between Qualified Individuals and appropriate Federal officials and persons providing response personnel and equipment, must be immediate.</p> <p><i>§§ 130.102 and 130.106 renumbered as §§ 130.105 and 130.130, respectively</i></p>
<p><i>33 U.S.C. 1321(j)(5)(D)(iii)</i></p> <p>Identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst-case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge.</p>	<p>Includes the establishment of response zones, to ensure availability of personnel and equipment in different geographic route segments. Requires planning framework for response zones including ensuring resources are staged within 12 hours at any part of the applicable route</p> <p>Includes requirements to identify organization, personnel, equipment, and deployment location thereof capable of removal and mitigation for a worst-case discharge (WCD). Allows use of Oil Spill Removal Organization (OSRO) which has been classified by the United States Coast Guard under 33 CFR 154.1035 or 155.1035 to be used in lieu of listing personnel and equipment</p> <p><i>§ 130.135</i></p>	<p>Minimal. Clarifies railroads determine the boundaries of each response zone, provided resources are identified with appropriate planning framework. Clarifies use of U.S. Coast Guard (USCG) guidelines for determining and evaluating required response resources during the response in accordance with appendix C of 33 CFR part 154.</p> <p><i>§ 130.107 renumbered as § 130.135</i></p>
<p><i>33 U.S.C. 1321(j)(5)(D)(iv)</i></p> <p>Describe the training .....</p>	<p>Requires certification and documentation employees have been trained in carrying out their responsibilities under the plan.</p>	<p>Minimal. Clarifies Incident Command System (ICS) incident commander level training is recommended best practice.</p>

TABLE 2—COSRPs—Continued

OSRP statutory requirements	HM-251B final rule COSRP requirements	HM-251B NPRM differences
<p><i>33 U.S.C. 1321(j)(5)(D)(iv)</i> Describe . . . equipment testing .....</p>	<p><i>§ 130.140</i> Requires description and certification equipment testing meets the manufacturer's minimum requirements.</p>	<p><i>§ 130.108 renumbered as § 130.140</i> Minimal. Edits section number and title.</p>
<p><i>33 U.S.C. 1321(j)(5)(D)(iv)</i> Describe . . . periodic unannounced drills .....</p>	<p><i>§ 130.140</i> Requires exercises to be equivalent to the PREP Guidelines.</p>	<p><i>§ 130.108 renumbered as § 130.140</i> Minimal. Updates USCG website address and replaces term "drill" with "exercise."</p>
<p><i>33 U.S.C. 1321(j)(5)(D)(iv)</i> Describe . . . response actions of persons on the vessel or at the facility.</p>	<p><i>§ 130.130</i> COSRPs describe:  <ul style="list-style-type: none"> <li>• Activities and responsibilities of railroad personnel prior to arrival of Qualified Individual;</li> <li>• Qualified Individual's responsibilities and actions; and</li> <li>• Procedures coordinating railroad/Qualified Individual actions with On-Scene Coordinator (OSC).</li> </ul> </p>	<p><i>§ 130.106 renumbered as § 130.130</i> Minimal. Adds a reference to appendix C of 33 CFR part 154 to clarify the equivalent planning standards to use of OSROs classified under 33 CFR 154.1035 and 155.1035.</p>
<p><i>33 U.S.C. 1321(j)(5)(D)(v)</i> Be updated periodically .....</p>	<p><i>§ 130.150</i> Clarifies plans should be reviewed every 5 years, when significant information changes, or after a discharge requiring plan activation occurs.</p>	<p><i>§ 130.109 renumbered as § 130.150</i> Minimal. In response to commenters, this final rule clarifies that railroads may operate for two years upon submission of response plan to PHMSA and certification of appropriate resources, for better consistency with the CWA.</p>
<p><i>33 U.S.C. 1321(j)(5)(E)</i> (1) With respect to any response plan submitted under this paragraph for an onshore facility that, because of its location, could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines or the exclusive economic zone, and with respect to each response plan submitted under this paragraph for a tank vessel, nontank vessel, or offshore facility, the President shall—                      (i) promptly review such response plan;                      (ii) require amendments to any plan that does not meet the requirements of this paragraph;                      (iii) approve any plan that meets the requirements of this paragraph;</p>	<p><i>§ 130.150</i> Requires approval of plans by PHMSA provided minimum requirements for the plan are met.</p>	<p><i>§ 130.111 renumbered as § 130.150</i> Minimal. NPRM proposed FRA approve railroad COSRPs. Final rule consolidates DOT's approval of OSRPs under PHMSA. As with other PHMSA programs and procedures, PHMSA will continue to work with FRA for guidance on rail specific information and procedures, including shared review and enforcement. Clarifies method to submit plans in electronic format.</p>
<p>(2) A tank vessel, nontank vessel, offshore facility, or onshore facility required to prepare a response plan under this subsection may not handle, store, or transport oil unless—                       (i) in the case of a tank vessel, nontank vessel, offshore facility, or onshore facility for which a response plan is reviewed by the President under paragraph (1), the plan has been approved by the President; and                      (ii) the vessel or facility is operating in compliance with the plan</p>	<p><i>§ 130.100</i> Prohibits transportation of oil subject to COSRPs unless requirements for submission, review, and approval in § 130.150 are met and the railroad is operating in compliance with the plan</p>	<p><i>§ 130.101 moved to §§ 130.100 and 130.150</i> Minimal. Edits the section numbering and title for plain language.</p>

TABLE 2—COSRPs—Continued

OSRP statutory requirements	HM-251B final rule COSRP requirements	HM-251B NPRM differences
(3) Notwithstanding paragraph (1), the President may authorize a tank vessel, nontank vessel, offshore facility, or onshore facility to operate without a response plan approved under this paragraph, until not later than 2 years after the date of the submission to the President of a plan for the tank vessel, nontank vessel, or facility, if the owner or operator certifies that the owner or operator has ensured by contract or other means approved by the President the availability of private personnel and equipment necessary to respond, to the maximum extent practicable, to a worst-case discharge or a substantial threat of such a discharge.	<p style="text-align: center;"><i>§ 130.100</i></p> Allows railroads to temporarily continue operating for up to 2 years while waiting for plan approval, provided the plan has been submitted to PHMSA and the railroad submits a signed certification statement of appropriate resources.	<p style="text-align: center;"><i>§ 130.111 moved to § 130.100</i></p> Minimal. PHMSA receives plans. Clarifies temporary continuation are limited to 2 years per statutory language.

*B. HHFT Information Sharing Notification for Emergency Response Planning*

This final rule adopts the requirements for HHFT information sharing as proposed in the NPRM, with

clarification for plain language and modifications in response to commenters. The information sharing notification requirements are promulgated under the authority of Federal hazardous materials transportation law (49 U.S.C. 5101–

5128). Table 3 below summarizes the advanced notification information sharing requirements mandated by the Fixing America’s Surface Transportation (FAST) Act of 2015 and adopted in this final rule.

TABLE 3—INFORMATION SHARING NOTIFICATION FOR EMERGENCY RESPONSE PLANNING

Topic	FAST Act (advanced notification) Section 7302(a)(3), (4), (6)	Final rule HM-251B (information sharing) 49 CFR 174.312
<i>Who is subject?</i>	Class I railroads transporting HHFT (20 cars in a block, 35 in consist carrying ANY Class 3 flammable liquid).	All railroads transporting HHFT (20 cars in a block, 35 in consist carrying ANY Class 3 flammable liquid).
<i>Who must the railroads notify?</i>	Railroads must notify State Emergency Response Commissions (SERCs), who must provide the notification information (and updates) to any political subdivision of a State or public agency responsible for emergency response or law enforcement, upon request of the political subdivision or public agency.	Railroads must notify SERCs, Tribal Emergency Response Commissions (TERCs), or other appropriate State designated entities who share information with appropriate local authorities, upon their request.
<i>What security measures are required?</i>	Required security and confidentiality protections include protections from the public release of proprietary information or security-sensitive information, to prevent the release to unauthorized persons.	If the disclosure includes information that railroads believe is security sensitive or proprietary and exempt from public disclosure, the railroads should indicate that in the notification.
<i>What to include in the notification?</i>	A reasonable estimate of the number of implicated trains that are expected to travel, per week, through each county within the applicable state. Identification of the routes over which such liquid will be transported. Identification and a description of the Class 3 flammable liquid being transported on such trains and applicable emergency response information, as required by regulation. A point of contact at the Class I railroad responsible for serving as the point of contact for State emergency response centers and local emergency responders related to the Class I railroad’s transportation of such liquid.	A reasonable estimate of the number of HHFTs that are expected to travel, per week, through each county within the state. The routes over which the affected trains will be transported. A description of the materials shipped and applicable emergency response information required by subparts C and G of part 172 of this subchapter.
<i>When/how often?</i>	Update the notifications prior to making any material changes to any volumes or frequencies of HHFTs traveling through a county. ‘Material changes’ in Emergency Order means changes greater than 25%.	Updates the notification for changes in volume greater than 25 percent.
<i>How are records maintained?</i>	Requires notification “consistent with the notification content requirements in Emergency Order Docket No. DOT-OST-2014-0067”.	Notification may be provided electronically or in writing. Railroads provide the notification to DOT upon request.

<sup>1</sup> “Onshore facility” means any facility (including, but not limited to, motor vehicles and

rolling stock) of any kind located in, on, or under,

any land within the United States other than submerged land. 33 U.S.C. 1321(a)(10).

TABLE 3—INFORMATION SHARING NOTIFICATION FOR EMERGENCY RESPONSE PLANNING—Continued

Topic	FAST Act (advanced notification) Section 7302(a)(3), (4), (6)	Final rule HM-251B (information sharing) 49 CFR 174.312
<i>What COSRP Information must be included?</i>	N/A .....	For petroleum oil trains subject to the COSRP in part 130, includes the contact information for Qualified Individual and the response zone description from the COSRP.

**C. Initial Boiling Point Test**

The NPRM proposed to incorporate by reference ASTM International’s (ASTM) D7900, “Standard Test Method for Determination of Light Hydrocarbons in Stabilized Crude Oils by Gas Chromatography” related to initial boiling point for crude oils containing light hydrocarbons as an acceptable testing alternative to the boiling point tests specified in the current regulations. This ASTM standard is referenced by the industry best practice, American National Standards Institute (ANSI)/American Petroleum Institute (API) Recommended Practices 3000, “Classifying and Loading of Crude Oil into Rail Tank Cars,” First Edition, September 2014.

This final rule incorporates the test method by reference as proposed under the authority of Federal hazardous materials transportation law (49 U.S.C. 5101–5128). This final rule clarifies that initial boiling point, when determining the boiling distribution using ASTM D7900, is the temperature at which 0.5 weight percent is eluted. Inclusion of this additional boiling test option provides regulatory flexibility and promotes enhanced safety in transport through accurate Packing Group (PG) assignment.

**II. Background**

Expansion in U.S. energy production has led to significant challenges for the country’s transportation system. Traditionally, pipelines and oceangoing tankers have delivered most crude oil to U.S. refineries, accounting for approximately 93 percent of total receipts (in barrels) in 2012.<sup>2</sup> Although other modes of transportation—rail, barge, and truck—have accounted for a relatively minor portion of crude oil shipments historically, volumes have risen rapidly in the 2010s relative to previous decades.<sup>3</sup> The rail

transportation of large volumes of crude oil and other petroleum products presents unique safety risks. Rail accidents have tracked changes in production and rail shipments of crude oil—rising when rail shipments increase in volume and falling when crude oil volumes fall according to FRA and PHMSA incident report data. Please see the RIA for further discussion and a graph of oil-by-rail shipments and derailments. This final rule will improve response readiness and mitigate effects of rail accidents and incidents by instituting information sharing requirements for HHFTs and COSRP requirements for petroleum oil trains.

DOT reached out to stakeholders in industry, emergency response, and State and tribal governments through various forums and events to better understand and increase community awareness and preparedness for response to bulk transportation incidents involving energy products. In May 2014, PHMSA published the “Crude Oil Rail Emergency Response Lessons Learned Roundtable Report,” which outlined key factors that were identified by a panel of fire chiefs and emergency response management officials as having a direct impact on success in managing the outcomes of a crude oil transportation incident.<sup>4</sup> More information about DOT’s actions related to community awareness of and preparedness for response to bulk transportation incidents involving energy products is available on PHMSA’s “Safe Transportation of Energy Products” website.<sup>5</sup>

**A. Oil Spill Response Plans**

The Oil Pollution Act of 1990 (OPA 90) amended the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act (CWA), at 33 U.S.C. 1321 by adding oil spill response planning requirements for

“facilities” that handle oil. Railroads or “rolling stock” are included in the definition of “onshore facility.”<sup>6</sup> The CWA requires owners and operators of onshore facilities to prepare and submit Oil Spill Response Plans (ORSPs) for facilities that “could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.” The CWA directs the President to issue regulations requiring owners and operators of onshore oil facilities to develop, submit, update and in some cases obtain approval of OSRPs meeting certain minimum requirements in 33 U.S.C. 1321(j)(5).

On October 22, 1991, the President delegated authority to the Secretary of Transportation to regulate certain transportation-related facilities (*i.e.*, motor carriers and railroads) under sections 1321(j)(1)(C) and 1321(j)(5) of the CWA. *See* E.O. 12777, 56 FR 54757, sections 2(b)(2) and 2(d)(2). The Secretary later delegated this authority to PHMSA’s predecessor agency, the Research and Special Programs Administration (RSPA). PHMSA’s delegated authority under sections 1321(j)(1)(C) and 1321(j)(5) for certain transportation-related facilities (*i.e.*, motor vehicles and rolling stock) is solely the authority to promulgate regulations. When required, COSRPs are submitted to the Federal Highway Administration or the FRA, for motor carriers and railroads, respectively.

On June 17, 1996, RSPA published a final rule carrying out its delegated authority under the CWA for motor carriers and railroads.<sup>7</sup> The 1996 final rule established “comprehensive plans” under the authority of 33 U.S.C. 1321(j)(5) for anyone transporting oil in a quantity greater than 1,000 barrels or 42,000 gallons per package. The 1996 final rule also adopted requirements in part 130 for the preparation of “basic plans” for containers with a capacity of

<sup>2</sup> Bureau of Transportation Statistics, “Crude Oil and Petroleum Products Transported in the United States by Mode.” U.S. Department of Transportation. Last modified 01/2018. <https://www.bts.gov/content/crude-oil-and-petroleum-products-transported-united-states-mode>.

<sup>3</sup> U.S. Energy Information Administration, “Petroleum and Other Liquids.” Independent Statistics and Analysis. Last modified 08/2018.

[https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=ESM\\_EPC0\\_RAIL\\_ZAMN-ZAMN\\_MBBL&f=M](https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=ESM_EPC0_RAIL_ZAMN-ZAMN_MBBL&f=M).

<sup>4</sup> <https://www.phmsa.dot.gov/safe-transportation-energy-products/emergency-response-and-training>.

<sup>5</sup> <https://www.phmsa.dot.gov/safe-transportation-energy-products/safe-transportation-energy-products-overview>.

<sup>6</sup> “Onshore facility” means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.” 33 U.S.C. 1321(a)(10). “Rolling stock” refers to rail cars.

<sup>7</sup> 61 FR 30533 (June 17, 1996).

3,500 gallons or more carrying petroleum oil. Basic plans were adopted as a “containment rule pursuant to § 1321(j)(1)(C)” of the CWA and therefore do not meet the minimum requirements for OSRPs in section 1321(j)(5).<sup>8</sup>

A rail tank car designed to carry liquid materials, including petroleum oil, has an approximate capacity of 30,000 gallons. Because the typical rail tank car has a capacity around 30,000 gallons, no rail carriers are currently transporting tank cars of petroleum oil subject to the 42,000-gallon packaging threshold for COSRPs adopted by the 1996 final rule. On July 6, 2013, an unattended, runaway unit train carrying crude oil from the Bakken region of North Dakota derailed in the town of Lac-Mégantic, Quebec. The incident resulted in loss of life and destruction of property and the environment. The cause was found to be human error that led to the unattended train gathering speed before derailing near the center of Lac-Mégantic. While an OSRP may not have prevented this incident, the Lac-Mégantic incident prompted examination into the safety of crude oil transportation by rail. The National Transportation Safety Board (NTSB) recommended requiring COSRPs for unit trains of petroleum in Safety Recommendation R-14-005. Congress also directed DOT to develop and report on a plan to finalize updated requirements for OSRPs in section 7307 of the FAST Act. Additionally, in the Consolidated Appropriations Act of 2018, signed into law on March 23, 2018, Congress directed the Secretary to “issue a final rule to expand the applicability of comprehensive oil spill response plans.”

On July 29, 2016, PHMSA, in consultation with FRA, published an NPRM titled “Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains.” The NPRM proposed to modernize COSRP requirements under 49 CFR part 130 in response to NTSB recommendations (including Safety Recommendation R-14-005), the FAST Act, and comments from the public to an August 1, 2014, Advance Notice of Proposed Rulemaking (ANPRM) (79 FR 45079). PHMSA also proposed the requirements to address needs identified by first responders in the “Crude Oil Rail Emergency Response Lessons Learned Roundtable Report” and challenges identified through analysis of recent spill events.<sup>9</sup>

Specifically, the NPRM proposed to expand COSRPs to routes over which railroads operate a single train containing 20 or more tank cars loaded with liquid petroleum oil in a continuous block or a single train containing 35 or more tanks cars loaded with liquid petroleum oil throughout the train consist.

The NPRM also proposed to update the COSRP requirements in response to comments requesting greater specificity to plan contents through a closer alignment to other Federal OSRP regulations promulgated under the CWA. The proposed requirements in the NPRM are similar to PHMSA’s Office of Pipeline Safety’s (OPS) requirements for pipeline oil spill response plans in 49 CFR part 194. Developing OSRPs for both pipeline and rail require planning for routes spanning large geographic areas. The NPRM proposed railroads divide their routes into “response zones” that connect notification procedures and available response resources to the specific geographic area for the covered route segments. Response zones include geographic information, such as a planning framework, which ensures response resources are staged within 12 hours of any point along the route. The NPRM requested comments on providing regulatory flexibility for small businesses, requiring faster response times in certain “High Volume Areas,” and recommending that the Qualified Individual should be trained to the Incident Commander level using the Incident Command System (ICS).

#### *B. HHFT Information Sharing Notification for Emergency Response Planning*

Federal hazardous materials transportation law (49 U.S.C. 5101–5128) authorizes the Secretary to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” The Secretary delegates this authority to PHMSA under 49 CFR 1.97(b). PHMSA is responsible for overseeing a hazardous materials safety program that minimizes the risks to life and property inherent in the transportation of hazardous materials in commerce. The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) include operational requirements applicable to transportation of hazardous materials by highway, rail, aircraft, and vessel. The Secretary also has authority over all areas of railroad transportation safety (Federal railroad safety laws, principally 49 U.S.C. chapters 201–213); this authority is delegated to FRA under 49

CFR 1.89. FRA promulgates and enforces a comprehensive regulatory program (49 CFR parts 200–244) and inspects and audits railroads, tank car facilities, and hazardous material offerors for compliance with both FRA’s regulations and the HMR. Because of the shared role in the safe and secure transportation of hazardous materials by rail, PHMSA and FRA work closely when considering regulatory changes.

The agencies take a system-wide, comprehensive approach consistent with the risks posed by the bulk transport of hazardous materials by rail.

On May 7, 2014, the Secretary, under the authority of 49 U.S.C. 5121(d), issued an Emergency Restriction/Prohibition Order in Docket No. DOT–OST–2014–0067 (Order).<sup>10</sup> The Order requires each railroad transporting 1 million gallons or more of Bakken crude oil in a single train in commerce within the United States to provide certain information in writing to the State Emergency Response Commission (SERC) for each state in which it operates such a train. Tribal Emergency Response Commissions (TERCs) are permitted to coordinate with the appropriate SERC(s) for access to data supplied under this Emergency Restriction/Prohibition Order.<sup>11</sup> The Order also requires a railroad to provide SERCs information about the type of oil, volume, route, and emergency response procedures, as well as appropriate railroad contact information. It also requires railroads to provide SERCs updated notifications prior to any “material change” in the volume of affected trains and provide copies of notifications made to each SERC to FRA upon request. DOT subsequently issued a document compiling frequently asked questions (FAQs) to clarify several aspects of the Order.<sup>12</sup>

On October 3, 2014, FRA published “Proposed Agency Information Collection Activities; Notice and Request for Comments” (79 FR 59891) to provide additional analysis of the requirements of the Order. FRA consulted with DOT, the U.S. Department of Homeland Security (DHS), and the Transportation Security Administration (TSA), and determined the information required by the Order was not commercially sensitive or Sensitive Security Information (SSI) as defined by DOT, DHS, or TSA regulations. *Id.* at 59892. FRA further noted that DOT found no basis to

<sup>10</sup> <https://www.regulations.gov/document?D=DOT-OST-2014-0067-0001>.

<sup>11</sup> <https://www.regulations.gov/document?D=DOT-OST-2014-0067-0003>.

<sup>12</sup> See document number 0003 in Docket No. DOT–OST–2014–0067.

<sup>8</sup> 61 FR 30537 (June 17, 1996).

<sup>9</sup> <https://www.phmsa.dot.gov/safe-transportation-energy-products/emergency-response-and-training>.

conclude that the public disclosure of the information is detrimental to transportation safety.

In the May 8, 2015, final rule “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains” (HM–251 final rule), PHMSA decided against adopting an earlier proposal to codify the specific requirements of the Order for railroads transporting 1 million gallons or more of crude oil originating in the Bakken region, and instead adopted similar requirements more easily integrated into the HMR that achieved the desired result.

On May 28, 2015, PHMSA announced plans to extend the Order indefinitely and to consider options for codifying the disclosure requirement on a permanent basis after further evaluating the issue within DOT.<sup>13</sup> PHMSA recognized the desire for local communities to receive proactive notification of hazardous materials moving through their cities and towns. PHMSA noted that transparency is critical to DOT’s comprehensive approach to safety and expressed support for the public disclosure of this information to the extent allowed by applicable State, local, and tribal laws.

On December 4, 2015, the FAST Act was signed into law. The FAST Act includes the “Hazardous Materials Transportation Safety Improvement Act of 2015” at sections 7001 through 7311, which provides direction for the hazardous materials safety program. Section 7302 directs the Secretary to issue regulations to require (1) real-time sharing of the electronic train consist information for hazardous materials shipments; and (2) advanced notification of HHFTs. DOT has initiated a separate rulemaking to address the requirements of section 7302(a)(1) related to real-time electronic train consists. Docket No. PHMSA–2016–0015 (HM–263).<sup>14</sup>

Section 7302(a)(3) of the FAST Act directs DOT to promulgate regulations requiring advanced notification consistent with notification content requirements of the Order. The FAST Act expands the Order to require Class I railroads to provide advanced notification and information on HHFTs to each SERC. The FAST Act requires SERCs receiving this advanced notification to provide the information to law enforcement and emergency response agencies upon request. The

FAST Act, in section 7302(a)(6), also directs the Secretary to establish security and confidentiality protections for electronic train consist information and advanced notification information.

In response to the FAST Act and DOT’s commitment to codifying the Order, PHMSA proposed information sharing notification requirements in the “Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains (HM–251B)” NPRM published July 29, 2016. The NPRM proposed that all railroads transporting HHFTs notify SERCs, Tribal Emergency Response Commissions (TERCs), or other State-delegated agencies with information consistent with the Order. The NPRM proposed that the notification include key information from COSRPs, when applicable.

The intent of these requirements is to ensure that local emergency responders and emergency response planning officials have access to sufficient information regarding the movement of HHFTs in their jurisdictions to adequately plan and prepare for emergency events involving HHFTs. This purpose is reaffirmed by the FAST Act’s requirements for sharing and protection of information required by the advanced notification. Under the Emergency Planning and Community Right-to-Know Act (EPCRA) in title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Governor of each state is required to establish a SERC. The SERC is responsible for establishing emergency planning districts and appointing, supervising, and coordinating Local Emergency Planning Committees (LEPCs). For federally recognized tribal governments, the Chief Executive Officer of the Tribe appoints a Tribal Emergency Response Commission (TERC), as designated by the Environmental Protection Agency (EPA) in a final rule published July 26, 1990 (55 FR 30632). TERCs have the same responsibilities as SERCs. On July 26, 1990, EPA published a final rule designating Indian Tribes and their chief executive officers as the implementing authorities for EPCRA on all Indian lands.

The NPRM proposed to protect information by allowing railroads to indicate information they “believe is security sensitive or proprietary and exempt from public disclosure.” Previous analysis by DOT, FRA, and DHS concluded that the aggregated information required to be shared by railroads does not qualify for withholding under Federal standards for business confidential information or

SSI; however, as noted in FRA’s previous discussion of this matter in its October 2014 Information Disclosure Notice, State laws control, and may limit, the disclosure and dissemination of this information.<sup>15</sup> Therefore, the NPRM acknowledged that states may differ in their methods and proposed an approach intended to provide flexibility for SERCs, TERCs, and other State-delegated agencies to disseminate information in accordance with state laws and procedures. As proposed, before fulfilling a request for information and releasing the information, the States and Tribes will be on notice of which information the railroads consider to be inappropriate for public release.

### C. Initial Boiling Point Test

The offeror’s responsibility to classify and describe a hazardous material is a key requirement under the HMR. Improper classification and failure to identify applicable material properties can have significant negative impacts on transportation safety. Proper classification is necessary to ensure proper packaging, operational controls, and hazard communication requirements are met, all of which are important to mitigate the negative effects of a train derailment or other hazardous materials incident. It is an offeror’s responsibility to accurately classify and describe a hazardous material. For transportation purposes, classification is ensuring the proper hazard class, packing group, and shipping name are assigned to a material. To determine whether a hazardous material should be classified as Class 3 Flammable liquid, as well as determine the appropriate packing group, the HMR require testing for the material’s flash point and initial boiling point (IBP) under §§ 173.120 and 173.121.

The American National Standards Institute (ANSI) recognized recommended practice includes guidance on the material characterization, transport classification, and quantity measurement for overfill prevention of petroleum crude oil for the loading of rail tank cars (*see* API RP 3000, “Classifying and Loading of Crude Oil into Rail Tank Cars”). For crude oils containing volatile, low molecular weight components (*e.g.*, light ends), the industry recommended best practice for IBP is to test using ASTM D7900. The initial boiling point, when determining the boiling distribution using ASTM D7900, is the temperature at which 0.5

<sup>13</sup> <https://www.phmsa.dot.gov/news/phmsa-notice-regarding-emergency-response-notifications-shipments-petroleum-crude-oil-rail>.

<sup>14</sup> <https://www.regulations.gov/docket?D=PHMSA-2016-0015>.

<sup>15</sup> 79 FR 59892 (June 30, 2014).



weight percent is eluted. The ASTM D7900 differs from the boiling point tests currently in the HMR in that it is the only test that ensures a minimal loss of light ends; however, the ASTM D7900 is not currently included in the list of testing methods authorized in the HMR in § 173.121(a)(2).

In this final rule, PHMSA is adopting the NPRM's proposal to incorporate by reference the ASTM D7900 test method identified within API RP 3000, thus permitting use of this IBP industry best practice. The incorporation of the ASTM D7900, which aligns with the API RP 3000, will not replace the currently authorized initial boiling point testing methods. Rather, it will serve as a testing alternative if one chooses to use that method. PHMSA believes this provides flexibility and promotes enhanced safety in transport through accurate packing group assignment.

**III. Recent Spill Events**

PHMSA collected and reviewed information from various sources pertaining to recent derailments involving discharges of petroleum oil. In this rulemaking and the accompanying analysis, PHMSA has focused on the following derailments: Mosier, OR (June 2016); Watertown, WI (November 2015); Culbertson, MT (July 2015); Heimdahl, ND (May 2015); Galena, IL (March 2015); Mt. Carbon, WV (February 2015); La Salle, CO (May 2014); Lynchburg, VA (April 2014); Vandergrift, PA (February 2014); New Augusta, MS (January 2014); Casselton, ND (December 2013); Aliceville, AL (November 2013); and Parkers Prairie, MN (March 2013). In the Regulatory Impact Analysis (RIA), PHMSA provides narratives and discussion of the circumstances and consequences of these derailments. Please refer to the rulemaking docket (Docket No. PHMSA-2014-0105) for the

preliminary and final RIA and all supporting documents.

PHMSA's review of these derailments identified challenges during oil spill response that occurred in the past and could potentially occur in future derailment scenarios. PHMSA incorporates this understanding of response challenges into this rulemaking, which amends the requirements of 49 CFR part 130, to improve COSRPs by way of new and revised requirements. Improved oil spill response planning will, in turn, improve the actual response to future derailments involving petroleum oil and lessen potential negative effects on communities.

**IV. National Transportation Safety Board Safety Recommendations**

This rulemaking partially addresses several recommendations from the NTSB, as summarized in Table 4:

TABLE 4—NTSB RECOMMENDATIONS PARTIALLY ADDRESSED IN THIS RULEMAKING

NTSB recommendation	Recommendation summary	Rulemaking description
R-14-002: Issued January 23, 2014.	Recommends that FRA develop a program to audit response plans for rail carriers of petroleum products to ensure that adequate provisions are in place to respond to and remove a worst-case discharge to the maximum extent practicable and to mitigate or prevent a substantial threat of a worst-case discharge.	Requires PHMSA to approve COSRPs for rail.
R-14-005: Issued January 23, 2014.	Recommends that PHMSA revise the spill response planning thresholds contained in 49 CFR part 130 to require comprehensive response plans to effectively provide for the carriers' ability to respond to worst-case discharges resulting from accidents involving unit trains or blocks of tank cars transporting oil and petroleum products.	Revises the spill planning thresholds to address 20 cars of liquid petroleum oil in a continuous block or 35 cars of liquid petroleum oil in a consist.
R-14-014: Issued August 22, 2014.	Recommends that PHMSA require railroads transporting hazardous materials through communities to provide emergency responders and local and state emergency planning committees with current commodity flow data and assist with the development of emergency operations and response plans.	Adopts information sharing requirements for HHFTs.
R-14-006: Issued January 23, 2014.	Recommends that PHMSA require shippers to sufficiently test and document the physical and chemical characteristics of hazardous materials to ensure the proper classification, packaging, and record-keeping of products offered in transportation.	Adds ASTM D7900 test method as option to determine boiling point of certain crude oil.

**V. Summary and Discussion of Public Comment**

*A. Overview of NPRM Comments*

In the NPRM, PHMSA solicited public comment on potential revisions to regulations that would: Expand the applicability of COSRPs to HHFTs based

on the amount of petroleum oil in an entire train consist, rather than a single package or tank car; require rail carriers to share information regarding HHFTs with State authorities; and incorporate by reference of the ASTM D7900 test method. The NPRM summarized and discussed comments received in

response to questions regarding potential revisions to the COSRP requirements asked by the earlier ANPRM. PHMSA received approximately 130 comments in response to the NPRM. See Table 5 describing commenter backgrounds:

TABLE 5—COMMENTS BACKGROUND

Commenter background	Count	Description and examples of category
Non-Government Organizations .....	35	Environmental groups (30), emergency response organizations (4), and other non-governmental organizations (1).
Governments .....	19	Local (8), State (9), Federal (2).
Private Individuals .....	67	Members of the public.
Carrier Industry Stakeholders .....	6	Railroads (1) and related trade associations (5).
Shipper Industry Stakeholders .....	4	Shippers (2) and petroleum-related trade associations (2).

Most commenters addressed proposed COSRP requirements. COSRP-related comments comprised four general categories: (1) Reiterating comments provided to the ANPRM; (2) providing statements of general support for expanding COSRP requirements; (3) expressing general concern or requests to require faster response times for response zones; or (4) recommending additional requirements not proposed by the NPRM. Many commenters noted the negative impact that a petroleum oil spill or HHFT derailment would have on their individual communities and personal property, with most such comments coming from residents of the Hudson River Valley region. A few commenters provided detailed comments about specific proposals in the NPRM for COSRPs. Comments related to COSRPs are further discussed in “Section V.B. Summary of Oil Spill Response Plan Comments” of this final rule.

PHMSA received approximately 20 comments on the proposed HHFT information sharing notification requirements. These comments fall into several categories, including: (1) Applicability; (2) notification recipients; (3) frequency of notification; and (4) information security and confidentiality concerns. Comments related to HHFT information sharing are further discussed in “Section V.C. Summary of HHFT Information Sharing Notification Comments” of this final rule.

PHMSA received five comments addressing the proposed incorporation by reference of the ASTM D7900 test method. Comments related to incorporation by reference are further addressed in “Section V.D. Summary of Initial Boiling Point Comments” of this final rule.

Additionally, PHMSA received several miscellaneous comments that voiced general concern about the public health, safety, and/or environmental risks of petroleum trains and/or fossil fuels. These comments either did not provide recommendations for regulatory action or exceeded the scope of PHMSA’s authority.

### *B. Summary of Oil Spill Response Plans Comments*

#### *Summary and Response to Basic Spill Response Plan (§ 130.31) Comments*

The current threshold for a basic OSRP is 3,500 gallons of petroleum oil. Several commenters suggested that basic plans for packages exceeding this threshold should be eliminated and replaced with comprehensive oil spill response plans, which would effectively require a COSRP for all tank-car

shipments of petroleum oil. Commenters suggested basic OSRPs be replaced because they do not meet the minimum requirements of the CWA in 33 U.S.C. 1321(j)(5)(D). The State of California Department of Fish and Wildlife, for example, disagreed that basic OSRPs could be issued under a containment rule pursuant to section 1321(j)(1)(C).

The NPRM did not propose changes to the requirements for basic OSRPs; therefore, this rule does not make such changes. As stated in the NPRM and the initiating 1996 final rule, the requirements for a basic OSRP were issued as a “containment rule pursuant to § 1321(j)(1)(C)” of the CWA, and therefore were not intended to fulfill the requirements of 33 U.S.C. 1321(j)(5)(D). The requirements of 33 U.S.C. 1321(j)(5)(D) for OSRPs are promulgated in the requirements for COSRPs.

#### *Summary of Comments Regarding Applicability of COSRP (§ 130.100)*

The NPRM proposed to expand the applicability for COSRPs so that any railroad that transports a single train carrying 20 or more loaded tank cars of liquid petroleum oil in a continuous block or a single train carrying 35 or more loaded tank cars of liquid petroleum oil throughout the train consist must also have a current, written COSRP. The NPRM provided an exception for tank cars carrying residue as defined in § 171.8 of subchapter C or diluted mixtures that do not meet the definition of a Class 3 flammable or combustible liquid. The NPRM maintained both the current exception in part 130 for mixtures that contain less than 10 percent oil by volume and the current threshold of 42,000 gallons per package for both petroleum oil and non-petroleum oil.

PHMSA received approximately 20 comments to the NPRM pertaining to the applicability of COSRPs. Most of these comments fell into two major categories: The volume of oil being transported and the type of materials that trigger COSRPs. Additionally, there were a few comments pertaining to applicability in response to a question in the NPRM that asked whether additional relief should be given to small entities, such as Class II or III railroads.

While some commenters supported the proposed volume applicability threshold, many commenters provided alternative suggestions. Most comments reiterated suggestions regarding applicability provided in comments responding to the ANPRM. Generally, individuals and environmental organizations recommended using lower

thresholds of petroleum oil to trigger COSRPs due to environmental concerns, safety concerns, or interpretations that the CWA requires oil spill response plans for all rolling stock carrying oil. Several commenters requested lower applicability thresholds without specifying an alternative number.<sup>16</sup> Lower-volume thresholds proposed by commenters ranged from any amount of oil to 20 rail cars of oil. Commenters suggested replacing basic plans with COSRPs for packages exceeding 3,500 gallons. Commenters who suggested a threshold of one tank car—approximately 29,000 gallons—believed that any rail line carrying an oil tank car should be subject to COSRPs. Commenters that suggested a two-tank car threshold did so to maintain consistency with the current requirement of 42,000 gallons in one tank car, but suggested changing the language to require COSRPs when a train is carrying 42,000 gallons of oil in any form, not just one tank car. It was also suggested that the 42,000-gallon threshold be removed outright. The Minnesota Pollution Control Agency stated that the threshold is not meaningful and seems “arbitrary and outdated especially when you consider two 30,000-gallon tank cars pose the same or more risk and are not regulated.”

In addition to quantitative applicability comments, PHMSA received several qualitative applicability comments about the type of oil that should require a COSRP. Most of these comments were from environmental groups or private citizens and reiterated comments provided in response to the ANPRM, without providing additional data. Suggestions for expanded applicability of COSRPs included all hazardous substances, all Class 3 flammable liquids or other hazardous materials, all kinds of oil, or all kinds of liquid petroleum oils (irrespective of hazard class). Mandating COSRPs for all hazardous substances was suggested by state agencies and environmental groups, who cited the CWA statute requirements for hazardous substances, in addition to oil spills per 33 U.S.C. 1321(j)(5). These commenters supported using the Federal On-Scene Coordinator (OSC) to identify concerns evaluating a plan’s compliance with the statutory and regulatory requirements and expressed concern about the potential harm from hazardous substances. In addition, commenters cited some state

<sup>16</sup> See PHMSA–2014–0105–0250, PHMSA–2014–0105–0251, PHMSA–2014–0105–0252, PHMSA–2014–0105–0253, PHMSA–2014–0105–0256, PHMSA–2014–0105–0290.

plans, such as Minnesota's, in which COSRPs are required for all hazardous substances. Multiple commenters suggested adding all Class 3 flammable liquids to the materials requiring a COSRP, with justifications mostly based on environmental or safety concerns. Commenters also cited ethanol as an example of a Class 3 flammable material that poses a risk by rail.

NTSB opposed the exception from the COSRP requirements for unit trains carrying "mixtures or solutions of petroleum oil not meeting the criteria for Class 3 flammable or combustible material." NTSB found use of the term "mixtures or solutions" confusing, as petroleum products are inherently a mixture. NTSB also stated:

[S]pilled, petroleum products are significant environmental pollutants, whether or not they are Class 3 flammable or combustible liquids. In fact, less-flammable petroleum materials that are denser than water may sink to form emulsions, adhere to sediments, and produce tar balls that are often more difficult to remove from waterways than less viscous Class 3 flammable oils.

The Association of American Railroads (AAR) provided comments related to the identification of petroleum oil subject to the plan. AAR requested that PHMSA specify which UN or NA identification numbers are associated with the definition of petroleum oil. AAR suggested requiring railroads to determine which UN or NA numbers associated with Class 3 materials further meet the definition of petroleum oil and create an additional burden on railroads.

AAR provided comments about the applicability of route segments in the plans and requested clarification that the COSRP requirements do not apply to route segments where applicable quantities of oil are not transported. AAR also suggested "that plans should be required for only portions of HHFT routes situated within a half-mile (0.5 miles) of a navigable waterway" so that railroads do not need to perform their own environmental reviews throughout the entire rail network, which would be overly burdensome. In addition, AAR stated that the use of a half-mile standard for planning purposes is consistent with existing standardized planning distances found in 40 CFR part 112, appendix C, section 5.

The International Association of Fire Chiefs (IAFC) suggested revising the applicability proposed in § 130.101 ("Any railroad which transports a single train transporting . . ."), so as to replace "transports" with "operates" for "better flow."

In the NPRM, PHMSA asked whether regulatory relief may be appropriate for certain small businesses (*i.e.*, Class II and III short lines). Most commenters supported regulations based on the risk, quantity, and type of oil, regardless of business size. The State of California Department of Fish and Wildlife expressed concern that the threshold of 20 tank cars in a unit or 35 tank cars across the consist would exempt too many short lines from COSRPs. The American Short Line and Regional Railroad Association (ASLRRA) submitted comments stating that many Class II and III short lines only operate the first or last mile of an applicable route and that requiring them to create plans would be an undue burden. ASLRRA also described scenarios in which the short line acts as a tenant on track owned by a Class I railroad, suggesting that Class III railroads should be offered some level of relief if voluntarily entering into agreement to use a plan created by the Class I for the route section used by both railroads. ASLRRA further clarified:

[This is not to] suggest the host railroad's oil spill response plan should address the tenant's operations as a matter of regulatory fiat. Rather, ASLRRA is asking PHMSA to acknowledge that it is permissible for a tenant railroad to contract with a host railroad for the latter to supply the oil spill response capability required by PHMSA.

#### Response to Comments Regarding Applicability of COSRP (§ 130.100)

PHMSA initiated this rulemaking in response to changing conditions stemming from the increase in the volume of petroleum oil transported by rail and the consequent incidents and accidents; however, pursuant to the CWA requirement for rolling stock that "could reasonably be expected to cause substantial harm," PHMSA seeks to minimize burdens by expanding requirements for COSRPs only where there is a demonstrated need. PHMSA does not have evidence of rail incidents involving unit trains carrying other non-petroleum oils (as defined in 49 CFR 130.5) that have demonstrated a need to expand the applicability of comprehensive plans to other non-petroleum oils. Commenters did not provide additional data on rail transportation of non-petroleum oil or hazardous substances identifying new conditions, nor did they identify rail incidents indicating new risks posed by other non-petroleum oils or hazardous substances. Therefore, we are continuing with a threshold of 42,000 gallons for tank cars carrying petroleum or other non-petroleum oil. However, we may consider revising the

requirements for other non-petroleum oils or hazardous substances in a future rulemaking.

We disagree that the applicability should be expanded to include additional hazardous materials, such as all Class 3 flammable or combustible liquids. Commenters did not provide adequate data indicating that the type of planning and level of resources required by this rulemaking would be appropriate for cleaning up spills for materials other than oils. Furthermore, this rulemaking was promulgated to respond directly to the risks and unique response requirements related to the large volumes of petroleum oil being transported in unit trains.

PHMSA disagrees that COSRPs would be appropriate for a lower volume of petroleum oil or a lesser number of tank cars. As discussed in the NPRM and HM-251 final rule, modeling data from FRA indicates that for trains with fewer than 20 tank cars in a block, or fewer than 35 tank cars dispersed throughout a train, relatively few tank cars containing petroleum oil would be breached on average in the event of an incident.<sup>17</sup> The threshold of 20 cars in a block as used in the HM-251 rulemaking comes from AAR's Circular OT-55, which provides "Recommended Railroad Operating Practices for Transportation of Hazardous Materials" and defines "key trains." Then, FRA performed an analysis to determine the average number of cars that would derail with 20 tank cars in a block. Once that number was determined, FRA did further analysis to determine at what number of tank cars dispersed throughout the consist would the number of tanks cars derailed be equivalent. The result was 35 tank cars throughout the consist. Therefore, in a derailment scenario, these lower-risk train configurations (*i.e.*, fewer than 20 tank cars in a block or 35 tank cars throughout the train) are not "reasonably expected" to breach in a manner that could "cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone." Furthermore, given the enhanced tank car standards promulgated in the HM-251 final rule and resulting improvements in tank-car integrity, PHMSA believes the likelihood of a tank car releasing its total contents in a derailment has been significantly reduced.<sup>18</sup> PHMSA maintains that lower-risk train configurations should not be the focus of this rulemaking because extending

<sup>17</sup> 80 FR 26665 (May 8, 2015).

<sup>18</sup> 80 FR 26665 (May 8, 2015).

the requirements of this rule to operators of lower-risk configurations would be burdensome, costly, and inefficient.

PHMSA did not propose changes to the communication requirements in 49 CFR 130.11, which apply to both basic and comprehensive plans. Basic plans already require that shipments of tank cars carrying petroleum oil be described on shipping papers or similar documents as containing oil, unless they are identified as “aviation fuel, diesel fuel, fuel oil, gasoline, jet fuel, kerosene, motor fuel, or petroleum.” While basic plans will be replaced with COSRPs for certain train configurations, the responsibility for offerors to identify oil will not change. Additionally, the U.S. Coast Guard (USCG) maintains a “List of Petroleum and Non-Petroleum Oils” as a guide to determining whether a particular substance is an oil under their regulations.<sup>19</sup> Therefore, PHMSA further disagrees that additional guidance is necessary to identify petroleum oil, and is adopting the definition of petroleum oil as proposed.

The definition of petroleum oil in § 130.5 includes both refined and unrefined petroleum products. Oils which do not contain petroleum, such as synthetic oils or essential oils, continue to be defined as “non-petroleum oil” in § 130.5. We are maintaining PHMSA’s longstanding provision that any “mixture or solution in which oil is in a concentration by weight of less than 10 percent” is excluded from the requirements in part 130. Therefore, petroleum oil in part 130 includes mixtures containing at least 10 percent petroleum oil, such as denatured ethanol fuel E85 (ethanol containing 15 percent gasoline); however, mixtures containing less than 10 percent petroleum oil, such as diluted waste water or E95 (ethanol with 5 percent gasoline) continue to be excluded.

We also disagree with NTSB that the exception for unit trains not carrying petroleum oil meeting the definition of a Class 3 flammable liquid or combustible liquid should be removed. Providing this exception aligns this rulemaking’s applicability to unit trains with the subset of HHFTs carrying petroleum oil covered in other PHMSA rulemakings. Furthermore, the railroad can leverage information from the routing analysis required by 49 CFR 172.820 when developing plans.

<sup>19</sup> United States Coast Guard, Hazardous Materials Division, available at: <http://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Design-Engineering-Standards/eng5/>

We agree with AAR that the intent of COSRPs is to cover routes where applicable quantities of oil are transported. Railroads are not required to include routes or route segments in response zones when applicable quantities of oil are not transported on these routes or route segments. We assume that routes transporting applicable quantities of oil are a subset of the routes that railroads must already identify under the requirements for routing analysis in the HM–251 final rule. Therefore, we are editing the applicability language in § 130.100 to state, “any route or route segments used to transport. . . a single train carrying. . . .” This clarification further addresses IAFC’s recommendation to avoid using the term “transports a single train transporting” in the requirements proposed in § 130.101, adopted in § 130.100.

The CWA requires OSRPs for any facility that “because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.” PHMSA is not aware of evidence demonstrating that routes located more than 0.5 miles from navigable waters provide a sufficient buffer to ensure substantial harm could not occur in the event of a spill. The EPA’s FRP requirements in section 5.0 of attachment C–III (“Calculation of the Planning Distance”) to appendix C of 40 CFR part 112 provide detailed planning calculations for facilities to determine the threat to fish and wildlife and sensitive environments or downstream public water intake as a result of a discharge of oil to navigable waters. For example, under section 5.6 of the above-referenced attachment, facilities located further than 0.5 miles from navigable waters must also consider the distance to nearby storm drains and factors that may be conducive to overland transport of oil to these storm drains. Additionally, section 5.7 of the above-referenced attachment requires an owner or operator to consider the “proximity to fish and wildlife and sensitive environments, not bordering a navigable water” in whether a facility poses substantial harm. PHMSA was unable to perform detailed analysis for features such as storm drains, or topographic features, along every point on an HHFT route, so PHMSA assumes that all rail routes used for applicable quantities of oil are expected to have the potential to impact navigable waters. Therefore, the entire route carrying

applicable oils should be covered by the planning requirements for COSRPs.

PHMSA disagrees that Class II or III railroads transporting petroleum oil should be excluded from COSRP requirements. As evidenced by the derailment in Aliceville, Alabama, which involved a 90-car crude oil unit train, Class II and Class III railroads are transporting quantities of petroleum oil that pose the same risk as Class I railroads. Nothing in the regulations precludes Class I railroads from assisting short lines in developing a plan or precludes one railroad from utilizing resources provided by another railroad through contract or other means; however, both railroads would be subject to submitting a plan covering their responsibilities to ensure those responsibilities are clearly delineated.

#### Summary of Comments Regarding General Requirements for COSRP Format (§ 130.105)

In the NPRM, PHMSA proposed a COSRP format requiring a core plan with general information applicable to the entire plan and response zones with information specific to the route segment. The NPRM proposed that the plan must use and be consistent with the core principles of the National Incident Management System (NIMS), including use of the Incident Command System (ICS) throughout the plan. The NPRM also proposed use of the Integrated Contingency Plan (ICP) as an alternate format.<sup>20</sup>

NTSB commented in support of the general plan requirements in proposed § 130.102, stating they would “serve to ensure a carrier’s ability to respond to worst-case oil and petroleum discharges called for by Safety Recommendation R–14–005.”

We received comments from State government agencies and railroad stakeholders on the use of alternative plan formats. The Washington State Department of Ecology and AAR both supported the permissive use of ICPs as providing greater flexibility to meet planning standards when subject to requirements by other agencies. Both AAR and other State government commenters highlighted differences between requirements for State plans

<sup>20</sup> In June 1996, the National Response Team (NRT) published the Integrated Contingency Plan (ICP, or One Plan) Guidance with support from five agencies: The Environmental Protection Agency (EPA); the Coast Guard; the Occupational Safety and Health Administration (OSHA); the Office of Pipeline Safety of the Department of Transportation (DOT); and the Minerals Management Service (MMS) of the Department of the Interior. The ICP provides a mechanism for consolidating multiple facility response plans into one plan that can be used during an emergency. See 61 FR 28642

and the proposed Federal plan requirements.

Several commenters supported the requirement that plans integrate NIMS and ICS, while also requesting further clarification of their roles. API commented in support of ensuring that “the terminology used and practices required are consistent with established response organizations and structures to include the National Response Framework, the National Contingency Plan, the National Preparedness and Response Exercise Program (NPREP), and National Incident Management System (NIMS).” Additionally, industry commenters highlighted the importance of NIMS and ICS, and recommended additional clarity. AAR stated, “PHMSA should clarify that railroads, at their discretion, may use EPA’s or DHS’s criteria to be consistent with the NCP” in relation to the requirements to use NIMS/ICS terminology. API highlighted the importance of railroad personnel following NIMS and ICS using “common terminology, training and management of change for staff,” further suggesting that PHMSA and FRA “should be prepared to provide guidance and oversight to the regulated community as they establish processes that support personnel and organizational changes.”

IAFC recommended clarifying that NIMS and ICS are utilized throughout the plan by adding the underlined words to the proposed requirements: “The plan must use *and be consistent with the core principle* of the National Incident Management System (NIMS) *including the utilization of the ICS.*”

Comments in Response to General Requirements for COSRP Format (§§ 130.105)

PHMSA agrees with providing flexibility for railroads submitting multiple plans under differing Federal and State regulations. The ICP was developed to provide a single format for response plans in recognition that entities may be required to develop and submit plans for multiple Federal agencies to cover different facility types and activities. The ICP provides railroads with flexibility.

We are also adding an alternative for railroads to submit plans that meet State requirements, provided the State plan also meets the minimum requirements of the Federal standard. In addition to the State plan, the railroad must include the information summary (including the contact information for the Qualified Individual) and ensure through contract or other approved means the availability of private personnel and equipment necessary to respond to a worst-case

discharge (WCD) or a substantial threat of such a discharge. The use of State plans is voluntary and, therefore, does not impose any additional burdens. PHMSA is adding this alternative to ensure that railroads do not engage in unnecessary duplication and to provide regulatory flexibility in response to comments that discuss the potential burden from states with differing requirements and plan formats. PHMSA encourages railroads to make use of this alternative when possible to minimize compliance costs. This alternative will provide equivalent or greater protections to the Federal response plan. Furthermore, the allowance of ICP and state plans is consistent with the OPS requirements for pipelines. In addition, it is PHMSA’s intention that railroads will be able to use the same data and other information gathered for other response plans (*i.e.*, Federal, state, international) to inform the OSRPs required under this rulemaking action, provided they meet PHMSA’s OSRP requirements.

PHMSA agrees that consistency with NIMS and ICS is important. Requiring use of NIMS and ICS maintains consistency with EPA or DHS and ensures better consistency with the current response framework. We are adopting the requirements as proposed in the NPRM, with clarifications suggested by IAFC to highlight the role of the NIMS and ICS throughout the plan, and with minor edits for plain language.

Summary of Comments Regarding Worst-Case Discharge for COSRP (§§ 130.105 and 130.5)

Under the statute, worst-case discharge (WCD) means “the largest foreseeable discharge in adverse weather conditions,” as defined at 33 U.S.C. 1321(a)(24). PHMSA proposed to define a WCD from a train consist as the greater of: (1) 300,000 gallons of liquid petroleum oil; or (2) 15 percent of the total lading of liquid petroleum oil transported within the largest train consist reasonably expected to transport liquid petroleum oil in a given response zone.

Environmental groups stated the WCD calculation was too low and should instead include the entire petroleum content of all tank cars on the train and additional factors affecting the incidence or severity of a derailment (*e.g.*, bridge collapse, tide activity, etc.). The coalition comments from Riverkeeper, Center for Biological Diversity, et al. stated that the analysis for WCD was insufficient. They provided several arguments against specific analysis points in the agency’s

determination of WCD, citing an incomplete incident history, disagreeing with adjustments made to account for the protections from the enhanced tank car standard in the HM-251 final rule, and asserting that CWA only provides deviation from setting a WCD at a package’s full contents when “secondary containment” is provided.

The coalition comments from Riverkeeper, Center for Biological Diversity, et al. also stated the WCD should be redefined to include the full contents of all tank cars carrying petroleum oil in a train. They stated the full contents is a “reasonable assumption” and provided examples of Area Contingency Plans (ACP) that plan for a WCD using the full contents of all tank cars. The coalition comments from Riverkeeper, Center for Biological Diversity, et al. also stated that the final rule must “appropriately account for a range of damages and resources required to rehabilitate communities and the environment after a worst-case disaster.”

Some private individuals supported removing the “300,000 gallon” option for the WCD and requiring it to be 15 percent for all trains carrying petroleum oil. These commenters stated 300,000 gallons was too low of a calculation. However, they did not address train configurations for which 300,000 gallons is a greater volume than 15 percent.

Response to Comments Regarding Worst-Case Discharge for COSRP (§§ 130.105 and 130.5)

This final rule adopts the proposed requirements for WCD. Under the statute, worst-case discharge means “the largest foreseeable discharge in adverse weather conditions,” as defined at 33 U.S.C. 1321(a)(24). The largest foreseeable discharge includes discharges resulting from fire or explosion.<sup>21</sup> PHMSA and FRA have not observed any unit train derailments that have resulted in the release of the entirety of the train’s contents. Furthermore, the likelihood of a unit train losing the entire contents of all tank cars is extremely low. Therefore, defining a WCD as the total contents of all tank cars overstates the “largest foreseeable discharge.”

PHMSA disagrees that the analysis for the WCD is inadequate; it is based on the U.S. incident record relevant to the applicability of this rule. PHMSA identified and analyzed the quantities released from tank cars in the major derailments involving petroleum oil that have occurred in recent years in the

<sup>21</sup> 33 U.S.C. 1321(j)(5)(D)(iii).

United States to estimate the approximate volume of petroleum oil that would constitute a WCD in the United States. PHMSA continues to maintain that including rail incidents that have occurred outside of the United States is not appropriate for COSRP analysis. PHMSA's analysis indicates that the WCD, in terms of the quantity released from tank cars that punctured or experienced thermal tears, would be approximately 500,000 gallons of petroleum oil.

Recognizing that the comprehensive safety enhancements, including tank car design enhancements promulgated in the HM-251 final rule, would reduce the overall quantity released in a derailment scenario occurring in the future, PHMSA did not propose 500,000 gallons as a planning volume for a WCD. The HM-251 final rule adopted lower speed limits for HHFTs during the phase-in period for the new tank car design to reduce risk. PHMSA believes the safety improvements for HHFTs adopted in the HM-251 final rule provide a reasonable basis for adopting a lower planning volume for WCDs. Adjusting the largest quantity released within the crude-by-rail derailment history (*i.e.*, 474,936 gallons) by the expected mitigation of damages (0.33) from the HM-251 rule, we expect related safety improvements over the 10-year period from 2017–2026.<sup>22</sup> This calculation (474,936 x 0.67) yields 318,000 gallons. Specifically, the quantity released in the Casselton, ND indicates that a WCD would involve 474,936 gallons. Expressed as a percentage of the total petroleum oil lading carried by the derailed Casselton, ND train, a WCD would involve approximately 15 percent of the total (474,936 gallons released divided by the 3,088,000 gallons carried by the train; rounded down from 15.38 percent). Specifically, 104 tank cars loaded with petroleum oil were involved in that derailment, and we have assumed that the all tank cars contained 29,700 gallons. Notably, there have been only two derailment incidents in the U.S. safety record that had greater than 15 percent of material released: Casselton, ND and Aliceville, AL. The crude oil tank car fleet has seen major improvements since the HM-251 final rule, and if those derailments would have occurred given the current fleet composition, we would expect the releases for both incidents to fall beneath the WCD threshold. In addition, the WCD is sufficiently high so that no incident has exceeded it to the degree

that it seems unlikely that preparation for the WCD amount would have resulted in an inadequate response to the incident that occurred.

As previously discussed, PHMSA accounted for the expected mitigation of damages achieved through the HM-251 final rule to determine the proposed 300,000 gallon WCD planning volume. However, for the proposed WCD planning volume based on the percentage of the total petroleum oil lading within a train consist, PHMSA did not incorporate the expected mitigation of damages of the HM-251 rulemaking because we believe that this percentage does not account for uncertainty in large train configurations. Large train configurations (*e.g.*, 135-tank car trains) have an appropriate WCD planning volume, commensurate with their presentation of increased risk.

As an illustration of the WCD definition and its application to WCD planning volumes for use in COSRPs, consider a 50-tank car train and a 100-tank car train carrying petroleum oil. For the 50-tank car train, the WCD planning volume would be 300,000 gallons, since 300,000 gallons is greater than 15 percent of the total petroleum oil lading carried by that train (*i.e.*, 225,000 gallons, assuming each tank car carries 30,000 gallons). For the 100-tank car train, the WCD planning volume would be 450,000 gallons, since 15 percent of the petroleum oil carried by that train—or 450,000 gallons—is greater than 300,000 gallons. Furthermore, PHMSA acknowledges both the existence of even larger trains (*e.g.*, 120-tank car trains), as well as the uncertainty surrounding the number of tank cars loaded with petroleum oil that might be transported by rail in the future.

PHMSA maintains that distinguishing larger train configurations from relatively smaller ones is appropriate given differences in risk, and we further maintain that this calculation is to be used to determine the “planning volume” for WCDs within a given response zone. It is not re-calculated for each train in operation within a given response zone; rather, it is based on the largest train configuration that can reasonably be expected to transport petroleum oil within a response zone. Furthermore, nothing in the rulemaking prohibits a railroad from using a higher planning volume in their plan.

Given that the discussion above applies to the WCD for the expanded applicability to unit trains of petroleum oil, we are clarifying that the calculation for 300,000 gallons or 15 percent of the lading across the train consist applies to unit trains. As stated in the NPRM,

PHMSA did not propose to change the applicability requirements for tank cars exceeding 42,000 gallons. When separating the definition of “maximum most probable discharge” and “worst-case discharge,” the planning volume for tank cars exceeding 42,000 gallons was inadvertently omitted. Therefore, we are amending the definition of “worst-case discharge” to reinstate that the planning volume for tank cars exceeding 42,000 gallons “equals the capacity of the cargo container.”

Summary of Comments Regarding the Response Zone for COSRP (§§ 130.105 and 130.5)

In the NPRM, PHMSA proposed to define the term response zone as “one or more route segments identified by the railroad utilizing the response resources which are available to respond within 12 hours after the discovery of a WCD or to mitigate the substantial threat of such a discharge for a comprehensive plan meeting requirements of subpart C.” PHMSA additionally asked whether the 12-hour response time was sufficient for all areas subject to the plan, or whether a shorter response time (*e.g.*, 6 hours) would be appropriate for certain areas (*e.g.*, High Volume Areas) which pose an increased risk for higher consequences from a spill. PHMSA further invited comments on the criteria and support-levels for “high volume areas.” Commenters to the NPRM provided recommendations for determination of the response zone and response times.

Commenters recommended several different revisions to the definition of response zone. Environmental groups and State agencies recommended re-defining response zones as pre-defined “geographic response areas.” This suggestion promotes resource sharing and more closely aligns with the EPA response structure. For example, the Minnesota Pollution Control Agency gave the example of non-profits “WAKOTA CAER and Red Wing CAER,” which have voluntarily formed a response cooperative. The Minnesota Pollution Control Agency further suggested utilizing response zones with pre-defined areas because, “all railroads/industries operating within that geographical area could be encouraged or required to establish caches of equipment, contractors and other response resources jointly. Those resources would then be available to any industry with similar preparedness/response requirements.”

Other commenters supported resource sharing without linking the requirement to specific geographic response zone definition. ASLRRA requested that short

<sup>22</sup> Please see the benefits section, Section 3, in the RIA.

lines (Class II or III) operating as a tenant to a Class I railroad be permitted to enter into a voluntary agreement to use the plan and resources belonging to the Class I railroad for the area of track (e.g., response zone) which falls under the tenant/host relationship. NTSB encourages, “small entities to enter into an agreement similar to the one managed by the Marine Preservation Association, a not-for-profit membership corporation that helps its members address problems caused by spills of oil and petroleum in transportation and allows its members to enter into a OSRO [oil spill removal organization] service agreements.”

AAR commented, “PHMSA should allow each railroad (Class 1, 2 or 3) to define the number and location of ‘Response Zones’ that meet the specific railroad’s existing incident management team (“IMT”) location, organizational structure, and contractor network. Railroads should not be required to use a prescriptive set of planning standards that specify ‘Response Zones.’” AAR provided sample regulatory text:

Railroad plan holders will develop “Response Zones” with response resources located within 12 hours of each point along the HHFT route where “Response Activities” would occur. Additionally, Response Zone locations, boundaries and numbers will be based on the existing location and organizational structure of each railroad’s incident management team (IMT) including Qualified Individuals (QIs), response resources, and railroad-contracted Oil Spill Removal Organization (OSROs) available to arrive onsite to mitigate a WCD or substantial threat of one.

Overall, most commenters felt that 12 hours was too long and recommended a shorter response timeframe ranging from immediately to 6 hours for all areas. Commenters expressed concerns about public safety and environmental damage that could be caused by spills, fires, or explosions during the first 12 hours and provided detailed descriptions of harm that could occur during that timeframe. Commenters claimed faster response times provide better protection, but they provided no quantitative data to support the effectiveness of faster response resources.

Commenters provided examples of State requirements and proposed legislation specifying response times for various activities related to responding to rail incidents. The State of Minnesota requires railroads to: (1) Within one hour, provide qualified personnel on-scene to assess the discharge; (2) within the first 8 hours, be capable of deploying resources to contain and recover 10 percent of the volume of the worst-case scenario and to protect

sensitive areas and potable water intakes; and (3) within the first 60 hours, deploy full response resources for containing and recovering the worst-case scenario. The coalition comments from the Riverkeeper, Center of Biological Diversity, et al. provided the response times in the Emergency Response Guidebook and the requirements adopted in the HM-251 final rule for thermal protection capable of withstanding a pool fire for 100 minutes.

Commenters provided support for including different areas with a faster response timeframe. NTSB suggested that no areas should have a longer response time than 12 hours, given the capability for the 12-hour response time was already demonstrated. NTSB also suggested adopting a 6-hour response time for “High Volume Areas” (consistent with the definition in § 194.5 of the pipeline regulations, excepting the pipeline diameter). NTSB further recommended that PHMSA adopt a High Volume Area definition “that recognizes credible single HHFT exposure risks based on the proximity of the track to the river and natural drainage paths,” citing the pipeline spill in Marshall Michigan<sup>23</sup> and the Lac-Mégantic, Quebec derailment as having caused more than one billion dollars in damage and supporting a need for faster response times.

Commenters defined a wide range of features, such as population, schools, economic activity, cultural and ecological significance, geologic factors, speed of tides, and location of nuclear reactors or other higher risk activities, as necessitating a faster response time. Commenters most frequently described drinking water intakes, environmentally-sensitive areas, and specific local waterways, such as the Hudson River, as necessitating faster response times and more detailed identification or mapping in a plan. Commenters also included suggestions such as scaling response times based on the amount of time oil would take to reach water or the volume of applicable trains in an area as criteria for faster response times. The State of Idaho Department of Environmental Quality included concerns that inclement weather and fast moving water streams would delay response and lead to larger area of impact. Commenters also focused on risk factors, and suggested weighting factors from the railroad routing analysis required by § 172.820 of the HMR. Commenters also provided the “High Consequence Areas (HCA)”

from the part 195 of the OPS pipeline regulations as an example of risk-based criteria. These areas include population density in the definition and are related requirements for an operator’s pipeline integrity management program. It should be noted this is a separate program from the OPS requirements for OSRPs in 49 CFR part 194.

AAR requested clarification that response times are a “planning standard, not a compliance standard. For example, if a response vehicle has a flat tire on the way to a response, the company should not be cited as being out of compliance.” AAR also requested that PHMSA “clarify that the 12-hour response timeframe applies only to track where HHFT trains traverse, and not to the entire rail network.” AAR provided examples of specific changes to the regulatory text to clarify this responsibility.

Response to Comments Regarding Response Zone for COSRP (§§ 130.105 and 130.5)

We are adopting the proposed requirements for response zones with clarification to the regulatory text in response to commenters. We disagree with limiting response zones to pre-defined areas, whether geographic response areas or similar criteria. Providing pre-defined response areas exceeds the scope of this rulemaking, as commenters did not have the opportunity to comment on such boundaries. Furthermore, the requirements for consistency with the NCP, ACP, along with the notification requirements, ensure that railroads have the necessary consistency with local and regional response structures.

We agree with AAR that the intent of the requirement for response zones is to allow railroads the flexibility to develop response zones and stage resources, provided that the planning standards for resources are met. The draft RIA provided an estimate of the number of response zones for each railroad for the purpose of estimating costs. We did not intend for the assumptions and estimation in the draft RIA to prescribe a specific number of response zones. Furthermore, we did not intend for railroads to provide information and resources about route segments where applicable quantities of oil are not transported. Therefore, we are clarifying both the definition of response zone and the general requirements to communicate that railroads may determine the boundaries of response zones, provided that the plan demonstrates that resources within the response zone meet the planning criteria. We are also clarifying that plans

<sup>23</sup> <https://www.nts.gov/investigations/AccidentReports/Pages/PAR1201.aspx>.

with only one response zone do not need to duplicate information between the core plan and response zone.

In general, we agree that railroads and industries should be encouraged to share response resources; however, we disagree that adding pre-defined response zone boundaries for response zones is necessary to enable resource sharing. Nothing in this rulemaking prohibits the formation of cooperatives or other such resource sharing agreements, provided that each railroad required to have a plan demonstrates the availability of appropriate resources by contract or other means.

Additionally, railroads communicate the response zone location to emergency response planning officials through the information sharing notification requirements adopted in § 174.312, providing adequate information to enable resource sharing.

The purpose of the response time requirement is to ensure railroads are demonstrating that they can identify, and ensure by contract or other means approved by the President, the availability of private personnel and equipment necessary to remove, to the maximum extent practicable, a worst-case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge.<sup>24</sup> USCG has developed planning guidance and standard calculations for response times in the 2016 “Guidelines for the U.S. Coast Guard Oil Spill Removal Organization Classification Program.”<sup>25</sup> Adopting a 12 hour response time and the USCG’s assumption that response resources can travel according to a land speed of 35 miles per hour ensures that the resources listed in the plan are available for a response and that response personnel will know when the resources can reasonably be expected to be available on-site. However, we disagree with AAR’s recommendation that it is necessary to include additional regulatory language stating 12 hours is not a performance guarantee.

In this final rule, we are adopting the requirement for a single response time of 12 hours in all areas. This response time is consistent with the requirement for “all other areas” used by the OPS for pipelines. In the NPRM, PHMSA requested public comment on whether the 12-hour response time would be sufficient for all areas subject to the plan, or whether a shorter response time

(e.g., 6-hours) would be appropriate for certain areas (e.g. High Volume Areas) that pose an increased risk for higher consequences from a spill; on criteria to define such “High Volume Areas” where a shorter response time should be required, as well as whether the definition for “High Volume Area” in 49 CFR 194.5 (excluding pipeline diameter) captures this increased risk, or if there is other criteria that can be used to reasonably and consistently identify such areas for rail; on whether requiring response resources to be capable of arriving within 6 hours would lead to improvements in response, and for specific evidence of these improvements; and on whether the final rule should have a longer response time than 12 hours for spills for all other areas subject to the plan requirements in order to offset costs from requiring shorter response times for High Volume Areas. Commenters did not provide adequate support to demonstrate that requiring the staging of resources for response times faster than 12 hours would bring about measurably improved protection or benefits, and that there were clear definitions for adequately defining high volume areas. Without sufficient data, PHMSA is unable to support a clear definition of a high volume area. Therefore, in the interest of safety and economic efficiency, PHMSA assumes the entire route threatens navigable water and that further identification for every point along the route would be impracticable. Rather, the use of 12 hours as a planning framework provides flexibility for OSROs to maintain larger inventory to be included within the response area. There is nothing prohibiting railroads from staging resources closer to specific route segments, and disagree that a voluntary designation will increase coverage for sensitive areas. We also note that providing response resources to remove, maintain, and mitigate WCD does not replace other emergency response procedures and resources for responding to a release of hazardous materials by rail.

Summary of Comments Regarding COSRP Consistency With NCP and ACP (§§ 130.110 and 130.115)

NTSB commented generally in support of compliance with the National Contingency Plan and Area Contingency Plan provisions proposed in § 130.103, stating they would “serve to ensure a carrier’s ability to respond to worst-case oil and petroleum discharges called for by Safety Recommendation R-14-005.”

Coalition comments from Riverkeeper, Center for Biological Diversity, et al. questioned whether the

proposed “minimum consistency” with the NCP and ACPs meets the requirements of OPA 90. Conversely, AAR stated that PHMSA “must clarify which elements are necessary for minimum consistency with the National Contingency Plan.”

IAFC supported the requirements for minimum consistency with NCP, but recommended additional clarification to ensure that the railroads understand that both Federal and state entities have an active role in the unified command, citing the NCP requirements in 40 CFR 300.105(d). The NCP requirements in 40 CFR 300.105(d) provide the “organizational concepts of the national response system” and describe a framework which, “brings together the functions of the Federal Government, the state government, and the responsible party to achieve an effective and efficient response.” IAFC suggested the proposed language for the requirement in § 130.103(a)(1)(i), namely to “[d]emonstrate a railroad’s clear understanding of the function of the federal response structure” be amended to include the “applicable state and federal response structure.”

Overall, commenters supported consistency with the ACP, but had several suggestions related to the inclusion of Environmentally Sensitive Areas (ESAs). Environmental groups and private citizens supported special identification and protections for ESAs. They also described many specific geographic areas, or suggested criteria for determining which environmentally sensitive areas require additional protection. They often cited cultural, economic, and ecological significance in their descriptions. The coalition comments of Scenic Hudson and Riverkeeper highlighted the importance of including additional strategies to protect and deflect oil from ESAs. They further recommended including a requirement to update and revise the plan contents.

AAR noted that the burden of railroads determining ESAs would be too great and recommended limiting the requirement to:

[R]eadily available U.S. Fish and Wildlife and Sensitive Environment Regional Contingency Plans (RCPs), Area Contingency Plans (ACP), Sub-Area Contingency Plans (SACPs) or Geographic Response Plans (GRPs) Annex(s) or databases to identify environmentally sensitive or significant areas as defined in § 130.5 of this part, along the route, which could be adversely affected by a worst-case discharge and reference available SACPs or GRPs deflection and protection strategies to protect these areas.

A private individual also requested that PHMSA ban the use of dispersants,

<sup>24</sup> 33 U.S.C. 1321(j)(5)(D)(iii).

<sup>25</sup> <https://homeport.uscg.mil/Lists/Content/Attachments/1286/Guidelines%20for%20the%20USCG%20OSRO%20Classification%20Program.pdf>.



instead of limiting their use to scenarios where they are permitted and approved by the ACP and Federal OSC.

#### Response to Comments Regarding COSRP Consistency With NCP and ACP (§§ 130.110 and 130.115)

PHMSA maintains that the requirements for “minimum consistency” fulfill the requirements of the CWA. The requirements for the NCP and ACP in 40 CFR part 300 include many sections that may not be applicable to the rail context. Clarifying which requirements must be followed for minimum consistency ensures the most important elements are included. Doing so also responds to AAR’s comments in response to both the ANPRM and NPRM requesting additional clarity and provides greater consistency with the OPS requirements for pipelines. We further agree with IAFC that the intent of requiring a clear understanding of the Federal response structure is to ensure that railroads can operate within a unified command, which may include State entities. Therefore, we are simplifying the requirement to state that OSRPs must, “[d]emonstrate a railroad’s clear understanding of the Incident Command System and Unified Command and the roles and responsibilities of the Federal On-Scene Coordinator.” Overall, we are adopting the requirements as proposed, with clarifications, as discussed in this section.

We agree with AAR that the intent of including ESAs was to ensure consistency with the approach identified in ACPs. We did not intend to include the additional burden of requiring a new category for analysis. Therefore, we are adopting AAR’s suggestion that we clarify that the inclusion of required ESAs be limited to those which have been identified in the existing contingency plans. We are further simplifying the definition of ESA to mean a “sensitive area” identified in the applicable Area Contingency Plan, or if no applicable, complete ACP exists, an area of environmental importance which is in or adjacent to navigable waters. We are not adopting the recommendation to expand the definition of ESAs to include additional areas and to include additional deflection strategies at this time. Doing so would require railroads to perform extensive analysis and develop new expertise, which would further delay the development and implementation of plans.

We further disagree that DOT should ban the use of dispersants, but rather the appropriate use should be determined per the NCP, ACP, and Federal OSC.

The use of dispersants is generally not authorized by the NCP or ACP for inland oil discharges.

#### Summary of Comments Regarding Notification Procedures and Contacts for COSRPs (§ 130.125)

Overall, commenters supported the inclusion of notification requirements. The NTSB commented in support of the notification procedures proposed in § 130.105, stating they would ensure a carrier’s ability to respond to worst-case oil and petroleum discharges called for by Safety Recommendation R-14-005.

Commenters also recommended providing time limits on the notification procedures. Riverkeeper, Center for Biological Diversity, et al. stated that because the proposed requirements do not explicitly require immediate communication “between OSROs or the affected industry and the Federal official in charge of spill response,” the proposed requirements do not meet the requirements of OPA 90.

Several commenters also recommended that the notification procedures either include additional state or local resources (*e.g.*, SERCs, TERCs, water utilities, etc.) or that the communication between the railroad and local resources be formalized with additional requirements. The State of Minnesota provided the State requirement for annual communication with emergency managers, fire departments, and employee unions as an example of more formal communication.

#### Response to Comments Regarding Notification Procedures and Contacts for COSRPs (§ 130.125)

The proposed rule establishes a new section with requirements for the notification procedures and contact information that a railroad must include in a COSRP. The proposed rule sought to improve consistency with existing requirements for pipelines in § 194.107 and appendix A to part 194. Both part 194 and the combined comment of AAR and ASLRRRA in response to the ANPRM include a requirement for immediate communication procedures. Therefore, in the final rule we are adding a requirement to include “immediate notification procedures” to the proposed language in § 130.107(a)(4) stating, “the circumstances and necessary time frames under which the notifications must be made.”

We disagree that listing additional entities or further formalizing communication requirements is necessary at this time. The government structure and the entities that require contacting will vary between States or

localities, and based upon the characteristics of the response zone. Furthermore, the plan requires consistency with the NCP and ACP, which requires the railroads to understand the response structure along the route. Additionally, the information sharing requirements adopted in part 174 provide contact between the railroad and State and tribal agencies.

#### Summary of Comments Regarding Response and Mitigation Activities for COSRPs (§ 130.130)

Overall, commenters agreed that response and mitigation activities should be included in the plan. NTSB commented generally in support of the response and mitigation activities proposed in § 130.106, stating they would ensure a carrier’s ability to respond to worst-case oil and petroleum discharges called for by Safety Recommendation R-14-005; however, commenters provided a range of suggestions on the response and mitigation activities included in the plan.

Some commenters provided general support for the response and mitigation activities, but also recommended additional specificity or clarifications. IAFC recommended the proposed language requiring resources able to “remove oil” be edited to “control and remove oil” to clarify that the plan also includes common and necessary response resources which may not directly remove oil. The National Association of SARA Title Three Program Officials (NASTTPO) supported the proposed requirements for railroads to include the location and inventory of equipment that can be mobilized in a response, but recommended including the number and training level of personnel that will be mobilized and providing a description of the response time, assuming favorable weather.

Many commenters offered multiple suggestions to require railroads to provide response resources which exceeded the scope of the proposed requirements. For example, some commenters suggested requiring railroads to stage additional resources that were not proposed or to require specific equipment, such as helicopters with firefighting capabilities or “SAFETY Rail Cars” which contain firefighting and containment equipment. One private individual suggested all equipment or supplies should be heavily duplicated. Other commenters recommended adding requirements for railroads to provide equipment to local responders. For example, the City of Berkeley commented that response

resources should be available to first responders, in addition to the clean-up resources and personnel.

Commenters recommended requiring more detailed procedures. For example, commenters recommended including supplies and procedures to account for more specific WCD scenarios, such as specific adverse weather conditions, bridge collapses, and the effect of tides. Citizens Acting for Rail Safety-Twin Cities requested “public education” that includes evacuation procedures. Scenic Hudson and Riverkeeper suggested that, at a minimum, COSRPs should ensure, “the maximum cleanup practicable, given both the weather, the physical conditions and other factors at the spill site.” Commenters also recommended specifying requirements for differing procedures to account for different oil types, such as heavy- or light-crude oil, citing studies on differing clean-up procedures.

The coalition comments from Riverkeeper, Center for Biological Diversity, et al. expressed concern that “certifying” that the identified resources are available by “contract or other means” is not sufficient to ensure that the preparations have been made. They requested that PHMSA reintroduce the requirement that OSRPs show—by contract—that preparations have been made to respond to the maximum extent practicable. They further specified that the proposed rulemaking should account for a range of damages and resources required to rehabilitate communities and the environment after a WCD. The comments included a list of examples of potential damages ranging from “loss of life” to “fear of a future catastrophe,” but do not specify figures or how to address these damages beyond “inclusion” in the WCD.

#### Response to Comments Regarding Response and Mitigation Activities for COSRPs (§ 130.130)

Overall, we have adopted the proposed requirements, which continue to align with the pipelines requirements. Many of the additional response resources recommended by commenters would increase the burden of the rulemaking beyond what was proposed in the NPRM. Furthermore, the comments recommending additional resources and activities lacked data about the corresponding costs and benefits of these recommendations. We did not propose specific mitigation activities. We are clarifying in the final rule that the equipment and resources must meet the planning standards outlined in appendix C of 33 CFR part 154. This is consistent with the approval of OSRPs for pipelines in 49

CFR part 194 and the assumptions in the NPRM; it also maintains a level of OSRO response resources equivalent to that specified by the USCG in 33 CFR 154.1035 and 155.1035. We are maintaining the exception from listing equipment for OSROs classified in the aforementioned sections. We expect railroads, in cooperation with OSROs, to determine and describe the appropriate mitigation and response activities they use relative to the response zone and available resources. The guidance in appendix C of 33 CFR part 154 provides the necessary flexibility to allow railroads and OSROs to tailor activities and equipment to the specific geographic conditions in the response zone.

We agree with IAFC’s proposed edit to include the word “control.” It clarifies that the range of activities may include those beyond the direct removal of oil.

We disagree with coalition comments from Riverkeeper, Center for Biological Diversity, et al. that the language to “certify” response resources is inadequate. The plan requirements make it clear that the resources must be available by “contract or other means.”<sup>26</sup> Plans must meet all requirements of subpart C of part 130 for approval and, therefore, must demonstrate a “contract or other means” of availability.

#### Summary of Comments Regarding Training Procedures for COSRPs (§ 130.135)

The NPRM proposed requirements for training of railroad employees to ensure that they are capable of carrying out a role in the plan and are familiar with the applicable requirements. The proposed training requirements further specify the minimum elements to be included in training for all reporting personnel and railroad employees subject to the plan. The NPRM also proposed requirements for the railroad to document and certify completion of this training. The NPRM asked commenters whether ICS incident commander-level training should be required for the Qualified Individual.

PHMSA received several comments about COSRP training procedures. Many commenters highlighted the importance of training. NTSB commented generally in support of the training procedures proposed in § 130.107, stating they would ensure a carrier’s ability to respond to worst-case oil and petroleum discharges, as called for by Safety

Recommendation R-14-005. Many commenters provided suggestions for additional training requirements that exceeded the scope of the proposed rulemaking, such as requiring railroads or shippers to either train or provide additional funding for the training of firefighters and local responders. NTSB also recommended requiring the use of training referenced by OSHA in 29 CFR 1910.120(p) and (q) and by the National Fire Protection Association (NFPA) in Standard 472.12. The State of Idaho recommended increasing training frequency to every three years, instead of every five years.

Some industry commenters suggested additional clarification was needed for training requirements. API suggested that the training standards lacked specificity and needed to describe the required training for the Qualified Individual and clarify differences “for personnel on the train versus other railroad personnel, or whether or not plans and employee training records should be kept on the trains or with the conductor.” They recommended aligning these practices with commonly accepted practices for other modes and facilities to provide consistency and confidence in railroad capabilities.

AAR commented that the proposed training is too broad and does not sufficiently protect railroads from liability relating to volunteers working under the direction of state and other stakeholder groups. They provided suggested edits to the proposed regulatory text in § 130.107(c)(4)(d), including clarifying that “[p]lan holders shall not be responsible for contracting with or training volunteers during responses working under the direction of state or stakeholder groups” and distinguishing that additional training standards may apply to response personnel “under contract to the plan holder.”

Commenters also provided suggestions on the recordkeeping and re-training requirements. The coalition comments from Riverkeeper, Center for Biological Diversity, et al. stated it is not sufficient to certify that employees received training, as 33 U.S.C. 1321(j)(5)(D)(iv) states that “a response plan must describe the training to be carried out under the plan to ensure the safety of the facility and to mitigate or prevent the discharge.”

Many commenters also responded to PHMSA’s inquiry in the NPRM about whether the proposed training requirements were sufficient, or whether the Qualified Individual should be trained to the ICS Incident Commander-level. Commenters, including State governments and

<sup>26</sup> “Contract or other means” is defined in 49 CFR 130.5. This rulemaking did not change the definition.

emergency responder organizations provided support for requiring either the Qualified Individual or another individual to receive Incident Commander-level training. The Washington State Department of Ecology explained that the Qualified Individual and the Incident Commander do not perform the same functions, stating that railroads must identify an individual who will be trained and qualified to act as an Incident Commander, whether it is the Qualified Individual or some other individual. The IAFC further recommended requiring that Incident Commander training be consistent with the intent of “Homeland Security Presidential Directive-5—Management of Domestic Incidents.” Other commenters recommended further identifying and outlining the roles and responsibilities of an Incident Commander in the COSRP until the appropriate local, State, or Federal authorities take control of the incident. API supported a requirement to include Incident Commander training, as consistent with use of NIMS and ICS, but stated PHMSA and FRA should be prepared to provide guidance and oversight to the regulated community as they establish processes that support personnel and organizational changes.

#### Response to Training Procedures for COSRP Comments (§ 130.135)

We disagree with adding requirements for railroads to train emergency responders in State and local governments, or otherwise provide training which exceeds the scope of the rulemaking. Such comments did not account for current programs available to improve training of emergency responders. For example, PHMSA’s Hazardous Materials Emergency Preparedness (HMEP) Grant Program awards more than \$20 million annually in grant funding to States, Territories, and Tribes to carry out planning and training activities to ensure State and local emergency responders are properly prepared and trained to respond to hazardous material transportation incidents.<sup>27</sup>

We agree with the industry, State and other governments, and emergency responder organizations that a best practice is for the individual acting as the Incident Commander to have Incident Commander-level training to ensure the ability to operate in a unified command. We further agree that the railroads should have the flexibility to designate the Incident Commander, as

someone other than the Qualified Individual to receive the training and serve in this role; however, we note that mandating that the railroad name the incident commander or requiring Incident Commander-level training may limit the railroad’s ability to quickly establish an incident command after a release. Employees in proximity to an event may need to temporarily serve as the Incident Commander until additional employees arrive onsite to assume command. Therefore, we are encouraging, but not mandating, use of ICS-300, Intermediate ICS for Expanding Incidents, or equivalent, and NFPA 472 Chapter 8 for Incident Commander-level training as a best practice.<sup>28</sup> Additional guidance can be found in NFPA High Hazard Flammable Trains (HHFT) On-Scene Incident Commander Field Guide.<sup>29</sup>

We further disagree that the proposed training requirements lack clarity or create undue burdens to train volunteers. The training requirements allow railroads flexibility to provide training appropriate to an employee’s role in carrying out the duties specified in the response plan. The regulatory text provides a note and illustrative examples as a reminder that other training may be applicable (see § 130.135(d)). However, this cross-reference does not impose new training burdens on employees or volunteers. Therefore, we are adopting the training requirements as proposed.

#### Summary of Comments Regarding Recordkeeping, Plan Updates, Submission, and Approval for COSRPs (§§ 130.145 and 130.150)

The NPRM inquired whether the proposed mandatory compliance date of 60 days after the date of publication of a final rule in the **Federal Register** was feasible. PHMSA received two comments in response to this inquiry. Citizens Acting for Rail Safety-Twin Cities supported the 60-day compliance date. AAR requested 180 days, stating the time was necessary for the coordination, contracting, and planning required for covered routes. They further stated that additional time would be needed if PHMSA did not adopt their recommendation for clarifying use of previously identified ESAs. API also suggested additional time would be necessary for railroads to develop COSRPs.

<sup>28</sup> <https://training.fema.gov/emcources/crsdetail.aspx?cid=E300&ctype=R>.

<sup>29</sup> <http://www.nfpa.org/news-and-research/fire-statistics-and-reports/research-reports/fire-emergency-responders/fireground-operations/high-hazard-flammable-trains-on-scene-incident-commander-field-guide>.

We also received other comments on various aspects of the recordkeeping and approval requirements. The coalition comments from Riverkeeper, Center for Biological Diversity, et al. recommended including “CWA and OPA” in the statement, “FRA will approve the response plan if FRA determines that the response plan meets all requirements of this part to ensure plans meet both the regulations and the statute.”

Many commenters, such as the NASTTPO, agreed that FRA was the appropriate agency to review and approve plans. Several commenters questioned whether FRA had the resources and knowledge to approve and enforce the oil spill response planning regulations. NTSB noted that the requirements for FRA approval would work toward implementing the intent of Safety Recommendation R-14-2. NSTB further stated:

It is vital that the FRA develop a program and provide sufficient resources for thorough on-site audits. This will help to avoid the regulated industry essentially policing itself and spill response plans being approved without sufficient verification. Therefore, we believe that while the proposed requirements in the NPRM for comprehensive OSRPs are complete and admirable, it is not enough to approve plans without trained staff to verify that sufficient resources and tactics are in place to ensure timely and effective responses to worst-case oil discharges.

API encouraged DOT to ensure that FRA receives the personnel, resources, and expertise necessary to execute its new role effectively and efficiently. API requested additional details related to FRA’s COSRP administration, approval, and adjudication processes.

The Washington State Department of Ecology supported FRA approval with the proposed consultation by EPA and USCG, as well as expanding consultation to include states. Several commenters recommended requiring approval from additional entities. Private individuals suggested public hearings on plans prior to approval. Riverkeeper, Center for Biological Diversity, Sierra Club, etc. requested inclusion of “regulatory impact survey” of FRA’s ability to enforce these requirements.

The coalition comments from Riverkeeper, Center for Biological Diversity, et al. further recommended adding a two-year limit to the time a railroad can operate without a plan, after submitting it for approval to better align with the OPA 90 law. The State of Idaho Department of Environmental Quality recommended requiring FRA to approve or deny plans within 180 days.

<sup>27</sup> <https://www.phmsa.dot.gov/grants/hazmat/hazardous-materials-grants-program>.

Comments from State governments and others suggested stricter timelines for resubmission of plans. The State of Minnesota suggested plans should be resubmitted every three years, instead of the five years proposed in the rulemaking. The State of Idaho Department of Environmental Quality recommended that the railroad should only have 30 days to revise plans that have been resubmitted after an initial denial. Citizens Acting for Rail Safety-Twin Cities suggested that railroad plans should be updated and tested at least annually and within 30 days of railroad ownership change.

Other commenters requested additional clarification or criteria for conditions requiring resubmission of plans. Scenic Hudson and Riverkeeper stated that plans should be revised to reflect periodic updates to the ACP, especially when changes to the ESAs are made or the associated protection and/or deflection strategies are updated.

AAR supported the inclusion of specific criteria that determine when railroads must update plans, but suggested the proposed language was overly broad and required clarification. Specifically, AAR suggested clarifying that the requirement to modify plans to include new routes should only apply to HHFT routes. AAR also suggested that ACP or NCP changes must be presented to the railroad before being required to be considered for plan changes. AAR also suggested removing the requirement, "Any other information relating to circumstances that may affect full implementation of the plan."

#### Response to Comments Regarding Recordkeeping, Plan Updates, Submission, and Approval for COSRPs (§§ 130.145 and 130.150)

We agree with AAR's comments that 180 days (6 months) is appropriate for plan development, given the inclusion of geographic information. Railroads have already developed basic plans that include some components of the comprehensive oil spill response plans. Railroads are required to perform a routing analysis in 49 CFR 172.820, which indicates the location of applicable route segments. Furthermore, many railroads have participated in voluntary programs to increase spill preparedness. However, other plan elements may require reformatting or additional data gathering. Therefore, we believe 180 days is sufficient for the additional planning and coordination necessary to submit the COSRPs.

The Secretary of Transportation has to approve OSRPs for rail tank cars. While this authority was originally delegated by the Secretary to FRA, after

considering comments questioning FRA's resources to approve plans, this authority is transferred to PHMSA, so that a sole DOT administration will have the authority to approve OSRPs. In addition to reviewing and approving OSRPs, PHMSA also has authority to pursue administrative penalties for violation of part 130, as it is issued pursuant to its delegated authority of 33 U.S.C. 1321(j).<sup>30</sup> PHMSA's Oil Spill Preparedness and Emergency Support Division is an established program with experience approving OSRPs for pipelines. However, as with other PHMSA programs and procedures, PHMSA will continue to work with FRA for guidance on rail specific information and procedures, including shared review and enforcement. We are also adopting the option for PHMSA to consult with the EPA or the USCG, as needed. As 33 U.S.C. 1321(j)(5)(E) requires that a plan that meets the minimum requirements be approved, we maintain that mandating multi-agency, public participation, or additional approval activities would fail to provide enough value in an explicit approval process to justify the increased burden and potential delay.

We disagree with Riverkeeper, Center for Biological Diversity, et al. that it is necessary to include "the OPA and CWA" in the regulatory text specifying plan approval. The regulatory authority for part 130 references the appropriate citations for CWA, and the requirements have been promulgated in accordance with the statutory requirements. Further specifying this law in the regulatory text as suggested by these comments may cause confusion.

We agree with Riverkeeper, Center for Biological Diversity, et al. that a two-year limit for the time a railroad can operate without a plan after submitting it for approval should be added to better align with the OPA 90 law (33 U.S.C. 1321(j)(5)(G)). We have added language to meet the requirements of OPA 90. Although, the NPRM did not include language specifying two years, the additional burden to approve plans in a timely manner is placed on PHMSA; there is no additional burden on railroads.

We disagree with States recommending a stricter timeline for resubmission of plans, as this goes beyond the proposed rulemaking and creates an additional burden for

railroads not proposed. Furthermore, the requirement for resubmission every 5 years aligns with OPS requirements for pipelines and requires resubmission of plans within 90 days of significant changes that affect the implementation of the plan. We do not expect that more frequent submission of non-significant changes (*i.e.*, changes that will not affect the implementation of the plan) will improve response.

We agree with commenters on many of the clarifications requested regarding the approval and submission requirements. We agree with Scenic Hudson and Riverkeeper comments that changes to the identification ESAs or deflection strategies may require resubmission of the plan. In the proposed rule, we included language requiring updates for "[a] change in the NCP or an ACP that has significant [effect] on the equipment appropriate for response activities." As ESAs are a component of the ACP, they would fall under this requirement. We have added language clarifying this relationship and explaining that a change to applicable ESAs is an example of a significant change to the ACP, requiring an update. We have also added "the type of oil transported, if the type affects the required response resources, such as a change from crude oil to gasoline" as an example of a change requiring an update. We agree with AAR that railroads only need to include updated route information if the route is used to transport trains requiring a COSRP.

We disagree, however, that further clarification of the requirements triggering an update to the plan is necessary. We also disagree with AAR that NCP and ACP changes must be presented to the railroads. It is the railroads' responsibility to ensure they maintain consistency with the NCP and ACP for the route segments in which they are operating. We further disagree that including "information relating to circumstances that may affect full implementation of the plan" is overly broad. This language is consistent with the longstanding language in the OPS requirements for pipelines, and ensures that railroads are updating plans to reflect changing conditions and informing those who need to know.

We disagree with commenters that the methods proposed in § 130.109 and adopted in § 130.145 for railroads to respond to alleged deficiencies are inadequate and should be either further limited or further elaborated. These requirements are parallel to the longstanding requirements adopted by the OPS for pipelines, which ensure a documented and timely response to

<sup>30</sup> 33 U.S.C. 1321(b)(6) authorizes the Secretary of Transportation to assess "Class I" administrative penalties as specified and as updated in 40 CFR 19.4. The Attorney General has authority, pursuant to 33 U.S.C. 1321(b)(7), to pursue a civil penalty action in the district court in which is the defendant is located, resides, or is doing business.

either fix or contest the identification of deficiencies by the approval agency.

#### Comments Regarding Confidentiality and Security Concerns for COSRPs (§ 130.150)

Industry commenters described the plans as sensitive for both business and security concerns. AAR's comments highlighted concerns that releasing COSRPs to the public would lead to security risks. The comments emphasized that they considered routing information to be especially vulnerable. AAR cited terrorist propaganda targeting petroleum trains as support for their position. Other commenters highlighted the value of releasing plan information to a broader audience. These commenters expressed their belief in the importance of sharing information freely with State entities, emergency responders, and the public. The coalition comments from Riverkeeper, Center for Biological Diversity, et al. supported full public disclosure, but suggested that the plans be shared with public and local response agencies at a minimum. They requested details about which specific COSRP elements are sensitive. Members of Congress, States, and cities suggested both State and/or local authorities should receive unredacted plans, as they are familiar with protecting information, and since advance knowledge of the plans can help them better respond to incidents. For example, the City of Davis, California, provided examples of pipeline information and dam inundation maps, for which first responders and local entities who participate in NIMS structure sign non-disclosure agreements. Comments submitted on behalf of San Francisco Baykeeper requested the comprehensive plan information be provided online, including sensitive site strategies.

#### Response to Comments Regarding Confidentiality and Security Concerns for COSRPs (§ 130.150)

PHMSA values transparency and provides resources to the emergency response community in many forms. We continue to disagree, however, that providing an entire COSRP to emergency responders or the public will lead to better preparedness. We agree with AAR and ASLRRRA that some elements of a COSRP may contain information that is business confidential, SSI, or personally identifiable information. Other elements are specific to railroad operations and will not inform the actions of first responders or communities.

Therefore, we are adopting the proposed requirements that railroads may follow existing procedures to request confidential treatment for documents filed with the agency, provided that the information is exempt by law from public disclosure (*e.g.*, exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), required to be held in confidence by 18 U.S.C. 1905). However, we are changing the citation for confidential information from FRA's procedures in 49 CFR 209.11 to PHMSA's equivalent procedures in 49 CFR 105.30. Under this process, the railroads may submit a redacted version of the plan, but PHMSA retains the right to make its own determination in this regard. We disagree with the comment that specific examples of confidential information should be provided. These decisions are determined on a case-by-case basis as differences between the levels of detail provided by the railroad may impact the determination. We maintain that these procedures are well-established and allow for both transparency and the safe and secure flow of information.

To ensure that State, tribal, and local government planning agencies receive advanced notification of the most pertinent information from COSRPs, we are adopting the proposed information sharing requirements in § 174.312 to include a description of the response zone and the contact information for the Qualified Individual for HHFTs subject to the response plan.

#### Summary of Comments Regarding Equipment Testing and Drill/Exercise Procedures for COSRPs (§ 130.140)

NTSB commented in support of the equipment testing and drill requirements proposed in § 130.108. One commenter recommended requiring heavily duplicated equipment testing. No other comments addressing the proposed equipment testing requirements were received. The NPRM received several comments on the drills/exercises.

NTSB and several other commenters recommended changing the term "drill" to "exercise" for consistency with National Scheduling Coordination Committee and PREP Guidelines. API requests additional clarification on use of Government Initiated Unannounced Exercises (GIUEs) in accordance with the PREP Guidelines. Other commenters commented in support of government-led exercises and drills.

Many commenters highlighted the value of regular exercises or drills between railroads and the local response community. Minnesota

highlighted a State requirement for railroads to conduct at least one containment, recovery, and sensitive areas-protection drill every three years. NASTTPO described the need for exercises in rural areas, acknowledging, "we have no expectation that rail carriers would be paying for the attendance of local first responders at training events and exercises, nor do we have an expectation that these exercises could rapidly be conducted in all areas," but continuing to request that rail carriers assess the local hazardous material response capability along their routes in conjunction with WCDs and prioritize field exercises and training for first responders in vulnerable areas.

#### Response to Comments Regarding Equipment Testing and Drill/Exercise Procedures for COSRPs (§ 130.140)

We disagree with commenters that duplicate equipment testing is necessary for all equipment. We are adopting the proposed requirement to describe and certify that equipment testing meets the manufacturer's minimum requirements. This ensures that the equipment is maintained as intended by the manufacturer and aligns with other Federal OSRP requirements under the USCG.<sup>31</sup>

This final rule adopts the use of PREP Guidelines as proposed, with a minor change in wording. We agree with commenters that the word "drill" should be replaced with "exercise" for better consistency with the PREP Guidelines. We disagree that commenters provided sufficient data to justify further prescribing exercise requirements at this time.

On April 11, 2016, USCG announced that the updated 2016 PREP Guidelines have been finalized and are now publicly available.<sup>32</sup> These updates included broadening section 5 of the PREP Guidelines to allow for the inclusion of other DOT/PHMSA-regulated facilities, such as rail. This provides an option for railroads to conduct exercises using the same guidelines as pipelines. The scope of the 2016 PREP Guidelines exercises is to: Demonstrate notification processes and accessibility between key facility personnel and the Qualified Individual; exercise the IMT's organization, communication, and decision-making in managing a response; and demonstrate the ability to deploy response equipment identified in the Facility Response Plan (FRP). The 2016 PREP Guidelines also specify that DOT/PHMSA has—and reserves—the

<sup>31</sup> 33 CFR 154.1057(a)(1).

<sup>32</sup> 81 FR 21362.

authority to conduct and require an operator to participate in a GIUE.

#### Summary of Comments Regarding Implementation of COSRPs and PHMSA Response (§ 130.155)

The NTSB provided support for the response plan implementation requirements proposed in § 130.112, stating they would ensure a carrier's ability to respond to worst-case oil and petroleum discharges, as called for by Safety Recommendation R-14-005. No other comments were received for this requirement. Therefore, we are adopting implementation language as proposed.

#### Summary of Comments Regarding Requirements for HHFT Operators and PHMSA Response (§ 174.310)

The State of California Department of Fish and Wildlife opposed including a cross-reference to part 130 requirements for COSRPs in the requirements for operators of HHFTs in § 174.310, stating that inclusion of the requirement inaccurately associates the plan with safety requirements related to the design, operation, and maintenance of railroads.

We disagree. Section 174.310 provides a consolidated list of PHMSA requirements specific to HHFTs. The section includes both unique requirements and cross-references (*e.g.*, additional security planning requirements in § 177.820). Adding a cross-reference to COSRPs in part 130 for those HHFTs carrying petroleum oil provides better clarity for navigating PHMSA's regulations, consistent with the intent of the section. We have also added a cross-reference to the HHFT information sharing notification in § 174.312 for clarity. These cross-references do not impose new burdens on railroads.

#### C. Summary of HHFT Information Sharing Notification Comments (§ 174.312)

PHMSA received approximately 20 comments about the proposed HHFT information sharing requirements. These comments fall into several categories, including applicability, notification recipients, frequency of notification, data security, and confidentiality concerns. PHMSA also received several comments outside the scope of this rulemaking requesting advanced notification of all hazardous materials rail shipments or notification to various local entities following an incident. The Kentucky Emergency Response Commission supported the proposed requirements in § 174.312 as written in the NPRM.

PHMSA received a small number of comments on the appropriate quantity threshold at which the HHFT information sharing requirements would apply. These suggested thresholds included: One car of any hazardous material; any oil; any hazardous material in any quantity; and a general reduction in the number of cars triggering the notification requirements. NTSB stated that the HHFT applicability partly satisfies Safety Recommendation R-14-14 in that emergency response agencies would have access to periodic reports of flammable hazardous material commodities transported through their communities, but urged PHMSA to require all railroads to provide advanced notification to communities for all hazardous materials transported on a given route.

Generally, most comments concerning notification recipients agreed with supplying HHFT information to the SERCs and TERCs. Several commenters also supported SERCs and TERCs further disseminating information to the appropriate local government officials. IAFC suggested adding fusion centers as an additional entity to receive notifications, but clarified that fusion centers should not replace SERCs. In terms of TERCs specifically, two commenters suggested that we work closely with tribes and allow their leadership to determine the best approach. One comment from AAR requested that the final rule mandate a registration system for SERCs and TERCs to receive information. NTSB supported expanding the notification requirements to include LEPs.

PHMSA received several comments about the frequency and type of information provided to SERCs and TERCs. IAFC agreed with the requirement for monthly updates and updates for when routes change a significant amount. They highlighted that receiving active, monthly notification was useful for emergency response planning by fire chiefs. AAR stated that the monthly reporting requirement would be redundant and asked that a new report should only be filed when there is a change in volume of 25 percent or greater. Commenters also requested more detailed notification of shipments either before or after incidents, including "real-time notification" of hazardous materials train consists. NTSB supported further inclusion of additional resources (*i.e.*, an emergency coordinator who participates in the local emergency planning process), additional notice of any operational changes that could affect emergency planning, and any

information necessary to develop and implement local emergency plans.

The most discussed category was the topic of data security and confidentiality. PHMSA received several comments on this topic with commenters either asking for the information to be more widely available or requesting increased confidentiality measures. State governments, environmental organizations, and a private individual were in favor of keeping the information public. A local government, trade organizations, a carrier, and an emergency response organization were in favor of keeping information confidential. Both sides provided various reasoning for their given perspective. The Washington State Department of Ecology explained that the requirement to provide aggregate information weekly is "consistent and complimentary with Washington law of aggregating crude rail information when releasing it to the public." The commenters advocating for this information to be public argued that making information private will put "the SERC and TERC staff in a situation of undue legal jeopardy" or cause confusion and delays in further providing information to appropriate entities. Commenters further supported public dissemination, as this information is not considered security sensitive information (SSI) by a number of States, right-to-know, and FRA's previous October 2014 Information Disclosure Notice.<sup>33</sup> Several comments mentioned FRA's determination in the October 2014 Information Disclosure Notice that crude-by-rail information required to be reported is not business confidential or proprietary information. Industry commenters, such as Union Pacific Railroad, advocated for this information to be withheld from the public. They argued that the proposed rule fails to meet the FAST Act requirement to identify rail information as sensitive, and expressed security concerns over the requested information being publicly available. The American Fuel & Petrochemicals Manufacturers (AFPM) specifically requested that the information be exempt from public disclosure—including state FOIA and sunshine laws—for anyone without need-to-know, due to concerns over security.

Some comments supported a mixed approach, supporting both greater public availability of data and increased security measures. One comment requested that PHMSA and FRA establish guidelines as to what information is considered non-public

<sup>33</sup> 79 FR 59892.

SSI. Another comment suggested that security and confidentiality should be controlled at the SERC level. Commenters explained that SERCs have experience properly controlling other sensitive information. Some commenters suggested that local governments should receive the notification, but sign non-disclosure agreements.

Response to Comments Regarding HHFT Information Sharing Notification (§ 174.312)

PHMSA disagrees that the applicability threshold should be lowered. Lowering the threshold is outside the scope of this rulemaking, and was not sufficiently supported by commenters. Additionally, a lower threshold may include non-unit trains in the requirement and significantly increase cost for small businesses. As such, the HHFT threshold captures the risk of unit trains and provides a consistent approach with the requirement to perform routing analysis. This applicability aligns with the FAST Act requirement to apply the information sharing provision to HHFTs. It also expands the applicability from the FAST Act to include Class II and III railroads to provide a unified approach to the risk posed by HHFTs.

We disagree with commenters that the proposed requirements are overly burdensome for ensuring SERCs, TERCs, and local responders receive the information contained in the notification. The entities included in the notification requirements align with the FAST Act. Furthermore, SERCs are already receiving the types of information specified in this requirement through the Emergency Order. The purpose of this notification is to actively inform communities about HHFTs which are transported through them. The routing notification requirements in § 172.820 already provide a method for communities to request information. The AAR Circular OT-55-P outlines a voluntary procedure whereby local emergency response officials and emergency planning organizations may request and obtain a list of the types and volumes of hazardous materials that are transported through their communities.<sup>34</sup> We also disagree with adding additional detailed information elements to the notification, as some of the suggestions by commenters for additional requirements exceed the scope of this rulemaking. Furthermore, PHMSA is addressing the FAST Act mandate in section 7302 to issue

regulations that require real-time sharing of electronic train consist information for hazardous materials shipments in a separate rulemaking action.

We agree with AAR that omitting the language for a “change of 25 percent or more” may cause confusion in determining when use of a certification of no change is appropriate and that requiring monthly notifications is redundant. This is the standard used for the Emergency Order. Therefore, we are adopting a requirement to update the notification when changes in volume are greater than 25%.

We disagree with commenters that the approach to security and confidentiality is inadequate. We maintain that notification to SERCs, TERCs, or other State-delegated agencies for the purpose of sharing with appropriate local officials is sufficient. Adoption of the proposed language, “If the disclosure includes information that railroads believe is security sensitive or proprietary and exempt from public disclosure, the railroads should indicate that in the notification,” is sufficient to ensure confidentiality and security. The purpose of SERCs and TERCs is to share information with local planning authorities, and adopting commenter recommendations for more prescriptive measures to disseminate information both exceeds the scope of the proposed rulemaking and places an additional burden on states. We acknowledge that states may differ in their methods. Maintaining this approach provides flexibility to ensure that SERCs, TERCs, and other State-delegated agencies disseminate information in accordance with State laws and procedures. Furthermore, this approach will help guard against inadvertent public disclosure of protected materials by ensuring that the information that railroads believe to be confidential for business or security reasons is marked appropriately. Before fulfilling a request for information and releasing the information, States will be on notice as to what information the railroads consider inappropriate for public release.

The adopted information sharing notification elements include aggregated information, and analyses by DOT and DHS have indicated that the information elements in the notification are not considered SSI. Furthermore, railroads have not demonstrated specific prospective harm that would be caused by the release of such aggregated information. Commenters to the NPRM repeated the same previously raised concerns that the sharing of routing information for HHFTs required them to

reveal proprietary business information. As discussed above, railroads argued that the Emergency Order routing information, if published or shared widely, could reveal information about customers. After considering the claim in an October, 2014 information collection notice, FRA concluded that the information would not be considered business confidential or SSI under Federal law. FRA’s “Proposed Agency Information Collection Activities; Notice and Request for Comments”<sup>35</sup> noted that the railroads did not specifically identify any prospective harm caused by the sharing of this information. DOT’s previous analysis concluded that the information shared by railroads does not qualify for withholding under Federal standards as business confidential information or SSI. DOT requires railroads to share aggregated information about the volumes of HHFTs that travel through a jurisdiction on a weekly basis. This information does not include customer information or other business identifying details. Further, it does not provide specifics about the timing of HHFT trains.

*D. Summary of Initial Boiling Point Test Comments (§ 173.121)*

PHMSA received five comments addressing the proposed incorporation by reference of the ASTM D7900 test method. The coalition comments from Scenic Hudson, Riverkeeper, et al. stated that the new test method should be mandatory. NTSB supported use of the test, but recommended that PHMSA remove other boiling point test options they consider to be less accurate and, further, mandate additional requirements for best method of classification, such as API RP 3000 and the report on sampling methods by Sandia National Laboratories. NTSB described adding the test as partly addressing NTSB Safety Recommendation R-14-6, which recommends testing and documentation for all hazardous materials. Industry commenters provided a more detailed description and recommendations related to the use of the test. Commenters additionally provided recommendations related to additional testing and sampling requirements for petroleum crude oil, which exceeded the scope of this rulemaking.

Both the AFPM and API stated that use of the test is not fully aligned with API RP 3000, pointing to differences between the API RP 3000 and HMR regarding sampling methods and specificity about when to use the test.

<sup>34</sup> <https://www.aar.org/boe>.

<sup>35</sup> 79 FR 59891 (October 3, 2014).

For example, API stated that ASTM D7900 was applicable only to stabilized crude oils, defined as having a Reid vapor pressure equivalent to or less than 82.7 kPa (12 psi). Newer versions of the API RP 3000 incorporate additional IBP tests for other crude oils. AFPM explains:

[The API RP 3000 requires] conducting an IBP analysis based on the definition of IBP in ASTM D7169, both the ASTM D7169 and ASTM D7900 tests must be run. The results of both tests are merged to obtain a boiling point distribution curve for the crude oil. The IBP is then calculated in accordance with the calculation procedures set out in ASTM D7169 to arrive at an IBP consistent with the IBP as defined in ASTM D7169. . . . The recommended practice for sampling in API RP 3000 differs substantially from the sampling methods prescribed in ASTM D7900, which requires that sampling be conducted in accordance with ASTM D4057 or D4177.

Both AFPM and API supported adoption of the API RP 3000 but recommended incorporating specific, detailed language containing limitations or descriptions about when and how the test should be used, if adopted. API further recommended incorporation of additional standards for the collection of samples (*e.g.*, the API Manual of Petroleum Measurement Standards (MPMS) Chapter 8.1/ASTM D4057, API MPMS Chapter 8.5/ASTM D8009, or ASTM D3700). AFPM recommended including an exception that crude oil may be classified as Packing Group (PG) I without further testing for better harmonization with requirements of Transport Canada.

Response to IBP Test Comments  
(§ 173.121)

PHMSA mostly disagrees with commenters and is adopting the IBP test as proposed in the NPRM with the addition of the boiling point definition for clarity. The proposed rule included incorporation by reference of an additional initial boiling point test method, which would make no further changes to other testing and sampling requirements for petroleum products in § 173.41, § 173.120, or § 173.121. The NPRM did not propose requiring mandatory use of the ASTM D7900 test or incorporating additional standards, nor did it provide an exception from all other sampling and testing requirements in the HMR by providing a PG I designation. Such requirements would reduce flexibility of industry stakeholders to comply with test requirements.

Additionally, a more precise test to measure boiling point may provide a limited value, as it is unlikely to lead to a difference in classification of

weathered and/or treated stable crude oils and may be unnecessarily costly to counter the limited outcome. However, PHMSA may consider incorporation of additional standards and further revising other sampling and testing criteria and methodology for petroleum crude oil in a future rulemaking action.

Overall, PHMSA further disagrees that adding limitations to the use of ASTM D7900 initial boiling point test is necessary to ensure shippers use the right test for their flammable materials. Currently, § 173.121 provides a list of initial boiling point tests. These tests do not apply to all Class 3 liquids; rather, shippers determine which test is most appropriate for their material. The full title of the test provided in § 173.121 is “Petroleum products containing known flammable gases—Standard Test Method for Determination of Light Hydrocarbons in Stabilized Crude Oils by Gas Chromatography (ASTM D7900),” which clearly describes the test is appropriately used for certain petroleum products. However, use of the ASTM D7900 requires understanding the definition of “initial boiling point, when determining the boiling distribution using ASTM D7900, is the temperature at which 0.5 weight percent is eluted.” This definition is included in the ASTM D7169, which is referenced inside the ASTM D7900. Therefore, we are adopting the proposed requirement and including the aforementioned definition. This provides sufficient information for shippers to follow the current classification procedures to select the most appropriate test for their samples.

#### VI. Incorporated by Reference

Section 171.7 lists all standards incorporated by reference into the HMR that are not set out in full text in the regulations. This final rule incorporates by reference the ASTM D7900–13<sup>e1</sup>, Standard Test Method for Determination of Light Hydrocarbons in Stabilized Crude Oils by Gas Chromatography, 2013, available for interested parties to purchase in either print or electronic versions through ASTM’s website at the following URL: <https://www.astm.org/Standards/D7900.htm>. The price charged for this standard at the time of publishing is \$52.00. The price charged to interested parties helps cover the cost of developing, maintaining, hosting, and accessing these standards.

This publication (*i.e.*, test method) ensures a minimal loss of light ends for crude oils containing volatile, low molecular weight components (*e.g.*, methane) because it determines the boiling range distribution from methane through n-nonane. Incorporation of this

publication (*i.e.*, test method) provides flexibility to use an industry best standard.

#### VII. Section-by-Section Review

##### Part 107

Administrative update to authorities to include 33 U.S.C. 1321(b)(6).

##### Section 107.301

Updates section to include reference to subchapter B to reflect administrative update to amended authority for COSRP regulations promulgated under 33 U.S.C. 1321(j). Updates reference to the Secretary’s delegation of authority from § 1.53 of this title to § 1.97 of this title.

##### Section 107.305

Updates section to include reference to subchapter B to reflect administrative update to amended authority for COSRP regulations promulgated under 33 U.S.C. 1321(j).

##### Section 107.309

Updates section to include reference to subchapter B to reflect administrative update to amended authority for COSRP regulations promulgated under 33 U.S.C. 1321(j).

##### Section 107.311

Updates section to include reference to subchapter B to reflect administrative update to amended authority for COSRP regulations promulgated under 33 U.S.C. 1321(j).

##### Section 107.329

Adds new paragraph (c) to include reference to the administrative civil penalty under 33 U.S.C. 1321(b)(6), as adjusted by 40 CFR 19.4, for violations of COSRP regulations promulgated under 33 U.S.C. 1321(j).

##### Part 130

We are restructuring part 130 to establish the following subparts:

Subpart A—Applicability and General Requirements contains current §§ 130.1–130.21 with minor revisions and clarifications.

Subpart B—Basic Spill Prevention and Response Plans contains current §§ 130.31–130.33 with minor revisions to remove comprehensive plan requirements.

Subpart C—Comprehensive Oil Spill Response Plans is a new subpart with new requirements for COSRPs. The section number and titles have been updated for plain language as follows in Table 6:



TABLE 6—PART 130 SUBPART C—COMPREHENSIVE OIL SPILL RESPONSE PLANS SECTIONS

NPRM	Final rule
130.101 Applicability for comprehensive plans .....	130.100 Applicability for comprehensive oil spill response plans.
130.102 General requirements for comprehensive plans .....	130.105 Purpose and general format.
130.103 National Contingency Plan (NCP) and Area Contingency Plan (ACP).	130.110 Consistency with the National Contingency Plan.
130.104 Information summary for comprehensive plans .....	130.115 Consistency with Area Contingency Plans.
130.105 Notification procedures and contacts for comprehensive plans.	130.120 Information summary.
130.106 Response and mitigation activities for comprehensive plans	130.125 Notification procedures and contacts.
130.107 Training procedures for comprehensive plans .....	130.130 Response and mitigation activities.
130.108 Equipment testing and drill procedures for comprehensive plans.	130.135 Training.
130.109 Recordkeeping and plan update procedures for comprehensive plans.	130.140 Equipment testing and exercise procedures.
130.111 Submission and approval procedures for comprehensive plans.	130.145 Plan review, update, and recordkeeping procedures.
130.112 Response plan implementation for comprehensive plans .....	130.150 Submission and approval procedures.
	130.155 Implementation of comprehensive oil spill response plans.

Section 130.2

Paragraph (d) is updated to show that the requirements in § 130.31(b) have moved to subpart C. PHMSA does not propose any other changes to this section.

Section 130.5

The changes to the definitions section are adopted as proposed in the NPRM. The introductory text is reformatted, including moving the definition for “Animal fat” to the correct alphabetical order as proposed in the NPRM. Definitions for “Maximum Potential Discharge,” “Oil Spill Removal Organization (OSRO),” “On-Scene Coordinator (OSC),” “Response activities,” “Response Plan,” and “Worst-Case Discharge” are added as proposed in the NPRM. Definitions for “Adverse Weather,” “Maximum Potential Discharge,” “Person,” “Petroleum Oil,” and “Worst-case discharge” are revised as proposed in the NPRM. This final rule corrects an NPRM error in which OSRO used “response” rather than the correct term “removal”. The IBR reference is corrected for the definition of “Liquid,” as proposed in the NPRM, and the definition is updated to remain consistent with the HMR. In response to comments on the NPRM, the proposed definitions for “Environmentally Sensitive or Significant Areas” and “Response Zone” have been further clarified in this final rule.

Section 130.31

This section is revised editorially as proposed in the NPRM to clarify that it applies to basic OSRPs and remove references to COSRPs.

Section 130.33

This section is revised as proposed in the NPRM to clarify that it only applies to basic OSRPs.

Section 130.100

This final rule establishes a new section to describe the applicability requirements for COSRPs. This section has been adopted as proposed in the NPRM with revisions for plain language to clarify requirements in response to comments. This includes moving the current applicability of COSRPs of 42,000 gallons per packaging from § 130.31 to § 130.100, and expanding the applicability of COSRPs to route segments in which railroads transport “a single train transporting 20 or more loaded tank cars of liquid petroleum oil in a continuous block or a single train carrying 35 or more loaded tank cars of liquid petroleum oil throughout the train consist.” This section also includes an exception proposed in the NPRM for oil that does not meet the definition of a Class 3 flammable or combustible liquid, and for tank cars carrying residue. Under this final rule, tank cars containing crude oil, fuel oil, petroleum distillates, diesel, and gasoline must be included when counting tank cars in the consist. However, mixtures that do not meet the criteria for Class 3 flammable or combustible material in § 173.120 of part 173, or that contain residue as defined in § 171.8 of subchapter C, are not required to be included when determining the number of tank cars transporting liquid petroleum oil. For example, waste water contaminated with petroleum oil or certain mineral oils may not meet the definition of a Class 3 flammable or combustible liquid. Additionally, oils which were already excepted from the applicability

in part 130 by § 130.2(b) are not required to be counted for COSRPs. Therefore, COSRPs would not be required for “any mixture or solution in which oil is in a concentration by weight of less than 10 percent;” or for “any petroleum oil carried in a fuel tank for the purpose of supplying fuel for propulsion of the transport vehicle to which it is attached,” or for “oil transport exclusively within the confines of a non-transportation-related or terminal facility in a vehicle not intended for use in interstate or intrastate commerce (see 40 CFR part 112, appendix A).”

Section 130.105

This final rule establishes a new section for general requirements for the overall development of a COSRP as proposed in the NPRM. This section includes general requirements for the plan format, such as development of a core plan, and geographic response zones and accompanying response zone appendixes. This section also adds permission for railroads to use State plans to meet the requirements of part 130 provided they maintain an equivalent or greater level of protection as the Federal standard.

Section 130.110

This final rule establishes a new section to require that COSRPs are certified for consistency with the NCP and demonstrate compliance through a list of minimum requirements. In response to comments, this section clarifies that the railroad must demonstrate a clear understanding of the “Incident Command System and Unified Command.”

**Section 130.115**

This final rule establishes a new section to require COSRPs are certified for consistency with each applicable ACP (or Regional Contingency Plan (RCP) for areas lacking an ACP) and demonstrate compliance through a list of minimum requirements. This section is adopted as proposed in the NPRM, with edits for plain language and clarification for ESAs. This section also clarifies that the identification of ESAs and protection strategies are determined by reviewing and summarizing readily available ACPs, or RCPs when an ACP is not available.

**Section 130.120**

This final rule establishes a new section with requirements for COSRPs to include a front-page information summary. This section is adopted as proposed in the NPRM with minor edits for plain language.

**Section 130.125**

This final rule establishes a new section with requirements for the notification procedures and contact information that a railroad must include in a COSRP. This section is adopted as proposed in the NPRM with minor edits for plain language and clarification that communication between Qualified Individuals and appropriate Federal officials and persons providing response personnel and equipment, must be immediate.

**Section 130.130**

This final rule establishes a new section for railroads to describe the response and mitigation activities and the roles and responsibilities of participants in COSRPs. This section is adopted as proposed in the NPRM with minor edits for plain language and to clarify that appendix C of 33 CFR part 154 provides equivalent planning standards for use of OSROs classified under 33 CFR 154.1035 and 155.1035.

**Section 130.135**

This final rule establishes a new section requiring railroads to certify that employees are trained in accordance with the requirements of this section. This section is adopted as proposed in the NPRM with edits for plain language. In response to commenters, this final rule clarifies requirements for volunteers and adds requirements for the person acting as Incident Commander to be trained in ICS.

**Section 130.140**

This final rule establishes a new section with requirements for equipment testing to be consistent with

the manufacturer's minimum requirements. This section is adopted as proposed in the NPRM, with edits for plain language and to update the USCG website.

**Section 130.145**

This final rule establishes a new section with requirements for exercise procedures consistent with current PREP requirements for COSRPs. This section is adopted as proposed in the NPRM, with edits for plain language and clarification. In response to commenters, this final rule replaces use of the term "drill" in the NPRM with "exercise" for consistency with the PREP guidelines.

**Section 130.150**

This final rule establishes a new section with requirements for recordkeeping, review, and submission of COSRPs. The NPRM proposed that railroads submit plans to FRA. The final rule designates PHMSA as agency receiving plans and updates this section with submission procedures applicable to PHMSA, including specifying options for electronic submission of plans. In response to commenters, this final rule clarifies that railroads may operate for two years upon submission of response plan to PHMSA and certification of appropriate resources, for better consistency with the CWA.

**Section 130.155**

This final rule establishes a new section to apply the current plan implementation requirements for COSRPs formerly under § 130.33. This section has been adopted as proposed with changes to the section numbering and title for plain language.

**Part 171****Section 171.7**

This section adds the ASTM D7900 standard to the list of ASTM materials incorporated by reference.

**Part 173****Section 173.121**

This section adds the ASTM D7900 standard to the list of initial boiling point tests in § 173.121(a)(2) that are incorporated by reference. This section adds a definition for initial boiling point when using the ASTM D7900 standard.

**Part 174****Section 174.310**

Part 174, subpart G, provides detailed requirements for transporting flammable liquids by rail. The HM-251 final rule added § 174.310 to this subpart to provide a consolidated list of

requirements specific to transporting HHFTs. This final rule adds a new paragraph (a)(6) titled "Oil spill response plans" for clarity, to reference the part 130 requirements for HHFTs composed of trains carrying petroleum oil. A new paragraph (a)(7) titled "Information sharing notification for emergency planning" is added for consistency, to provide a reference to the new notification requirements in § 174.312. Although, the reference in (a)(7) was not proposed in the NPRM, no new requirements are being imposed.

**Section 174.312**

This final rule adds a new § 174.312 to subpart G of part 174 to require rail carriers that operate HHFTs to provide notifications to each applicable SERC, TERC, or other appropriate State-delegated agencies for further distribution to appropriate local authorities, upon request. Railroads may identify information that they believe is security sensitive or proprietary and exempt from public disclosure. These requirements are adopted as proposed, with minor edits for plain language and clarification. The frequency of update is also modified to address commenter concerns. This section specifies that the HHFT information sharing notification must include:

- A reasonable estimate of the number of HHFTs that the railroad expects to operate each week, through each county within the State or through each tribal jurisdiction;
  - The routes over which the HHFTs will operate;
  - A description of the hazardous material being transported and all applicable emergency response information required by subparts C and G of part 172;
  - At least one point of contact at the railroad (including name, title, phone number, and address) with knowledge of the railroad's transportation of affected trains (referred to as the "HHFT point of contact"); and
  - If a route is subject to the COSRPs, the notification must include a description of the response zones (including counties and States) and contact information for the Qualified Individual and alternate, as specified under § 130.104(a).
- Railroads may provide the required notifications electronically or in hard copy and must update the notifications for changes in volume greater than 25%. The frequency of updates aligns with the Emergency Order. The NPRM proposed monthly updates or statement of "no change."
- Each point of contact must be clearly identified by name or title in

organization and by contact role (e.g., Qualified Individual, HHFT point of contact).

Adding this new HHFT information sharing notification to § 174.312 builds upon the information sharing framework for HHFTs started by expansion of the routing requirements in § 172.820 in the HM-251 final rule (80 FR 26644). Together, these requirements enable the railroads to work with State officials to ensure that safety and security planning is occurring. Under existing § 172.820(g) of the HMR, fusion centers and other State, local, and tribal officials with a need-to-know will continue to work with the railroads on routing and risk analysis information conducted pursuant to part 172, subpart I, for information that is deemed SSI. The HHFT notification in the newly established § 174.312 ensures that SERCs, TERCs, or other appropriate State agencies will routinely receive and share non-sensitive information from rail carriers regarding the movement of HHFTs in their jurisdictions that can aid local emergency responders and law enforcement in emergency preparedness and community awareness.

## VIII. Regulatory Analyses and Notices

### A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321, also known as the Clean Water Act (CWA), as amended by the Oil Pollution Act of 1990 (OPA 90), which directs the President to issue regulations requiring owners and operators of certain vessels and onshore and offshore oil facilities to develop, submit, update, and in some cases, obtain approval of oil spill response plans. Executive Order 12777 delegated responsibility to the Secretary of Transportation for certain transportation-related facilities. The Secretary delegated to PHMSA the authority to promulgate regulations, 49 CFR 1.97(c), and to review and approve OSRPs.<sup>36</sup> A Memorandum of Understanding (MOU) between the DOT and EPA further establishes jurisdictional guidelines for implementing OPA 90 (36 FR 24080). The changes to part 130 in this rule address minimizing the impact of discharge of oils into or on the navigable waters or adjoining shorelines.

This final rule is also published under the authority of the Federal hazardous

materials transportation law, 49 U.S.C. 5103(b), which authorizes the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.” The changes in this rule to 49 CFR parts 171, 173, and 174 address safety and security vulnerabilities regarding the transportation of hazardous materials in commerce. The requirements proposed in § 174.312 are also mandated by the FAST Act (Pub. L. 114–94).

The Federal railroad safety laws (49 U.S.C. 20103) provide the Secretary with authority over all areas of railroad transportation safety. The Secretary delegates this authority to the FRA in 49 CFR 1.89. Pursuant to its statutory authority, FRA promulgates and enforces a comprehensive regulatory program (49 CFR parts 200–244) addressing issues such as railroad track, signal systems, railroad communications, and rolling stock. The FRA inspects railroads and shippers for compliance with both FRA and PHMSA regulations.

### B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). However, this final rule is not an economically significant regulatory action as defined by section 3(f)(1) under Executive Order 12866, since it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. A Regulatory Impact Analysis (RIA) is available for review in the public docket for this rulemaking and summarized below. Please see the RIA for more details on the benefits and costs of the final rule.

### C. Executive Order 13771

This final rule is considered an E.O. 13771 regulatory action. Details on the estimated costs of this rulemaking can be found in the rule’s economic analysis.

### D. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, “Federalism,” (64 FR 43255; Aug. 10, 1999), and the presidential memorandum on “Preemption,” (74 FR

24693; May 22, 2009). Executive Order 13132 requires PHMSA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” These include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” The agency may not issue a regulation that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by state and local governments or the agency consults with state and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts state law, the agency, where practicable, seeks to consult with state and local officials in the process of developing the regulation.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The final rule amends the existing title 49 of the Code of Federal Regulations in three areas. First, it updates part 130 by expanding the applicability of COSRPs to unit trains of flammable liquid petroleum oil, and by providing more detailed requirements for COSRPs. Second, it updates part 174 by requiring railroads to share additional information with state and tribal emergency response organizations. Finally, it updates part 173 to incorporate by reference an additional initial boiling point test for flammable liquids as an acceptable testing alternative to the current list of boiling point tests.

The final rule does not impose any new requirements with effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among government entities. In addition, PHMSA has determined that this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

PHMSA issues this final rule under the following statutory authorities: The Hazardous Materials Transportation Act (HMTA), the Federal Railroad Safety Act (FRSA), and the Clean Water Act as

<sup>36</sup> The Secretary has delegated the authority to review approve OSRPs by memorandum. Section 1.97 will be updated to reflect this delegation as part of the Department’s next delegations rulemaking.

it is amended by the Oil Pollution Act of 1990.

The HMTA provides that a State law or Indian tribe requirement is preempted in the following cases: Compliance with both the State law or Indian tribe requirement and the Federal requirement is not possible; the State law or Indian tribe requirement creates an obstacle to accomplishing or executing the Federal requirement; or where a Federal requirement has covered the subject and the state law or Indian requirement is not substantively the same. Covered subjects under the HMTA include:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
- (4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials and other written hazardous materials transportation incident reporting involving state or local emergency responders in the initial response to the incident; and
- (5) The design, manufacture, fabrication, inspection, marking, maintenance, reconditioning, repair, or testing of a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

Under the FRSA, “[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.” With narrow exceptions for essentially local safety or security hazards, states may not “adopt or continue in force a law, regulation, or order related to railroad safety” once the “Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.” (33 U.S.C. 20106(a)(2)). This standard applies to Federal regulations governing the transportation of hazardous materials by railroad, even when PHMSA or another agency promulgates those regulations.

OPA 90 (codified into the CWA) provides the statutory authority for the oil spill response planning portions of this final rule. Regarding the changes to oil spill response planning requirements in 49 CFR part 130, Federal regulation under 33 U.S.C. 1321 accommodates regulation by States and political

subdivisions. Pursuant to 33 U.S.C. 1321(o)(2), states or political subdivisions are not preempted by the Federal oil spill requirements “from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.”

As PHMSA noted in the NPRM, the preemption language of 33 U.S.C. 1321 protects states’ abilities to regulate requirements, liabilities, and removal activities with respect to the discharge of oil or hazardous substances. Elements of state oil spill response plan legislation may be preempted under the preemption standard established by FRSA and HMTA if the state legislation imposes railroad safety or hazardous materials containment requirements.

PHMSA received several comments related to the NPRM’s preemption discussion. These comments include several submissions from states in support of the proposition that this final rule does not preempt states’ abilities to impose oil spill response requirements on entities, including railroads. Several states, including but not limited to Washington, California, and Minnesota, commented in support of the preemption standards discussed in the NPRM.

Some commenters provided detailed explanations of the distinction between hazardous materials and rail safety regulations under those statutory authorities and the CWA’s preemption standard. For example, the Pacific States and British Columbia Oil Spill Task Force (Task Force) noted that FRSA and HMTA may preempt State laws that focus on rail safety, but that states retain CWA authority to impose oil spill planning requirements. They noted that response plans are not relevant to traditional railroad safety or operational requirements. Oil spill response planning pursuant to the CWA is designed to minimize the environmental harm of spilled oil reaching state waters independent of the train and its normal operation. The Task Force supports PHMSA’s continued reliance on the Clean Water Act’s preemption standards and national framework of federal and state action. In another example, the coalition comments from organizations including Riverkeeper, the Center for Biological Diversity, Earthjustice, Scenic Hudson, Stand.earth, Sierra Club, the National Wildlife Federation, Waterkeeper Alliance, Lake Champlain Committee, Vermont Natural Resources Council, NY/NJ Baykeeper, Little River Waterkeeper, Lake Pend Oreille Waterkeeper, Snake River Waterkeeper,

Puget Soundkeeper Alliance, Communities for a Better Environment and several local riverkeeper and baykeeper organizations discussed 33 U.S.C. 1321(o)(2) of the Oil Pollution Act’s as follows:

Under OPA, state and local authorities may impose any additional liabilities and requirements regarding oil spills and impose their own financial penalties for any legal violations related to oil spills. This broad non-preemption provision therefore covers more than mere oil spill planning requirements, as this notice of proposed rulemaking suggests. Any state and local laws that impose oil spill-related requirements, liabilities, or financial penalties on crude-by-rail owners or operators are expressly preserved under OPA and cannot be subject to preemption under the FRSA or HMTA.

PHMSA also received comments from railroad trade associations requesting that PHMSA reverse its initial preemption discussion and find that the Federal standards in 49 CFR part 130 preempt state oil spill response plans. AAR argued that efforts in Washington and California to promulgate state-specific requirements and control rail operations are creating a patchwork of different and potentially conflicting requirements across the United States that will overburden the railroads. The AAR opined that state oil spill response plan legislation is preempted under the preemption standard established by FRSA, HMTA, and the ICC Termination Act. Recent efforts by states to promulgate differing state-specific requirements demonstrate the need for a single Federal standard to avoid a patchwork of potentially conflicting requirements across the United States that will overburden the railroads and impede commerce. ASLRRRA commented in agreement with AAR that PHMSA’s preemption of State rules is critical to prevent unnecessary duplication, inefficiency, and confusion to the rail industry. ASLRRRA recommended that PHMSA standards should preempt all current and future State rules requiring oil spill response plans for the rail industry.

After evaluating the comments on the issue of Federal preemption and the permissibility of state oil spill response planning requirements for railroads, PHMSA continues to believe that the discussion in the proposed rule accurately states the application of the existing statutory authorities. The Clean Water Act allows for states to regulate requirements, liabilities, and removal activities with respect to the discharge of oil or hazardous substances, including oil spill response planning requirements; however, any state or

local regulation of railroad safety standards or hazardous materials containment or communication standards under the guise of oil spill response planning will be preempted under FRSA and HMTA.

#### E. Executive Order 13175

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," (65 FR 67249; Nov. 9, 2000) requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that have tribal implications. Agencies must determine whether a proposed rulemaking has tribal implications, which include any rulemaking that imposes "substantial direct effects" on one or more Indian communities, on the relationship between the Federal Government and Indian tribes, or on the distribution of power between the Federal Government and Indian tribes. Further, to the extent practicable and permitted by law, agencies cannot promulgate two types of rules—(1) rules that have tribal implications that impose substantial direct compliance costs on Indian tribal governments and that are not required by statute, and (2) rules that have tribal implications and that preempt tribal law—unless they meet certain conditions.

PHMSA is committed to tribal outreach and engaging tribal governments in dialogue. In the NPRM, PHMSA solicited comments on potential tribal impacts in an effort to capture tribal concerns as part of the regulatory process. Additionally, PHMSA regularly conducts outreach efforts. For instance, PHMSA representatives attended the National Joint Tribal Emergency Management Conference in September 2016 and the Northwest Tribal Emergency Management Conference in May 2016. In the spirit of Executive Order 13175, and consistent with DOT Order 5301.1, PHMSA will be continuing outreach to tribal officials independent of our assessment of the direct tribal implications of this final rule.

#### F. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

PHMSA must consider whether a rulemaking would have a "significant economic impact on a substantial number of small entities," which include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000.

To ensure potential impacts of rules on small entities are properly considered, PHMSA in coordination with the FRA, developed this final rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the RFA.

The RFA and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

After subjecting the rule to public comment, the Agency is required by E.O. 13272 to assess the comments received by small entities and the public and prepare a final regulatory flexibility analysis (FRFA) which address a series of topics (presented below) regarding the rule's expected impacts on small entities affected.

Under the RFA at 5 U.S.C. 604(a), each final regulatory flexibility analysis is required to address the following topics:

(1) A statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting

the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

(7) for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

The RFA requires that each initial regulatory flexibility analysis contain a description of any significant alternatives to the proposal that accomplish the statutory objectives and minimize the significant economic impact of the proposal on small entities. 5 U.S.C. 603(c). In this instance, none of the alternatives accomplish the statutory objectives and minimize the significant economic impact of the proposal on small entities.

#### (1) Need for, and Objectives of, the Rule

PHMSA, in coordination with the FRA, is issuing this final rule in order to improve response readiness and mitigate effects of rail incidents involving petroleum oil and certain HHFTs. This is necessary due to the expansion in U.S. energy production, which has led to significant challenges for the country's transportation system. This final rule has requirements in two areas as shown below: Section I, Subsection A ("Oil Spill Response Plans") and Subsection B ("Information Sharing").<sup>37</sup> The first requirement modernizes the Comprehensive Spill Plan requirements. 49 CFR part 130. Additionally, this final rule requires railroads to share additional information with state and tribal emergency response organizations (*i.e.*, SERCs and TERCs) to improve community preparedness. The requirements of this final rule work in conjunction with the requirements adopted in the HHFT Final Rule (80 FR 26644) in order to continue the comprehensive approach toward ensuring the safe transportation of energy products and mitigating the consequences of such accidents should they occur. PHMSA is addressing below the potential impacts on small entities with the final rule requirements for

<sup>37</sup> This rulemaking also proposes incorporation and the voluntary use of the initial boiling point (IBP) test (ASTM D7900) to determine classification and packing group for Class 3 Flammable liquids. We note that the incorporation of API RP 3000 and consequently ASTM D7900 will not replace the currently authorized testing methods, rather serve as a testing alternative if one chooses to use that method. PHMSA believes this provides flexibility and promotes enhanced safety in transport through accurate PG assignment. This provision would not pose any impacts on small entities.

response plans and information sharing.<sup>38</sup>

#### (A) Oil Spill Response Plans

PHMSA is promulgating this final rule in response to recent train accidents involving the derailment of HHFTs. Shipments of large volumes of liquid petroleum oil pose a significant risk to life, property, and the environment. PHMSA has identified several recent derailments to illustrate the circumstances and consequences of derailments involving petroleum oil transported in higher-risk train configurations: Plainfield, IL (July 2017); Money, MS (May 2017); Mosier, OR (June 2016); Heimdal, ND (May 2015); Galena, IL (March 2015); Mt. Carbon, WV (February 2015); La Salle, CO (May 2014); Lynchburg, VA (April 2014); Vandergrift, PA (February 2014); New Augusta, MS (January 2014); Casselton, ND (December 2013); Aliceville, AL (November 2013); and Parkers Prairie, MN (March 2013).

For example, on December 30, 2013, a train carrying crude oil derailed and ignited near Casselton, North Dakota, prompting authorities to issue a voluntary evacuation of the city and surrounding area. On November 7, 2013, a train carrying crude oil to the Gulf Coast from North Dakota derailed in Aliceville, Alabama, spilling crude oil in a nearby wetland and igniting into flames. These train accidents involving derailments of HHFTs transporting crude oil resulted in discharges of petroleum oil that harmed or posed a threat of harm to the nation's waterways.

Of note here is the NTSB's Safety Recommendation R-14-5,<sup>39</sup> which requested that PHMSA revise the spill response planning thresholds prescribed in 49 CFR part 130 to require comprehensive OSRPs that effectively provide for the carriers' ability to respond to worst-case discharges resulting from accidents involving unit trains or blocks of tank cars transporting oil and petroleum products. In this recommendation, the NTSB raised a concern that, "[b]ecause there is no mandate for railroads to develop comprehensive plans or ensure the availability of necessary response resources, carriers have effectively

placed the burden of remediating the environmental consequences of an accident on local communities along their routes." In light of these accidents and NTSB Recommendation R-14-5, PHMSA has re-examined whether it is more appropriate to consider the train consist, rather than just the individual tank car, when setting the threshold for comprehensive OSRPs, and determined that such consideration is appropriate. The revisions included in the final rule expand the applicability of the comprehensive OSRP requirement. PHMSA holds that improved oil spill response planning will in turn improve the actual response to future derailments involving petroleum oil and lessen the negative impacts to the environment and communities.

On June 17, 1996, RSPA published a final rule issuing requirements that meet the intent of the Clean Water Act. This rule adopted requirements for packaging, communication, spill response planning, and response plan implementation intended to prevent and contain spills of oil during transportation. Under these current requirements, railroads are required to complete a basic OSRP for oil shipments in a package with a capacity of 3,500 gallons or more, and a comprehensive OSRP is required for oil shipments in a package containing more than 42,000 gallons (1,000 barrels).

Currently, most, if not all, of the rail community transporting oil, including crude oil transported as a hazardous material, is subject to the basic OSRP requirement of 49 CFR 130.31(a) since most, if not all, rail tank cars being used to transport crude oil have a capacity greater than 3,500 gallons. However, a comprehensive OSRP for shipment of oil was only required when the quantity of oil is greater than 42,000 gallons per tank car. Accordingly, the number of railroads required to have a comprehensive OSRP was much lower, or possibly non-existent, because a very limited number of rail tank cars in use would be able to transport a volume of 42,000 gallons in a car.<sup>40</sup>

The final rule expands the applicability of comprehensive OSRPs based on thresholds of crude oil that apply to the train consist. Specifically, the final rule expands the applicability for OSRPs so that no person may transport an HHFT quantity<sup>41</sup> of liquid

petroleum oil unless that person has implemented a comprehensive OSRP.

Each railroad subject to the final rule must prepare and submit a comprehensive OSRP that includes a plan for responding, to the maximum extent practicable, to a worst-case discharge and to a substantial threat of such a discharge of oil. The OSRP must also be submitted to the PHMSA, where it will be reviewed and approved by PHMSA personnel.

The changes respond to commenter requests for requirements for more detailed guidance and provide a better parallel to other federal oil spill response plan regulations promulgated under the OPA 90 authority. A full summary of the changes to the plan requirements are described in the final rule. Each comprehensive plan must include.<sup>42</sup> I. Core Plan: A core plan includes an information summary, as required in 49 CFR 130.105, and any components which do not change between response zones. Each plan must:

- Use and be consistent with the core principle of the National Incident Management System (NIMS) including the utilization of the Incident Command System (ICS):
  - Include an information summary as required by §§ 130.105 and 130.120.
  - Certify that the railroad reviewed the National Contingency Plan (NCP) and each applicable Area Contingency Plan (ACP) and that its response plan is consistent with the NCP and each applicable ACP and follows Immediate Notification procedures, as required by §§ 130.110 and 139.115.
  - Include notification procedures and a list of contacts as required in § 130.125.
  - Include response and mitigation activities and resources as required in § 130.130.
  - Certify that applicable employees were trained per § 130.135.
  - Describe procedures to ensure equipment testing and a description of the exercise program per § 130.140
  - Describe plan review and update procedures per § 130.145.
  - Submit the plan as required by § 130.150.

*II. Response Zone Appendix:* For each response zone, a railroad must include a response zone appendix to provide the information summary, as described in 49 CFR 130.120, and any additional components of the plan specific to the

train that are loaded with a Class 3 flammable liquid.

<sup>42</sup> The following text is provided as an overview of the rule and does not replace regulatory text included in the NPRM.

<sup>38</sup> We note that the incorporation of API RP 3000, which contains the ASTM D7900 test will not replace the currently authorized initial boiling point testing methods, but rather serve as a testing alternative if one chooses to use that method. PHMSA believes this provides flexibility and promotes enhanced safety in transport through accurate packing group assignment. This requirement will impose no new costs.

<sup>39</sup> <http://www.ntsb.gov/safety/safety-recs/reclatters/R-14-004-006.pdf>.

<sup>40</sup> The 2014 AAR's Universal Machine Language Equipment Register numbers showed five tank cars listed with a capacity equal to or greater than 42,000 gallons, and none of these cars were being used to transport oil or petroleum products.

<sup>41</sup> An HHFT exists when a train has a block of 20 tank cars or 35 tank cars dispersed throughout the

response zones. Each response zone appendix must identify:

- A description of the response zone, including county(s) and state(s);
- Identification of any environmentally sensitive areas along the router per § 130.115; and
- Identification of the location where the response organization will deploy and the location and description of equipment required by § 130.130.

In addition, the final rule requires plan holders to identify an OSRO, provided through a contract or other approved means, to respond to a worst-case discharge within 12 hours.

#### (B) Information Sharing

On May 7, 2014, DOT issued Emergency Restriction/Prohibition Order in Docket No. DOT-OST-2014-0067,<sup>43</sup> which required each railroad transporting 1,000,000 gallons or more of Bakken crude oil in a single train in commerce within the U.S. to provide certain information in writing to the SERC for each state in which it operates such a train. In the HM-251 (RIN 2137-AE91) NPRM published in 2014 (79 FR 45015; Aug. 1, 2014), PHMSA proposed to codify and clarify the requirements of the Order in the HMR and requested public comment on the various facets of that proposal. Unlike many other requirements in the August 1, 2014 NPRM, the notification requirements were specific to a single train that contains one million gallons or more of UN 1267, Petroleum crude oil, Class 3, sourced from the Bakken shale. In the HHFT Final Rule, PHMSA did not adopt the separate notification requirements proposed in the NPRM and instead relied on the expansion of the existing route analysis and consultation requirements of § 172.820 to include HHFTs to satisfy information sharing needs.

In response to the FAST Act and DOT's commitment to codifying the Order involving information sharing, we are requiring in this HM-251B final rule to add new § 174.312 for information sharing provisions to the additional requirements for transportation of flammable liquids by rail. This addition creates a tiered approach to information sharing, whereas fusion centers will continue to act as the focal point for risk analysis information deemed SSI under the routing analysis in § 172.820 and SERCs and TERCs will actively be provided with non-sensitive security information that can aid in emergency preparedness and community awareness. The final rule requirements

provide emergency responders with an integrated approach to receiving information about HHFTs.

As required by this final rule, the notification must meet the following requirements:

- A reasonable estimate of the number of HHFT that the railroad expects to operate each week, through each county within the State or through each tribal jurisdiction;
- The routes over which the HHFTs will operate;
- A description of the hazardous material being transported and all applicable emergency response information required by subparts C and G of part 172 of this subchapter;
- An HHFT point of contact: At least one point of contact at the railroad (including name, title, phone number and address) related to the railroad's transportation of affected trains;
- If a route is additionally subject to the comprehensive spill plan requirements, the notification must include a description of the response zones (including counties and states) and contact information for the qualified individual and alternate, as specified under § 130.104(a);
- Railroads must update the notifications for changes in volume greater than 25%.
- Notifications and updates may be transmitted electronically or by hard copy.
- Each point of contact must be clearly identified by name or title and role (e.g., qualified individual, HHFT point of contact) in association with the telephone number. One point of contact may fulfill multiple roles.
- Copies of HHFT notifications made must be made available to the Department of Transportation upon request.

The required changes build upon the requirements adopted in HHFT Final Rule to continue to the comprehensive approach to ensuring the safe transportation of energy products.

The Secretary has the authority to prescribe regulations for the safe transportation, including the security, of hazardous materials in intrastate, interstate, and foreign commerce (49 U.S.C. 5103(b)) and has delegated this authority to PHMSA via 49 CFR 1.97(b).

(2) A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

In response to the NPRM, PHMSA received several comments on whether

regulatory relief for oil spill response plans may be appropriate for certain small businesses (*i.e.*, short lines). As discussed in the Section B "Comment Summary" of this rulemaking, most commenters supported regulations based on the risk, quantity, and type of oil, regardless of business size.

The American Short Line and Regional Railroad Association (ASLRRRA) provided a global rulemaking comment which questioned whether the rulemaking "provides either a meaningful or operationally sustainable path to addressing safety, particularly from a small business perspective." ASLRRRA also noted that Class III railroads "meet the economic criteria established for inclusion in 49 CFR 1201.1" and suggested requirements under the under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) ("SBREFA"), apply along with the RFA. ASLRRRA did not provide any data analysis of the impact to Class III railroads. Their comments focused on three topics: (1) That short lines be exempt from comprehensive OSRP requirements; (2) that it should be permissible under the regulations for a short line to be covered by Class I comprehensive OSRPs when the short line is effectively a tenant of the Class I railroad; and (3) that Federal OSRP requirements should preempt State level OSRP requirements.

On point (1), PHMSA maintains that Class II or III railroads transporting petroleum oil and HHFTs are transporting materials that pose the same risk to communities as Class I railroads, and therefore should not be excluded from the rulemaking. The Agency received several comments to this effect from environmental organizations, members of the general public, and certain State governments. These comments generally supported the concept of basing OSRP requirements on the quantity and type of oil being transported, and risk, rather than entity size. PHMSA believes the final rule is an appropriate balance between risk mitigation and cost and ensures all entities that are at risk for a substantial oil spill are covered by the requirements of the final rule regardless of size.

On point (3) The "Executive Order 13132, "Federalism" discussion in this section provides an analysis and response to comments related to issues for federal preemption.

Finally, on point (2), PHMSA does not believe that the requirements of the final rule preclude Class I railroads from assisting Class III entities with developing comprehensive oil spill response plan. Nothing in OSRP

<sup>43</sup> <http://www.dot.gov/briefing-room/emergency-order>.

regulations prohibit Class I railroads from providing support to Class III Railroads to develop a plan or to prohibit resource sharing between railroads. There are large parts of plans (e.g. Identification of environmentally sensitive areas or sharing of qualified individuals) for which a Class I could provide the Class III with assistance. Another example would be the Class III including documentation, under an agreement with a Class I, of a “contract or other means” demonstrating they have permission to use the Class I’s response resources. Under the COSRP requirements adopted in this rulemaking, Class I railroads may choose to lessen the burden for Class III railroads through resource sharing agreements or by providing plan development information for overlapping response action plans. Nothing in the regulations precludes Class I railroads from assisting short lines in developing a plan or precludes one railroad from utilizing resources provided by another railroad through contract or other means; however, both railroads would be subject to submitting a plan to ensure the responsibilities are clearly delineated.

The ASLRRRA also contends that PHMSA should have consulted with the Small Business Administration’s Advocacy Office. PHMSA does not believe such consultation is necessary give the level of impacts and number of entities impacted by the final rule. The ASLRRRA comments did not provide any specific information on the cost to develop comprehensive OSRPs, number of entities affected, or a comparison of costs to average operating margins or total revenue. The cost impacts on small entities are described more fully below in the context of the average revenue for Class III railroads.

(3) The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Changes Made to the Proposed Rule in the Final Rule as a Result of the Comments

PHMSA did not receive any comments filed by the chief counsel for Advocacy of the Small Business Administration and hence has not made any changes as a result of comments from that office.

(4) A Description of and an Estimate of the Number of Small Entities To Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

The universe of the entities considered in this FRFA generally

includes only those small entities that can reasonably expect to be directly regulated by the regulatory action. Short line railroads are the types of small entities potentially affected by this final rule.

A “small entity” is defined in 5 U.S.C. 601(3) as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Title 49 U.S.C. 601(4) likewise includes within the definition of small entities non-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. Additionally, 5 U.S.C. 601(5) defines as small entities governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a “for-profit” railroad business firm may be, and still be classified as a small entity, is 1,500 employees for “line haul operating railroads” and 500 employees for “switching and terminal establishments.”

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final Statement of Agency Policy that formally establishes small entities or small businesses as being railroads, contractors, and hazardous materials offerors that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues,<sup>44</sup> and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. 68 FR 24891 (May 9, 2003) (codified as appendix C to 49 CFR part 209). The \$20 million limit is based on the Surface Transportation Board’s revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. PHMSA is using this definition for the rulemaking.

Railroads

Not all small railroads would be required to comply with the provisions of this rule. Most of the approximately

579 small railroads<sup>45</sup> that operate in the United States do not transport hazardous materials.<sup>46</sup> Based on the requirements of this final rule, the entities potentially affected by requirement are as described below:

#### (A) Oil Spill Response Plans

For determining the entities that would be affected by the requirements of this rulemaking, PHMSA used the configuration of trains contained in the definition of “HHFT” as it applies to petroleum oil, established in the HHFT Final Rule—defined as a train hauling 20 or more carloads of flammable liquid in a continuous block, or 35 or more carloads of crude oil throughout the train. PHMSA and FRA estimated that 55 small railroads transport crude oil in HHFTs and therefore could potentially be affected by this rule. This estimate was formulated using FRA’s extensive expertise in rail operations, knowledge of the STB Waybill Data, and outreach to the FRA regional offices in 2013 to collect information on small carriers shipping crude oil.

Therefore, this rule would impact 9.5 percent of the universe of 579 small railroads. The Agency attempted to update this number in the interim between the NPRM and final rule but, working in cooperation with FRA, was unable to identify data that would enable a re-estimation of the number of entities affected by the rule, because not all Class III railroads submit carload data to the STB for inclusion in the waybill sample. The volume of crude shipped by rail has declined significantly since publication of the NPRM, and one of the effects of this decline in volume shipped by rail may be that some Class III railroads have stopped shipping crude oil in the interim.

#### (B) Information Sharing

The applicability of this requirement is derived from the information published in the HHFT Final Rule. Specifically, the definition of a High-Hazard Flammable Train and the information sharing portion of the routing requirements are related to this final rule. The HHFT Final Rule defined “High-Hazard Flammable Train” as a continuous block of 20 or more tank cars in a single train or 35 or more cars

<sup>45</sup> Although there are approximately 738 small railroads in existence, a portion of these railroads do not haul freight and hence would not be affected entities. PHMSA estimates the number of small entities that haul freight and hence might be affected by OSRP requirements to be 579 entities.

<sup>46</sup> Short Line and Regional Railroad Association. 2017. “Short Line and Regional Railroad Facts and Figures.”

<sup>44</sup> For 2012 the Surface Transportation Board (STB) adjusted this amount to \$36.2 million.



dispersed through a train loaded with a flammable liquid.

This definition also served as the applicable threshold of many of the requirements in the HHFT rulemaking, including routing requirements. Section 172.820 prescribes additional safety and security planning requirements for transportation by rail. In the HHFT Final Rule, the applicability for routing requirements in § 172.820 were revised to require that any rail carrier transporting an HHFT comply with the additional safety and security planning requirements for transportation by rail. The routing requirements adopted in the HHFT Final Rule are related to the NPRM, as the final rule requirements will create a tiered approach to information sharing; whereas fusion centers will continue to act as the focal point for risk analysis information deemed SSI in § 172.820, SERCs and TERCs will actively be provided with non-sensitive security information in the HHFT notification that can aid in emergency preparedness and community awareness in § 174.312.

The universe of affected entities for the information sharing requirements is different than the number of entities affected under the comprehensive response plan requirement. The applicability of this requirement is derived from the information published in the HHFT Final Rule. Specifically, the definition of an HHFT and the information sharing portion of the routing requirements are related to the NPRM. The number of small entities impacted under this requirement is different from the number of entities impacted under the comprehensive OSRP requirement due to the different applicability of these two requirements. In particular, the comprehensive OSRP requirement applies to HHFTs transporting crude oil (and potentially other petroleum oils), while the information sharing requirement applies to HHFTs transporting both crude oil and ethanol (and potentially other Class 3 flammable liquids). As described under the impact on the small entities section with the routing requirements in the HHFT Final Rule, there are 160 affected small entities under the routing requirements. Thus, the requirement in this final rule could potentially affect 160 small railroads transporting flammable liquids in HHFTs. Therefore, this rule would impact 27.6 percent of the universe of 579 small railroads.

Again the Agency was unable to identify data that would enable us to adjust the number of entities affected in the interim between the NPRM and final rule.

(5) A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

For a thorough presentation of cost estimates, please refer to the draft RIA, which has been placed in the docket for this rulemaking. PHMSA is addressing below the two requirements areas in this final rule, Oil Spill Response Plans and Information Sharing.

#### (A) Oil Spill Response Plans

This rule modernizes the requirements by changing the applicability for comprehensive oil spill response plans and clarifying the comprehensive plan requirements. The final rule expands the applicability of comprehensive OSRPs to railroads transporting a single train of 20 or more loaded tank cars of liquid petroleum oil in a continuous block or a single train carrying 35 or more loaded tank cars of liquid petroleum oil throughout the train consist. These railroads, that are currently required to develop a basic plan, are now required to develop a comprehensive plan.

PHMSA describes below the impact on the small railroads that would be required under the final rule which requires any railroad carrying 20 or more tank cars of liquid petroleum oil in a continuous block or 35 such cars on a single train to submit a comprehensive OSRP. The total cost estimate with the requirements for small railroads is conservative, when compared to the cost estimates of the other several alternatives evaluated by PHMSA. PHMSA evaluated several alternatives related to the threshold values for the universe of affected entities that would be required to submit a comprehensive response plan.<sup>47</sup> For additional information about the development of these cost estimates, the specific differences between a basic and comprehensive OSRP including the estimated cost per railroad by railroad class please refer to the final RIA, which has been placed in the docket for this

<sup>47</sup> Under each of these alternatives, the number of Class I and Class II railroads affected by the proposed thresholds does not change. However, the number of Class III railroads that would be subject to the proposed rule ranges from 55 to 20 railroads. Based on evaluation of the 2013 Waybill Sample data and in consultation with the FRA, PHMSA determined that 55 small railroads are the largest number of small railroads that is subject to the proposed option requirements. Please, refer to the draft RIA for additional information regarding the number of impacted entities under the other several alternatives.

rulemaking. For determining the entities that would be affected by the required threshold, PHMSA used the definition HHFT from the HHFT Final Rule.<sup>48</sup> PHMSA narrowed the affected entities to only include railroads that transported crude oil and, in consultation with FRA, revised the estimated number of Class III carriers that would be subject to the rulemaking. Based on this assessment, PHMSA estimates there are 73 railroads (7 Class I, 11 Class II, and 55 Class III) that would be subject to this final rule.

*I. Core Plan:* A core plan includes an information summary, as adopted in § 130.105, and any components which do not change between response zones.

*II. Response Zone Appendix:* For each response zone, a railroad must include a response zone appendix to provide the information summary, as required in § 130.120, and any additional components of the plan specific to the response zones.

In addition, the final rule requires plan holders to identify an OSRO, provided through a contract or other approved means, to respond to a worst-case discharge within 12 hours.

PHMSA has identified several categories of costs related to the development and implementation of a comprehensive response plan. Those costs include the following: Plan development, submission, and maintenance; contract fees for designating an OSRO; training and drills; and plan review and approval. For additional information about the development of these cost estimates, please refer to the draft RIA, which has been placed in the docket for this rulemaking.

As noted in section 4 of this FRFA, approximately 55 small railroads carry crude oil in train consists large enough that they would potentially be affected by this rule.

PHMSA considers the average annual cost per railroad relevant for the purposes of this analysis in addition to presenting first year and subsequent year cost per railroad due to the nature of frequency of requirements with the development of a comprehensive plan, which varies between annual and every five years. The total undiscounted cost with the plan for the small railroads is \$15,221,806 over the ten-year period of the analysis. PHMSA estimates the total cost to each small railroad to be \$51,020 in the first year and an annual average cost of \$25,082 in subsequent years, taking into account the costs growing

<sup>48</sup> 80 FR 26643–26750 (May 8, 2015).

with increases in real wages.<sup>49</sup> Small railroads have annual operating revenues that range from \$3 million to \$20 million. A recent publication on from the ASLRRA states that average freight revenue for Class III railroads is \$4.75 million per year.<sup>50</sup> Thus, the costs associated with this requirement amount to roughly one percent or less of the railroad's annual operating revenue (in the initial year when costs are highest the amount is 1.07 percent of average annual revenue, and falls to an average of 0.53 percent in subsequent years and is 0.58 percent for the full ten year analysis period, assuming revenue is roughly stable at \$4.75 million over the analysis period). PHMSA realizes that some small railroads will have lower annual revenue than \$4.75 million. However, PHMSA is confident that this estimate of total cost per small railroad provides a good representation of the cost applicable to small railroads, in general.

In conclusion, PHMSA believes that although some small railroads will be directly impacted, the impact will amount to roughly one percent or less of an average small railroad's annual operating revenue. PHMSA plans to publish a Compliance Guide to explain the regulations to small businesses.

(B) Information Sharing

In response to the FAST Act and DOT's commitment to codifying the Order involving information sharing, in

this final rule we are adding new information sharing provisions to the additional safety and security planning requirements for transportation by rail in a new § 312. As discussed previously, § 172.820(g) provides the requirements for rail carrier point of contact on routing issues for SSI. In this final rule we add § 174.312 to add additional information sharing requirements. A rail carrier of a HHFT as defined in § 171.8 of this subchapter must provide the following notification to SERC, TERC, or other appropriate state delegated entities in which it operates. Information required to be shared must consist of the following:

- A reasonable estimate of the number of affected HHFTs that are expected to travel, per week, through each county within the state.
- The routes over which the affected trains will be transported.
- A description of the materials shipped and applicable emergency response information required by subparts C and G of part 172 of this subchapter.
- At least one point of contact at the railroad (including name, title, phone number and address) responsible for serving as the point of contact for the SERC, TERC, and relevant emergency responders related to the railroad's transportation of affected trains.
- The information summary elements (e.g. response zone description and contact information for qualified individuals) for the comprehensive oil

spill response plan required by § 130.120(c), when applicable.

- Railroads must update notifications made under § 174.312 for changes in volume greater than 25%.
- Copies of railroad notifications made under § 174.312 must be made available to DOT upon request.

Approximately 160 small railroads carry crude oil and ethanol in train consists large enough that they would potentially be affected by this rule. PHMSA estimates the total cost of information sharing to each small railroad to be \$7,758 in the first year and \$2,365 for subsequent years, with costs growing with increases in real wages.<sup>51</sup>

Small railroads' annual operating revenues range from \$3 million to \$20 million. A recent publication on from the ASLRRA states that average freight revenue for Class III railroads is \$4.75 million per year.<sup>52</sup> One percent of average annual revenue per small railroad is \$47,500. Thus, the costs associated with this requirement amount to less than one percent of the railroad's annual operating revenue. PHMSA realizes that some small railroads will have lower annual revenue than \$4.75 million. However, PHMSA is confident that this estimate of total cost per small railroad provides a good representation of the cost applicable to small railroads, in general.

Total Burden on Small Entities

TABLE 7—SUMMARY UNDISCOUNTED ANNUAL BURDEN ON CLASS III RAILROADS

Requirement area	Number of impacted small railroads	Year 1 cost per small railroad—undiscounted	Average annual cost in subsequent years per small railroad—undiscounted
Oil Spill Response Plans .....	55	\$51,020	\$25,082
Information Sharing .....	160	7,758	2,365
Total burden per small railroad (\$) .....	.....	58,778	27,447

In conclusion, PHMSA believes that although some small railroads will be directly impacted, the average impact will amount to less than one percent of an average small railroad's annual operating revenue.

This final rule is not expected to have a noticeable impact on the competitive position of the affected small railroads or on the small entity segment of the railroad industry as a whole. The small entity segment of the railroad industry faces little in the way of intramodal

competition. Small railroads generally serve as "feeders" to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for the larger railroads. They transport those cars over relatively short distances and then turn them over to the

<sup>49</sup>Costs per railroad are derived in the draft RIA, with costs for all Class III railroads divided by the 55 impacted railroads. The Year 1 total costs are calculated at \$2,806,125. The estimated Year 1 cost per railroad is then calculated at \$51,020 = \$2,806,125/55 small railroads. The average annual cost for the subsequent years is calculated at

\$1,379,520 = \$12,415,681/9 years. The estimated average annual cost per small railroad for the subsequent years is then calculated at \$25,082 = \$11,379,520/55 small railroads.

<sup>50</sup>Short Line and Regional Railroad Association.2017. "Short Line and Regional Railroad Facts and Figures."

<sup>51</sup>Please refer to the draft RIA for full description on how these costs per railroad are derived.

<sup>52</sup>Short Line and Regional Railroad Association. 2017. "Short Line and Regional Railroad Facts and Figures."

larger systems, which transport them relatively long distances to their ultimate destination, or for handoff back to a smaller railroad for final delivery. Although their relative interests do not always coincide, the relationship between the large and small entity segments of the railroad industry is more supportive and co-dependent than competitive.

It is also rare for small railroads to compete with each other. As mentioned above, small railroads generally serve smaller, lower density markets and customers. They tend to operate in markets where there is not enough traffic to attract or sustain rail competition, large or small. Given the significant capital investment required (to acquire right-of-way, build track, purchase fleet, etc.), new entry in the railroad industry is not a common occurrence. Thus, even to the extent the final rule may have an economic impact, PHMSA does not expect it to have an impact on the intramodal competitive position of small railroads.

(6) A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impacts on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

PHMSA is promulgating this final rule in response to recent train accidents involving the derailment of HHFTs. Shipments of large volumes of liquid petroleum oil pose a significant risk to life, property, and the environment. The Agency considered several alternatives that would lessen the impacts on small businesses, including: Applying the OSRP requirement to railroads operating on Class III track or higher, and applying the OSRP requirement to consists of 70 or more carloads of crude oil. While these alternatives would reduce the impact on small businesses relative to the alternative selected by PHMSA, the Agency determined that to ensure protection of the environment, life and property, OSRP requirements should be applied to all railroads operating trains hauling 20 or more carloads of crude oil in a block or 35 carloads throughout a train consist on all classes of track. Several commenters submitted comments stating that application of OSRPs should be based on the risk of a significant oil spill and not on entity

size. OSRPs will ensure a coordinated and prompt response to oil spills from trains at significant risk of spilling large quantities of oil. The other alternatives were rejected because they do not adequately address the risk of a worst-case discharge throughout the rail system.

(7) For a Covered Agency, as Defined in Section 609(d)(2), a Description of the Steps the Agency Has Taken To Minimize Any Additional Costs of Credit for Small Entities

PHMSA is not a covered entity.

#### G. Paperwork Reduction Act

PHMSA is requesting a revision to the information collection from the Office of Management and Budget (OMB) under OMB Control No. 2137-0628, entitled "Flammable Hazardous Materials by Rail Transportation." This final rule will result in an increase in annual burden and costs under OMB Control No. 2137-0628 due to proposed requirements pertaining to the creation of oil spill response plans and notification requirements for the movement of flammable liquids by rail.

Under the Paperwork Reduction Act of 1995, Public Law 104-13, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. Section 1320.8(d) of title 5 of the CFR requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information and recordkeeping requests.

This document identifies a revised information collection request that PHMSA will submit to OMB for approval based on the requirements in this final rule. PHMSA has developed burden estimates to reflect changes in this final rule. PHMSA received comments from industry stakeholders, API and AAR which suggested the burden hours estimated for plan development were too low. These commenters did not provide data or estimates to revise the data. To be responsive to commenters' concerns, PHMSA provided additional analysis and updated the estimates for the level of effort required to complete a response plan. This amounts to doubling the effort for core plan development and increasing by 12-fold the effort estimated to create a single response zone appendix. Additional information concerning OSRP plan development hours is available in the final RIA in the docket for this rulemaking.

#### Oil Spill Response Plans

PHMSA estimates that there will be approximately 73 respondents, based on a review of the number of railroad operators in existence that transport trains with 20 or more tank cars loaded with liquid petroleum oil in a continuous block or 35 or more tank cars loaded with liquid petroleum oil throughout the train. PHMSA estimates that it will take a rail operator 180 hours to produce a comprehensive oil spill response plan. In addition, the oil spill response plan will have an addendum for each response zone through which the applicable trains pass. It is estimated this addendum will take 180 hours per response zone. The comprehensive oil response plans also will require annual maintenance. This annual maintenance is expected to take 162 hours for Class I railroads, 54 hours for Class II railroads, and 36 hours for Class III railroads.

#### Initial Development of Oil Spill Response Plan

There are seven Class I railroads in existence that will be required to create a comprehensive oil spill response plan at 180 hours per plan resulting in 1,260 burden hours. Each Class I railroad is expected to have 8 response zones at 180 hours per response zone resulting in 10,080 burden hours. Combined this will result in a total of 11,340 burden hours Class I railroad oil spill response plans.

There are eleven Class II railroads in existence that will be required to create a comprehensive oil spill response plan at 180 hours per response plan resulting in 1,980 burden hours. Each Class II railroad is expected to have 2 response zones at 180 hours per zone resulting in 3,960 burden hours. Combined this will result in a total of 5,940 burden Class II railroad oil spill response plans.

There are 55 Class III railroads in existence that will be required to create a comprehensive oil spill response plan at 180 hours per response plan resulting in 9,900 burden hours. Each class III railroad is expected to pass through 1 response zones at 180 hours per zone resulting in 9,900 burden hours. Combined this will result in a total of 19,800 burden hours for Class III railroads oil spill response plans.

The total annual burden hours for all initial creation of oil spill response plans is 37,080 burden hours. There are no out of pocket expenses associated with this information collection. *Presented below is a summary of the numbers describe above:*

Class I—(7 Responses × 180 Hours per plan) + (7 responses × 8 Response Zones

× 180 hours per zone) = 11,340 burden hours.

Class II—(11 Response × 180 Hours per plan) + (11 response × 2 Response Zones × 180 hours per zone) = 5,940 burden hours.

Class III—(55 Response × 180 Hours per plan) + (55 responses × 1 Response Zone × 180 hours per zone) = 19,800 burden hours.

#### Oil Spill Response Plan Maintenance—Performed Annually

There are seven Class I railroads in existence that will be required to annually maintain their oil spill response plan at 162 hours per plan resulting in 1,134 annual burden hours.

There are eleven Class II railroads in existence that will be required to annually maintain their oil spill response plan at 54 hours per plan resulting in 594 annual burden hours.

There are 55 Class III railroads in existence that will be required to annually maintain their oil spill response plan at 36 hours per plan resulting in annual burden hours.

The total annual burden hours for annual updates of oil spill response plans is 3,708 burden hours. *Presented below is a summary of the numbers describe above:*

Class I—7 Responses × 162 Hours per response = 1,134 annual burden hours

Class II—11 Response × 54 Hours per response = 594 annual burden hours

Class III—55 response × 36 hours per response = 1,980 annual burden hours

Total Hours for Plan Maintenance = 3,708 Annual Burden Hours.

#### Notifications to Emergency Response Commissions

##### Initial Notification Response Plan

For the creation of the initial HHFT information sharing notification PHMSA estimates that there will be approximately 178 respondents based on a review of the number of railroad operators shipping class 3 flammable liquids. PHMSA estimates that it will take a rail operator 30 hours to create initial notification plan for the State Emergency Response Commissions (SERCs), 30 hours to create initial notification plan for the Tribal Emergency Response Commissions (TERCs), and 15 hours to create the initial plan for other state delegated agencies.

There are seven Class I railroads required to create SERC plans at 30 hours per response for a total of 210 burden hours. There are seven Class I railroads at 30 hours per response for 210 burden hours for TEPC plans. There are seven Class I railroads at 15 hours

per response for a total of 105 burden hours for other state delegated agency plans. This will result in an initial one year total burden of 525 hours for Class I railroads.

There are eleven Class II railroads at 30 hours per response resulting in 330 burden hours for SERC plans. There are eleven Class II railroads at 30 hours per response resulting in 330 burden hours for TERC plans. There are eleven Class II railroads at 15 hours per response resulting in 165 burden hours for other state delegated agency plans. This will result in an initial one year total burden of 825 hours for Class II railroads.

There are 160 Class III railroads at 30 hours per response resulting in 4,800 burden hours for SERC plans. There are 160 Class III railroads at 30 hours per response resulting in 4,800 burden hours for TERC plans. There are 160 Class III railroads at 15 hours per response resulting in 2,400 burden hours for other state delegated agency plans. This will result in an initial one year total burden of 12,000 hours for Class III railroads.

The total annual burden hours for initial notification plans is 13,350 burden hours.

*Presented below is a summary of the numbers describe above:*

Class I—(7 responses × 30 hours for SERC plan) + (7 responses × 30 hours for TERC plan) + (7 responses × 15 hours for other state delegated agency plan) = 525 burden hours.

Class II—(11 responses × 30 hours for SERC plan) + (11 responses × 30 hours for TERC plan) + (11 responses × 15 hours for other state delegated agency plan) = 825 burden hours.

Class III—(160 responses × 30 hours for SERC plan) + (160 responses × 30 hours for TERC plan) + (160 responses × 15 hours for other state delegated agency plan) = 12,000 burden hours.

#### Notification Response Plan Maintenance—Performed Annually

For the maintenance of the notification plan PHMSA estimates that there will be approximately 178 respondents based on a review of the number of railroad operators shipping class 3 flammable liquids. PHMSA estimates that it will take a rail operator 12 hours to maintain notification plan for the SERCs, 12 hours to maintain notification plan for TERCs, and 6 hours to maintain the plan for other state delegated agencies.

There are seven Class I railroads at 12 hours per response resulting in 84 burden hours for SERC plans. There are seven Class I railroads at 12 hours per response resulting in 84 burden hours for TERC plans. There are seven Class

I railroads at 6 hours per response resulting in 42 burden hours for other state delegated agency plans. This will result in an annual total burden of 210 hours for Class I railroads.

There are eleven Class II railroads at 12 hours per response resulting in 132 burden hours for SERC plans. There are eleven Class II railroads at 12 hours per response resulting in 132 burden hours for TERC plans. There are eleven Class II railroads at 6 hours per response resulting in 66 burden hours for other state delegated agency plans. This will result in an annual burden of 330 hours for Class II railroads.

There are 160 Class III railroads at 12 hours per response resulting in 1,920 burden hours for SERC plans. There are 160 Class III railroads at 12 hours per response resulting in 1,920 burden hours for TERC plans. There are 160 Class III railroads at 6 hours per response resulting in 960 burden hours for other state delegated agency plans. This will result in an annual burden of 4,800 hours for Class III railroads.

The total annual burden hours for annual maintenance of notification plans is 5,340 burden hours. There are no out of pocket expenses associated with this information collection.

*Presented below is a summary of the numbers describe above:*

Class I—(7 responses × 12 hours for SERC plan) + (7 responses × 12 hours for TERC plan) + (7 responses × 6 hours for other state delegated agency plan) = 210 burden hours.

Class II—(11 responses × 12 hours for SERC plan) + (11 responses × 12 hours for TERC plan) + (11 responses × 6 hours for other state delegated agency plan) = 330 burden hours.

Class III—(160 responses × 12 hours for SERC plan) + (160 responses × 12 hours for TERC plan) + (160 responses × 6 hours for other state delegated agency plan) = 4,800 burden hours.

#### Total Increased Burden

*OMB No. 2137-0682: Flammable Hazardous Materials by Rail Transportation.*

*Initial Year Annual Burden:*

*Initial Year Annual Responses: 740.*

*Initial Year Annual Burden Hours: 50,430.*

*Additional Cost Burden: \$0.*

*Subsequent Year Burden:*

*Annual Responses: 607.*

*Annual Burden Hours: 9,048.*

*Additional Cost Burden: \$0.*

Please direct your requests for a copy of the information collection to Steven Andrews or Shelby Geller, U.S. Department of Transportation, Pipeline & Hazardous Materials Safety

Administration (PHMSA), East Building, Office of Hazardous Materials Standards (PHH-12), 1200 New Jersey Avenue Southeast, Washington, DC 20590, Telephone (202) 366-8553.

*H. Executive Order 13211*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” (66 FR 28355; May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, advance NPRM, and NPRM) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

PHMSA has evaluated this action in accordance with Executive Order 13211. See the environmental assessment section for a more thorough discussion of environmental effects and the supply, distribution, or use of energy. PHMSA has determined that this action will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, PHMSA has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

*I. Unfunded Mandates Reform Act*

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995, Public Law 104-4. It does not result in costs of \$100 million or more, adjusted for inflation, to either State, local, or tribal governments, in the

aggregate, or to the private sector in any one year, and is the least burdensome alternative that achieves the objective of the rule. As such, PHMSA has concluded that the final rule does not require an Unfunded Mandates Act analysis.

*J. Executive Order 13609 and International Trade Analysis*

Under Executive Order 13609, “Promoting International Regulatory Cooperation,” 77 FR 26413 (May 4, 2012), agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96-39), as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international

standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards to protect the safety of the American public. We have assessed the effects of the final rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this rulemaking is consistent with Executive Order 13609 and PHMSA’s obligations under the Trade Agreement Act, as amended.

*K. Environmental Assessment*

PHMSA has analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321, *et seq.*), as amended; the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR parts 1500-1508); the U.S. Department of Transportation (DOT) Order 5610.C (September 18, 1979, as amended on July 13, 1982 and July 30, 1985), entitled “Procedures for Considering Environmental Impacts,” and other pertinent environmental regulations, Executive Orders, statutes, and laws for the consideration of environmental impacts of PHMSA actions. The agency relies on all authorities noted above to ensure that it actively incorporates environmental considerations into informed decision-making on all of its actions, including rulemaking. An “Environmental Assessment” (EA) and a “Finding of No Significant Impact” (FONSI) are available in the docket PHMSA-2014-0105 (HM-251B). PHMSA has concluded that this action would have a positive effect on the human and natural environments since these response plan and information requirements would mitigate environmental consequences of spills related to rail transport of petroleum oil and HHFTs by reducing the severity of incidents as follows:

Oil Spill Response Planning .....
Information Sharing .....

- Improved Response Times.
- Improved Communication/Defined Command Structure.
- Better Access to Equipment.
- Trained Responders.
- Improved Communication.
- Enhanced Preparedness.

*L. Regulatory Identification Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulator Actions (“Unified Agenda”). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. RIN 2137-AF08

can be used to cross-reference this action with the Unified Agenda.

*M. Privacy Act*

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to

[www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**List of Subjects**  
*49 CFR Part 107*

Administrative practice and procedure, Hazardous materials

transportation, Penalties, Reporting and recordkeeping requirements.

*49 CFR Part 130*

Incorporation by reference, Oil pollution, Packaging and containers, Reporting and recordkeeping requirements, Transportation.

*49 CFR Part 171*

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

*49 CFR Part 173*

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

*49 CFR Part 174*

Hazardous materials transportation, Incorporation by reference, Radioactive materials, Railroad safety.

In consideration of the foregoing, 49 CFR chapter I is amended as follows:

**PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES**

- 1. The authority citation for part 107 is revised to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 Section 4; Pub. L. 104–121 Sections 212–213; Pub. L. 104–134 Section 31001; Pub. L. 114–74 Section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97; 33 U.S.C. 1321.

- 2. Revise § 107.301 to read as follows:

**§ 107.301 Delegated authority for enforcement.**

Under re delegation from the Administrator of the Pipeline and Hazardous Materials Safety Administration, the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel exercise their authority for enforcement of the Federal hazardous material transportation law, Federal Water Pollution Control Act, this subchapter, and subchapters B and C of this chapter, in accordance with § 1.97 of this title.

- 3. Revise § 107.305(a) to read as follows:

**§ 107.305 Investigations.**

(a) *General.* In accordance with its delegated authority under part 1 of this title, the Associate Administrator may initiate investigations relating to compliance by any person with any provisions of this subchapter, subchapter B of this chapter, or subchapter C of this chapter, or any

special permit, approval, response plan, or order issued thereunder, or any court decree relating thereto. The Associate Administrator encourages voluntary production of documents in accordance with and subject to § 105.45 of this subchapter, and hearings may be conducted, and depositions taken pursuant to 49 U.S.C. 5121(a). The Associate Administrator may conduct investigative conferences and hearings in the course of any investigation.

\* \* \* \* \*

- 4. Revise § 107.309(a) to read as follows:

**§ 107.309 Warning letters.**

(a) The Associate Administrator may issue a warning letter to any person whom the Associate Administrator believes to have committed a probable violation of the Federal hazardous material transportation law, the Federal Water Pollution Control Act, or any provision of this subchapter, subchapter B of this chapter, subchapter C of this chapter, or any special permit issued thereunder.

\* \* \* \* \*

- 5. Amend § 107.311 by revising paragraphs (a) and (b)(1) to read as follows:

**§ 107.311 Notice of probable violation.**

(a) The Office of Chief Counsel may serve a notice of probable violation on a person alleging the violation of one or more provisions of the Federal hazardous material transportation law, the Federal Water Pollution Control Act, or any provision of this subchapter, subchapter B of this chapter, or subchapter C of this chapter, or any special permit, response plan, or order issued thereunder.

(b) \* \* \*

(1) A citation of the provisions of the Federal hazardous material transportation law, Federal Water Pollution Control Act, an order issued thereunder, this subchapter, subchapter B of this chapter, subchapter C of this chapter, or the terms of any special permit issued thereunder which the Office of Chief Counsel believes the respondent is violating or has violated.

\* \* \* \* \*

- 6. Amend § 107.329 by adding paragraph (c) to read as follows:

**§ 107.329 Maximum penalties.**

\* \* \* \* \*

(c) Any owner, operator, or person found to have violated a response plan or provision of 33 U.S.C. 1321(j), or any regulation or order issued thereunder, is subject to an administrative civil

penalty under 33 U.S.C. 1321(b)(6), as adjusted by 40 CFR 19.4.

**PART 130—OIL SPILL PREVENTION AND RESPONSE PLANS**

- 7. The authority citation for part 130 continues to read as follows:

**Authority:** 33 U.S.C. 1321; 49 CFR 1.81 and 1.97.

**§§ 130.1, 130.2, 130.3, 130.5, 130.11, and 130.21 [Designated as Subpart A]**

- 8. Designate §§ 130.1, 130.2, 130.3, 130.5, 130.11, and 130.21 as subpart A and add a heading for newly designated subpart A to read as follows:

**Subpart A—Applicability and General Requirements**

- 9. Amend § 130.2 by revising paragraphs (a) and (d) to read as follows:

**§ 130.2 Scope.**

(a) The requirements of this part apply to oil that is subject to a basic or comprehensive oil spill response plan in accordance with subparts B and C of this part.

\* \* \* \* \*

(d) The requirements in subpart C of this part do not apply to mobile marine transportation-related facilities (see 33 CFR part 154).

- 10. Amend § 130.5:

- a. By adding, in alphabetical order, definitions for “Adverse weather” and “Environmentally sensitive or significant areas”;
- b. By revising the definition for “Liquid” and removing the note following the definition;
- c. By adding, in alphabetical order, definitions for “Maximum potential discharge,” “Oil Spill Removal Organization,” and “On-Scene Coordinator”;
- d. By revising the definitions of “Person” and “Petroleum oil”;
- e. By adding, in alphabetical order, definitions for “Response activities,” “Response plan,” and “Response zone”; and
- f. By revising the definition of “Worst-case discharge”.

The additions and revisions read as follows:

**§ 130.5 Definitions.**

\* \* \* \* \*

*Adverse weather* means the weather conditions (e.g., ice conditions, temperature ranges, flooding, strong winds) that will be considered when identifying response systems and equipment to be deployed in accordance with a response plan.

\* \* \* \* \*

Environmentally sensitive or significant areas (ESA) means a "sensitive area" identified in the applicable Area Contingency Plan (ACP), or if no applicable, complete ACP exists, an area of environmental importance which is in or adjacent to navigable waters.

Liquid means a material, with a melting point or initial melting point of 20 °C (68 °F) or lower at a standard pressure of 101.3 kPa (14.7 psia). A viscous material for which a specific melting point cannot be determined must be subjected to the procedures specified in ASTM D4359-90 "Standard Test Method for Determining Whether a Material is Liquid or Solid" (IBR, see § 171.7 of this chapter).

Maximum potential discharge means a planning volume for a discharge from a motor vehicle or rail car equal to the capacity of the cargo container.

Oil Spill Removal Organization (OSRO) means an entity that provides response resources.

On-Scene Coordinator (OSC) means the Federal official pre-designated by the Administrator of the United States Environmental Protection Agency (EPA) or by the Commandant of the United States Coast Guard (USCG) to coordinate and direct Federal response under the National Contingency Plan (NCP) (40 CFR part 300, subpart D).

Person means an individual, firm, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body, as well as a department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government. This definition includes railroads.

Petroleum oil means any oil extracted or derived from geological hydrocarbon deposits, including oils produced by distillation or their refined products.

Response activities means the containment and removal of oil from navigable waters and adjoining shorelines, the temporary storage and disposal of recovered oil, or the taking of other actions as necessary to minimize or mitigate damage to the environment.

Response plan means a basic oil spill response plan meeting requirements of subpart B of this part or a comprehensive oil spill response plan meeting requirements of subpart C of this part. For comprehensive plans in subpart C, this definition includes both

the railroad's core plan and the response zone appendices, for responding, to the maximum extent practicable, to a worst-case discharge of oil or the substantial threat of such a discharge.

Response zone means a geographic area along applicable rail route(s), containing one or more adjacent route segments for which the railroad is required to plan for the deployment of, and provide, spill response capabilities meeting the planning requirements of § 130.130. The size, locations, and boundaries of the zone are determined and identified by the railroad after considering the existing location and organizational structure of each railroad's incident management team (IMT), including the availability and capability of response resources.

Worst-case discharge means "the largest foreseeable discharge in adverse weather conditions," as defined at 33 U.S.C. 1321(a)(24). The largest foreseeable discharge includes discharges resulting from fire or explosion. The worst-case discharge from a unit train consist is the greater of:

- (1) 300,000 gallons of liquid petroleum oil; or
- (2) 15 percent of the total lading of liquid petroleum oil transported within the largest unit train consist reasonably expected to transport liquid petroleum oil in a given response zone. The worst-case discharge calculated from tank cars exceeding 42,000 gallons is equal to the capacity of the cargo container.

§§ 130.22 through 130.29 [Added and Reserved]

■ 11. Add reserved §§ 130.22 through 130.29 to subpart A.

§§ 130.31 and 130.33 [Designate as Subpart B]

■ 12. Designate §§ 130.31 and 130.33 as subpart B and add a heading for newly designated subpart B to read as follows:

Subpart B—Basic Spill Response Plans

■ 13. Amend § 130.31 by revising the section heading and paragraphs (a) introductory text and (b) to read as follows:

§ 130.31 Basic spill response plans.

(a) No person may transport liquid petroleum oil in a packaging having a capacity of 3,500 gallons or more unless that person has a current basic written plan that:

\* \* \* \* \*

(b) A railroad with a comprehensive plan in conformance with the

requirements of subpart C of this part is not required to have a basic spill response plan for routes covered by the comprehensive plan.

\* \* \* \* \*

■ 14. Revise the heading of § 130.33 to read as follows:

§ 130.33 Basic response plan implementation.

\* \* \* \* \*

§§ 130.34 through 130.99 [Added and Reserved]

■ 15. Add reserved §§ 130.34 through 130.99 to subpart B.

■ 16. Add subpart C to read as follows:

Subpart C—Comprehensive Oil Spill Response Plans

Sec.

- 130.100 Applicability of comprehensive oil spill response plans.
- 130.105 Purpose and general format.
- 130.110 Consistency with the National Contingency Plan.
- 130.115 Consistency with Area Contingency Plans.
- 130.120 Information summary.
- 130.125 Notification procedures and contacts.
- 130.130 Response and mitigation activities.
- 130.135 Training.
- 130.140 Equipment testing and exercise procedures.
- 130.145 Plan review, update, and recordkeeping procedures.
- 130.150 Approval and submission procedures.

§ 130.100 Applicability of comprehensive oil spill response plans.

(a) Railroads must have current, written comprehensive oil spill response plans (COSRPs) meeting the requirements of this subpart for any route or route segments used to transport either of the following:

(1) Any liquid petroleum oil or other non-petroleum oil subject to this part in a quantity greater than 42,000 gallons (1,000 barrels) per packaging; or

(2) A single train carrying 20 or more loaded tank cars of liquid petroleum oil in a continuous block or a single train carrying 35 or more loaded tank cars of liquid petroleum oil throughout the train consist.

(i) Tank cars carrying liquid petroleum oil products not meeting the criteria for Class 3 flammable or combustible material in § 173.120 of this chapter, or containing residue as defined in § 171.8 of this chapter, are not required to be included when determining the number of tank cars transporting liquid petroleum oil in paragraph (a)(2) of this section.

(ii) [Reserved]

(b) The requirements of this subpart do not apply if the oil being transported is otherwise exempted per § 130.2(c).

(c) A railroad required to develop a response plan in accordance with this section may not transport applicable quantities of oil (including handling and storage incidental to transport) unless—

(1) The response plan is submitted, reviewed, and approved as required by § 130.150 except as described in paragraph (d) of this section; and

(2) The railroad is operating in compliance with the response plan.

(d) A railroad required to develop a response plan in accordance with this section may continue to transport oil without an approval from PHMSA provided that all of the following criteria are met:

(1) The railroad submitted a plan in accordance with the requirements of § 130.150(a) within the previous two years;

(2) The submitted plan includes the certification in § 130.130;

(3) The railroad is operating in compliance with the submitted plan; and

(4) PHMSA has not issued a final decision that all or part of the plan does not meet the requirements of this subpart.

#### § 130.105 Purpose and general format.

(a) Each railroad subject to this subpart must prepare and submit a plan, including resources and procedures, for responding, to the maximum extent practicable, to a worst-case discharge, and to a substantial threat of such a discharge, of oil. The plan must use and be consistent with the core principle of the National Incident Management System (NIMS) including the utilization of the Incident Command System (ICS).

(b) Each response plan must be formatted to include:

(1) *Core plan.* Response plans with more than one response zone must include a core plan containing an information summary required by § 130.120 and information that does not change between different response zones; and

(2) *Response zone appendix or appendices.* For each response zone included in the response plan, the response plan must include a response zone appendix that provides the information summary required by § 130.120 and any additional information that differs between response zones or is not included in the core plan. In addition, each response zone appendix must identify all of the following:

(i) A description of the response zone, including county(s) and state(s);

(ii) A list of route sections contained in the response zone, identified by railroad milepost or other identifier;

(iii) Identification of environmentally sensitive or significant areas per route section as determined by § 130.115; and

(iv) The location from which the Oil Spill Removal Organization will deploy, and the location and description of the response equipment required by § 130.130(c)(6).

(c) To meet the requirements of the response plan as required by § 130.100, a railroad may submit an applicable Annex(es) of an Integrated Contingency Plan (ICP). The Annex(es) must meet the minimum requirements of a Federal response plan required under this part. Guidance on the ICP is available from the National Response Team (<http://www.NRT.org>).

(d) To meet the requirements of the response plan as required by § 130.100, a railroad may submit a response plan that complies with a State law or regulation. The state plan must meet the minimum requirements of a Federal response plan required under this part and must include all of the following:

(1) An information summary as required by § 130.120;

(2) A list of the names or titles and 24-hour telephone numbers of the qualified individual(s) and at least one alternate qualified individual(s); and

(3) A certification and documentation that that railroad has identified and secured, through contract or other approved means, the private personnel and equipment necessary to respond to a worst-case discharge or a substantial threat of such a discharge.

#### § 130.110 Consistency with the National Contingency Plan.

(a) A railroad must certify in the response plan that it reviewed the NCP (40 CFR part 300) and that its response plan is consistent with the NCP.

(b) At a minimum, for consistency with the NCP, a comprehensive response plan must include all of the following:

(1) Demonstrate a railroad's clear understanding of the Incident Command System and Unified Command and the roles and responsibilities of the Federal On-Scene Coordinator;

(2) Include procedures to immediately notify the National Response Center; and

(3) Establish provisions to ensure safety at the response site.

#### § 130.115 Consistency with Area Contingency Plans.

(a) A railroad must certify for each response zone that it reviewed each applicable ACP (or Regional

Contingency Plan (RCP) for areas lacking an ACP).

(b) At a minimum, for consistency with the applicable ACP (or Regional Contingency Plan (RCP) for areas lacking an ACP), the comprehensive response plan must do all of the following:

(1) Address the removal of a worst-case discharge, and the mitigation or prevention of the substantial threat of a worst-case discharge, of oil;

(2) Identify environmentally sensitive or significant areas along the route, as defined in § 130.5, which could be adversely affected by a worst-case discharge, by reviewing and summarizing the applicable ACP or RCP;

(3) Incorporate appropriate strategies identified in applicable ACPs or RCPs, to protect environmentally sensitive or significant areas identified in paragraph (b)(2) of this section;

(4) Describe the responsibilities of the railroad and of Federal, State, and local agencies in removing a discharge and in mitigating or preventing a substantial threat of a discharge; and

(5) Identify the procedures to obtain any required Federal and State authorization for using alternative response strategies such as in-situ burning and/or chemical agents, as provided for in the applicable ACP and subpart J of 40 CFR part 300.

#### § 130.120 Information summary.

(a) Each person preparing a comprehensive response plan must include information summaries for the core plan and each response zone meeting the requirements of this section.

(b) The information summary for the core plan must include all of the following:

(1) The name and mailing address of the railroad;

(2) A listing and description of each response zone, including county(s) and State(s); and

(3) The name or title of the qualified individual(s) and alternate(s) for each response zone, with telephone numbers at which they can be contacted on a 24-hour basis.

(c) The information summary for each response zone appendix must include all of the following:

(1) The name and mailing address of the railroad;

(2) A description of the response zone, including county(s) and State(s);

(3) The name or title of the qualified individual(s) and alternate(s) for the response zone, with telephone numbers at which they can be contacted on a 24-hour basis;



(4) The type(s) of oil expected to be carried; and

(5) Determination of the worst-case discharge and supporting calculations.

(d) The information summary should be listed first, before other information in the plan, or clearly identified through the use of tabs or other visual aids.

**§ 130.125 Notification procedures and contacts.**

(a) The railroad must develop and implement notification procedures that include all of the following:

(1) Procedures for immediate notification of the qualified individual or alternate and immediate communications between that individual, and the appropriate Federal official and the persons providing personnel and equipment;

(2) A checklist of the notifications required under the response plan, listed in the order of priority;

(3) The primary and secondary communication methods by which notifications can be made;

(4) The circumstances and necessary time frames under which the notifications must be made; and

(5) The information to be provided in the initial and each follow-up notification.

(b) The notification procedures must include the names of the following individuals or organizations, with the ten-digit telephone numbers at which they can be contacted on a 24-hour basis:

(1) The National Response Center (NRC);

(2) Qualified individual, or alternative;

(3) Federal, State, and local agencies that the railroad expects to have pollution control responsibilities or provide pollution control support; and

(4) Personnel or organizations to notify for the activation of equipment and personnel resources identified in § 130.130.

**§ 130.130 Response and mitigation activities.**

(a) Each railroad must certify that it has identified and secured, by contract or other means, the private response resources in each response zone necessary to remove and control, to the maximum extent practicable, a worst-case discharge. The certification must be signed by the qualified individual or an appropriate corporate officer.

(b) Each railroad must identify and describe in the plan the response resources that are available to arrive onsite within 12 hours of the discovery of a worst-case discharge or the substantial threat of such a discharge. It

is assumed that resources can travel according to a land speed of 35 miles per hour, unless the railroad can demonstrate otherwise.

(c) Each plan must identify all of the following information for response and mitigation activities:

(1) Methods of initial discharge detection;

(2) Responsibilities of, and actions to be taken by, personnel to initiate and supervise response activities pending the arrival of the qualified individual or other response resources identified in the response plan that are necessary to ensure the protection of safety at the response site and to mitigate or prevent any discharge from the tank cars;

(3) The qualified individual's responsibilities and authority;

(4) Procedures for coordinating the actions of the railroad or qualified individual with the actions of the U.S. EPA or U.S. Coast Guard On-Scene Coordinator responsible for monitoring or directing response and mitigation activities;

(5) The Oil Spill Removal Organization's responsibilities and authority; and

(6) For each Oil Spill Removal Organization identified under this section, a listing adequate for the worst-case discharge listed in the plan of:

(i) Equipment, supplies, and personnel available, and the location thereof, including equipment suitable for adverse weather conditions and the personnel necessary to continue operation of the equipment and staff the Oil Spill Removal Organization during the response, in accordance with appendix C of 33 CFR part 154; or

(ii) In lieu of the listing of equipment, supplies, and personnel, a statement that the Oil Spill Removal Organization has been classified by the United States Coast Guard under 33 CFR 154.1035 or 155.1035.

**§ 130.135 Training.**

(a) A railroad must certify in the response plan that it has conducted training to ensure that:

(1) All railroad employees subject to the plan know—

(i) Their responsibilities under the comprehensive oil spill response plan; and

(ii) The name of, and procedures for contacting, the qualified individual or alternate on a 24-hour basis;

(2) All railroad employees with responsibilities as reporting personnel in the plan also know—

(i) The content of the information summary of the response plan;

(ii) The toll-free telephone number of the National Response Center; and

(iii) The notification process required by § 130.105; and

(3) The qualified individual or, as an alternative, the person acting in an Incident Commander role, may be trained in the Incident Command System at the Incident Commander Level.

(b) Employees subject to this section must be trained at least once every five years or, if the plan is revised during the five-year recurrent training cycle, within 90 days of implementation of the revised plan. New employees must be trained within 90 days of employment or change in job function.

(c) Each railroad must create and retain records of current training of each railroad employee engaged in oil spill response, inclusive of the preceding five years, in accordance with this section, for as long as that employee is employed and for 90 days thereafter. A railroad must make the employee's record of training available upon request, at a reasonable time and location, to an authorized official of the Department of Transportation. The record must include all of the following:

(1) The employee's name;

(2) The completion date of the employee's most recent training;

(3) The name and address of the person providing the training; and

(4) A certification statement that the designated employee has been trained, as required by this subpart.

(d) Nothing in this section relieves a person from the responsibility to ensure that all personnel are trained in accordance with other regulations. As an example, response personnel may be subject to the Occupational Safety and Health Administration (OSHA) standards for emergency response operations in 29 CFR 1910.120, including volunteers or casual laborers employed during a response who are subject to those standards pursuant to 40 CFR part 311. Hazmat employees, as defined in § 171.8 of this chapter, are subject to the training requirements in subpart H of part 172 of this chapter, including safety training.

**§ 130.140 Equipment testing and exercise procedures.**

(a) *Testing.* The plan must include a description of the methods used to ensure that equipment testing meets the manufacturer's minimum recommendations or equivalent.

(b) *Exercises.* A railroad must implement and describe an exercise program for COSRPs following the National Preparedness for Response Exercise Program (PREP) Guidelines, which can be found using the search function on the USCG's web page

(<https://homeport.uscg.mil>). These guidelines are also available from the TASC DEPT Warehouse, 33141Q 75th Avenue, Landover, MD 20875 (fax: 301-386-5394, stock number USCG-X0241). As an alternative, a railroad choosing not to follow PREP Guidelines must have an exercise program that is equivalent to PREP. The plan must include a description of the exercise procedures and programs the railroad uses to assess whether its response plan will function as planned, including the types of exercises and their frequencies.

(c) **Recordkeeping.** Railroads must keep records showing the exercise dates and times, and the after action reports that accompany the response plan exercises. Railroads must provide copies of these records to Department of Transportation representatives upon request.

**§ 130.145 Plan review, update, and recordkeeping procedures.**

(a) For purposes of this part, copy means a hardcopy or an electronic version. Each railroad must:

(1) Maintain a copy of the complete plan at the railroad's principal place of business;

(2) Provide a copy of the core plan and the appropriate response zone appendix to each qualified individual and alternate; and

(3) Provide a copy of the information summary to each dispatcher in response zones identified in the plan.

(b) Each railroad must include procedures to review the plan after a discharge requiring the activation of the plan in order to evaluate and record the plan's effectiveness.

(c) Each railroad must update its plan to address new or different conditions or information. In addition, each railroad must review its plan in full at least every 5 years from the date of the last approval.

(d) If changes to the plans are made, updated copies of the plan must be provided to every individual referenced under paragraph (a) of this section.

(e) If new or different operating conditions or information would substantially affect the implementation of the response plan, the railroad must immediately modify its plan to address such a change and must submit the change to PHMSA within 90 days in accordance with § 130.111. Examples of changes in operating conditions or information that would substantially affect a railroad's response plan are:

(1) Establishment of a new railroad route, including an extension of an existing railroad route, construction of a new track, or obtaining trackage rights over a route not covered by the

previously approved plan used for trains which require a comprehensive plan in accordance with § 130.100(a);

(2) The name of the Oil Spill Removal Organization;

(3) Emergency response procedures;

(4) The qualified individual;

(5) A change in the NCP or an ACP that has significant impact on the equipment appropriate for response activities (e.g., identification of ESAs as described by § 130.115);

(6) A change in the type of oil transported, if the type affects the required response resources (e.g., a change from crude oil to gasoline); and

(7) Any other information relating to circumstances that may affect full implementation of the plan.

(f) If PHMSA determines that a change to a response plan does not meet the requirements of this part, PHMSA will notify the operator of any alleged deficiencies, and provide the railroad with an opportunity to respond—including an opportunity for an informal conference—to any proposed plan revisions, as well as an opportunity to correct any deficiencies.

(g) A railroad that disagrees with a determination that proposed revisions to a plan are deficient may petition PHMSA for reconsideration within 30 days from the date of receipt of PHMSA's notice. After considering all relevant material presented in writing or at an informal conference, PHMSA will notify the railroad of its final decision. The railroad must comply with the final decision within 30 days of issuance, unless PHMSA allows additional time.

**§ 130.150 Approval and submission procedures.**

(a) Each railroad must submit an electronic copy in an industry standard format (e.g., Adobe Acrobat, Microsoft Word, or hypertext markup language (HTML)) of the COSRP required by this part. Copies of the response plan must be submitted via commercial carrier to: Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 2nd Floor, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. Alternatively, the railroad may arrange for secure electronic transfer of the file to PHMSA or email a copy of the plan to [PHMSA.OPA90@dot.gov](mailto:PHMSA.OPA90@dot.gov).

(b) If PHMSA determines that a response plan requiring approval does not meet all the requirements of this part, PHMSA will notify the railroad of any alleged deficiencies and provide the railroad an opportunity to respond—including the opportunity for an

informal conference—to any proposed plan revisions, as well as an opportunity to correct any deficiencies.

(c) A railroad that disagrees with PHMSA's determination that a plan contains alleged deficiencies may petition PHMSA for reconsideration within 30 days from the date of receipt of PHMSA's notice. After considering all relevant material presented in writing or at an informal conference, PHMSA will notify the operator of its final decision. The railroad must comply with the final decision within 30 days of issuance, unless PHMSA allows additional time.

(d) PHMSA will approve the response plan if PHMSA determines that the response plan meets all requirements of this part. PHMSA may consult with the U.S. Environmental Protection Agency (EPA) or the U.S. Coast Guard (USCG), allowing a Federal On-Scene Coordinator (OSC) to identify concerns regarding a plan's compliance with the statutory and regulatory requirements.

(e) If PHMSA receives a request from a Federal OSC to review a response plan, PHMSA will give a copy of the response plan to the Federal OSC provided that any requests for the plan are referred to PHMSA. PHMSA may consider Federal OSC comments on: Response techniques; protecting fish, wildlife and environmentally sensitive environments; and consistency with the ACP. PHMSA remains the approving authority for the response plan.

(f) A railroad may ask for confidential treatment in accordance with the procedures in § 105.30 of this chapter.

**§ 130.155 Implementation of comprehensive oil spill response plans.**

If, during transportation of oil subject to this subpart, a discharge of oil occurs—into or on the navigable waters; on the adjoining shorelines to the navigable waters; or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of, the United States—the person transporting the oil must implement the plan required by § 130.100 in a manner consistent with the National Contingency Plan, 40 CFR part 300, or as otherwise directed by the Federal On-Scene Coordinator.

**PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS**

■ 17. The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; Public Law 101–410 section 4; Public Law 104–134, section 31001; Public Law 114–74 section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97.

- 18. Amend § 171.7 by:
  - a. In paragraph (h) introductory text, removing “American Society for Testing and Materials” and adding in its place “ASTM International”; and
  - b. Redesignating paragraphs (h)(45) through (51) as (h)(46) through (52) and adding new paragraph (h)(45).  
The addition reads as follows:

§ 171.7 Reference material.

\* \* \* \* \*

(h) \* \* \*

(45) ASTM D7900–13<sup>e1</sup>, Standard Test Method for Determination of Light Hydrocarbons in Stabilized Crude Oils by Gas Chromatography, Approved December 1, 2013, into § 173.121.

\* \* \* \* \*

**PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS**

- 19. The authority citation for part 173 continues to read as follows:
 

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81, 1.96 and 1.97.

- 20. Amend § 173.121 by:
  - a. Removing the word “or” from the end of paragraph (a)(2)(iv);
  - b. Removing the period at the end of paragraph (a)(2)(v) and adding “; or” in its place; and
  - c. Adding paragraph (a)(2)(vi).  
The addition reads as follows:

§ 173.121 Class 3—Assignment of packing group.

(a) \* \* \*

(2) \* \* \*

(vi) Petroleum products containing known flammable gases—Standard Test Method for Determination of Light Hydrocarbons in Stabilized Crude Oils by Gas Chromatography (ASTM D7900) (IBR; see § 171.7 of this subchapter) where the initial boiling point is the temperature at which 0.5 weight percent is eluted when determining the boiling range distribution.

\* \* \* \* \*

**PART 174—CARRIAGE BY RAIL**

- 21. The authority citation for part 174 is revised to read as follows:
 

**Authority:** 49 U.S.C. 5101–5128; 33 U.S.C. 1321; 49 CFR 1.81 and 1.97.

- 22. Amend § 174.310 by:
  - a. Removing the semicolon at the end of paragraph (a)(1) and adding a period in its place;
  - b. Removing the “h” at the end of paragraph (a)(2); and
  - c. Adding paragraphs (a)(6) and (7).  
The additions read as follows:

§ 174.310 Requirements for the operation of high-hazard flammable trains.

(a) \* \* \*

(6) *Oil spill response plans.* The additional requirements for petroleum oil transported by rail in accordance with part 130 of of this chapter.

(7) *High-hazard flammable train (HHFT) information sharing notification for emergency response planning.* The additional requirements for notification in § 174.312.

\* \* \* \* \*

- 23. Add § 174.312 to read as follows:

§ 174.312 HHFT information sharing notification for emergency response planning.

(a) Prior to operating high-hazard flammable trains (HHFTs) as defined in § 171.8 of this subchapter, a railroad must provide the information described in paragraphs (b) and (c) to each State Emergency Response Commission (SERC), Tribal Emergency Response Commission (TERC), or other appropriate State-delegated agency in each State through which it operates HHFTs. The SERC, TERC, or other appropriate State-delegated agency shall further distribute the information to the appropriate local authorities at their request.

(b) At a minimum, the information railroads are required to provide to the relevant State or tribal agencies must include all of the following:

(1) A reasonable estimate of the number of HHFTs that the railroad expects to operate each week, through each county within the State or through each tribal jurisdiction;

(2) The routes over which the HHFTs will operate;

(3) A description of the hazardous materials being transported and all applicable emergency response information required by subparts C and G of part 172 of this subchapter;

(4) An HHFT point of contact: At least one point of contact at the railroad (including name or email address, title, phone number and address) who has knowledge of the railroad’s transportation of affected trains and who is responsible for serving as the point of contact for the SERC, TERC, or other State or tribal agency responsible for receiving the information; and

(5) If a route identified in paragraph (b)(2) of this section is additionally subject to the comprehensive spill plan requirements in subpart C of part 130 of this chapter, the information must include a description of the response zones (including counties and states) and the contact information for the qualified individual and alternate, as specified under § 130.120(c) of this chapter.

(c) The HHFT notification must be maintained and transmitted in accordance with all of the following requirements:

- (1) Railroads must update the notifications for changes in volume greater than 25%.
- (2) Notifications and updates may be transmitted electronically or by hard copy.
- (3) If the disclosure includes information that a railroad believes is security sensitive or proprietary and exempt from public disclosure, the railroad should indicate that in the notification.
- (4) Each point of contact must be clearly identified by name or title, and contact role (*e.g.*, qualified individual, HHFT point of contact) in association with the telephone number. One point of contact may fulfill multiple roles.
- (5) Copies of the railroad’s notifications made under this section must be made available to the Department of Transportation upon request.

Issued in Washington, DC, on February 12, 2019, under authority delegated in 49 CFR part 1.97.

**Drue Pearce,**  
*Deputy Administrator, Pipeline and Hazardous Materials Safety Administration.*

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