DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 130

[Docket Nos. HM–214 and PC–1; Amdt. No. 130–2]

RIN 2137–AC31

Oil Spill Prevention and Response Plans

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

ACTION: Final rule.

SUMMARY: This final rule implements the Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, and amends requirements that RSPA issued as an interim final rule on June 16, 1993. This rule adopts requirements for packaging, communication, spill response planning and response plan implementation intended to prevent and contain spills of oil during transportation. It requires comprehensive response plans for oil shipments in bulk packagings (i.e., cargo tanks (tank trucks), railroad tank cars, and portable tanks) in a quantity greater than 42,000 gallons and less detailed basic response plans for petroleum oil shipments in bulk packagings of 3,500 gallons or more.

DATES: Effective: June 17, 1996.

Applicability: Incorporation by reference of the publication listed in § 130.5 was authorized by the Director of the Federal Register on June 17, 1996.

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I. SUPPLEMENTARY INFORMATION:

A. Background

Statutory Authority and Delegations. This final rule implements two separate mandates under the Federal Water Pollution Control Act (FWPCA). Section 311(j)(1)(C) of the FWPCA, 33 U.S.C. 1321(j)(1)(C), directs the President to issue regulations ''establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.'' Section 311(j)(5), 33 U.S.C. 1321(j)(5), added to the FWPCA by the Oil Pollution Act of 1990 (OPA), Pub. L. 101–380, § 4202, 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.

On October 22, 1991, the President delegated to the Secretary of Transportation his authority to regulate transportation-related onshore facilities (among others) under §§ 1321(j)(1)(C) and 1321(j)(5). E.O. 12777, 56 FR 54757, §§ 2(b)(2), 2(d)(2). The terms ''transportation-related facility'' and ''non-transportation-related facility'' are defined in a December 18, 1971 Memorandum of Understanding (MOU) between the Department and the U.S. Environmental Protection Agency (EPA) establishing jurisdictional guidelines for implementing § 1321(j)(1)(C). 36 FR 24080; *reprinted at* 40 CFR part 112 App. ''Transportation-related facilities'' include:

> Highway vehicles and railroad cars which are used for the transport of oil in interstate or intrastate commerce and the equipment and appurtenances related thereto . . . . Excluded are highway vehicles and railroad cars and motive power used exclusively within the confines of a nontransportation related facility or terminal facility and which are not intended for use in interstate or intrastate commerce.

36 FR at 24081.

In 1992, the Secretary delegated to the RSPA Administrator his prevention authority under § 1321(j)(1)(C), 57 FR 8581 (Mar. 11, 1992), and his response plan authority under § 1321(j)(5), 57 FR 62483 (Dec. 31, 1992), with respect to motor carriers and railways. Subsequently, the authority to issue response plan requirements for motor carriers and railways transporting oil incident to transfer to or from vessels was redelegated by the Secretary to the Coast Guard Commandant. 58 FR 6193 (Jan. 27, 1993).

Accordingly, the jurisdiction of Part 130 extends to all oil transport by motor carriers and railways, with two exceptions. First, the rule does not apply to transportation exclusively within the confines of a non-transportation-related facility in a motor vehicle or railroad car dedicated to transportation within that facility. These motor vehicles and rail cars are considered non-transportation-related facilities under the 1971 DOT-EPA MOU, and are not within DOT jurisdiction. Response plan requirements applicable to these facilities have been promulgated by EPA under 40 CFR part 112. *See* 59 FR 34070 (July 1, 1994), (pet. for reconsideration filed August 12, 1994). Second, solely as to the § 1321(j)(5) ''comprehensive'' response plan requirements, set forth at § 130.31(b), the rule does not apply to motor vehicles and rail cars engaged in transportation incident to the transfer of oil to or from vessels. The term ''transportation incident to'' is to be read narrowly as encompassing only transportation that (1) is distinct from transportation on public ways and (2) solely facilitates transfer of the oil cargo to or from a vessel. Response plan requirements under 33 U.S.C. 1321(j)(5) for these transportation operations are within the authority of the Coast Guard and were promulgated by the Coast Guard under 33 CFR part 154. *See* 61 FR 7890 (Feb. 29, 1996).

RSPA's delegated authority under §§ 1321(j)(1)(C) and 1321(j)(5) for certain on-shore facilities (i.e., motor vehicles and rolling stock) is solely the authority to promulgate regulations. Spill response plans, when required to be submitted, are submitted to the Federal Highway Administration or the Federal Railroad Administration for motor carriers and railways, respectively. 57 FR 62483. Because RSPA's delegated authority does not provide for the review of response plans for portable tanks, the requirement in § 130.31(b)(6) to submit such plans to the Associate Administrator for Hazardous Materials Safety is removed.

The Coast Guard holds a delegation of authority to inspect motor carrier and rail operations, investigate potential violations of Part 130 (including determinations of whether a carrier's basic response plan conforms to requirements in § 130.31(a)), and enforce the regulations through administrative and civil penalties. *See* 33 U.S.C. 1321(b)(6), 1321(b)(7), 1321(m)(2); and 49 CFR 1.46(l); 57 FR 8581. Also, authority to seek an injunction to compel compliance with any provision of Part 130 has been delegated to the Coast Guard. E.O. 12777, 56 FR 54766, § 6(b); and 49 CFR 1.46(m), 57 FR 8581.

Section 1321(j)(5), as amended by OPA, also mandates the issuance of regulations requiring response plans for on-shore facility discharge of hazardous substances. RSPA will address this mandate in a future rulemaking.

Procedural History. On February 2, 1993, RSPA published an interim final rule (IFR–1) with a request for comments. IFR–1 implemented the mandates of 33 U.S.C. 1321(j)(1)(C) and 1321(j)(5) with respect to motor vehicles and railways by designating oil transported in bulk (i.e., in a packaging of greater than 119 gallons) as a ''hazardous material'' under section 104

of the Hazardous Materials Transportation Act, 49 App. U.S.C. 1803 (now codified at 49 U.S.C. 5103). This designation caused this category of oil transport to be subject to the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180, and met the § 1321(j)(1)(C) mandate by subjecting bulk oil transport to the packaging, transportation and emergency response requirements of the HMR. Additional response plan requirements applicable to oil transported in bulk packagings in a quantity greater than 42,000 gallons were incorporated into the HMR to meet the specific mandate of 33 U.S.C. 1321(j)(5).

Most oils, notably flammable and combustible petroleum oils, already are classed as hazardous materials. The greatest impact of IFR–1 was on those materials defined as oils under 33 U.S.C. 1321 but not already designated as hazardous materials, notably petroleum oils not meeting HMR criteria of flammability or combustibility (e.g., lube and cooling oils) and non-petroleum oils, including edible oils. Regulation of these previously undesignated oils was mandated not for their acutely hazardous properties, but for the environmental harm that their release into the environment could cause. Regulating transportation of environmentally sensitive materials by incorporating them into the HMR framework has its precedents in (1) the statutory designation of ''hazardous substances'' as hazardous materials at 42 U.S.C. 9656(a); and (2) the designation of ''marine pollutants'' as hazardous materials to implement treaty obligations under Annex III of the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978, 57 FR 52930 (Nov. 5, 1992). These regulatory actions address the environmental hazards of certain materials when transported in bulk by all modes of transportation.

Pursuant to 5 U.S.C. 553(b)(3)(B), RSPA issued an interim final rule (IFR–1) rather than a notice of proposed rulemaking on the basis of a finding that notice and public comment were impracticable and contrary to the public interest. Under § 4202(b)(4)(B) of the OPA, no facility required to prepare a response plan under the statute was permitted to handle, store or transport oil on or after February 18, 1993, unless the facility owner or operator had submitted its plan to the President. RSPA determined that an interim final rule was necessary in advance of the statutory deadline to establish response planning thresholds by regulation and provide guidance to facility owners and operators as to the applicability of the response plan requirements, so that they might avoid the prohibition of § 4202(b)(4)(B).

In the rule, RSPA requested comments and provided for a comment period that closed on April 5, 1993. On the basis of requests submitted to the docket, RSPA, on April 20, 1993, published an interim final rule reopening the comment period until June 3, 1993, and scheduling a public hearing for May 13, 1993. 58 FR 21260. Twenty-two representatives of interested parties presented their views at the public hearing. As of June 3, 1993, approximately 250 comments had been received from interested members of the public, governmental agencies and members of Congress.

After review of public comments, RSPA determined that significant changes in IFR–1 were warranted. Foremost, the comments revealed that a number of State and local jurisdictions use the Federal hazardous materials transportation law (Federal hazmat law) ''hazardous material'' designation as a ''trigger'' for a variety of legal requirements, many of which pertain to health and safety hazards, and do not logically apply to the types of hazards (specifically environmental hazards) posed by oils not already regulated under the HMR. In addition, the comments indicated that the hazardous material designation is a criterion in the transportation industry that determines arrangements concerning insurance, transportation rates, rail interlining and other matters. The comments suggested that designating bulk quantities of oil not already designated as a hazardous material potentially would cause the bulk transport of those oils to be subject to insurance unavailability and increased costs and dislocations not justified by the types of risks posed. Public comment also supported changes to the substance of the prevention regulations, including those concerning basic response plans.

Accordingly, on June 16, 1993, RSPA published a second interim final rule (IFR–2), removing the regulations from the HMR and placing them in Title 49 of the CFR under a newly established part 130. 58 FR 33302. In publishing IFR–2, RSPA sought to continue the timely and uninterrupted implementation of the FWPCA and avoid creating an undue hardship on the regulated community, with the potential to disrupt the sale and delivery of oil.

For high flashpoint petroleum oils, and those non-petroleum oils that were not previously subject to the HMR, IFR–2 also reduced the scope and complexity of the prevention requirements from that stipulated in IFR–1 by eliminating shipping paper, marking, labeling, operational, hazardous materials training and registration requirements. In addition, it raised the threshold for the application of prevention requirements from that established in IFR–1. Whereas under IFR–1 prevention requirements applied to all bulk oil transport, under IFR–2, those requirements only applied to transport of petroleum oil in packagings of 3,500 gallons or greater, and transport of non-petroleum oil in packagings containing a quantity greater than 42,000 gallons.

Spill response plan requirements pursuant to 33 U.S.C. 1321(j)(5) did not change. They continued to apply to transportation of both petroleum and non-petroleum oil in packagings containing a quantity greater than 42,000 gallons.

IFR–2 provided for a third comment period, which ended on July 30, 1993. A public meeting, allowing for dialogue between RSPA and interested members of the public, was held on June 28, 1993. All comments submitted to the docket through IFR–1 and IFR–2 comment periods, the public hearing and the public meeting have been considered in developing this final rule.

Effective Dates. As indicated above, OPA mandates that no facility required to prepare a comprehensive response plan may handle, store or transport oil on or after February 18, 1993, unless the facility owner or operator has submitted its plan to the President. Regulatory requirements in IFR–1 implementing this mandate were contained in § 171.5(c), but now appear in § 130.31(b). The current requirements pertaining to the comprehensive response plan are essentially unchanged from those published in IFR–1. No facility has requested regulatory relief from the deadline to prepare and file a comprehensive spill response plan, and the February 18, 1993 mandatory compliance date appears to have had no effect on routine operations of shippers or carriers. The requirements specified in § 130.31(b) remain effective since February 18, 1993.

RSPA has not granted requests from several commenters for an extension of the mandatory compliance date for oil spill prevention and containment requirements. Those requests ranged from a 60-day extension to give fleet operators ample time to prepare response plans to a one-year extension to give sufficient time for businesses to identify materials subject to Part 130 and comply with the requirements. The essential elements of this final rule are unchanged from the requirements

specified in IFR–2. In addition, the scope of requirements in IFR–2 is significantly less than that prescribed in IFR–1.

In consideration of the above, RSPA is denying all requests for an extension of the effective date.

B. Definitions and Scope of Requirements

The following discussion is provided in response to commenters' requests for clarification of the scope of Part 130:

''Onshore Facility''. In accordance with the definition of ''onshore facility'' at 33 U.S.C. § 1321(a)(10), § 130.2 (Scope) is revised to clearly except transportation of oil by aircraft or vessel. For consistency with the 1971 EPA–DOT MOU, § 130.2 is revised also to except oil transportation occurring exclusively within the confines of non-transportation-related or terminal facilities in vehicles not intended for use in interstate or intrastate commerce.

''Persons''. In this final rule, the definition of ''person'' at § 130.5 is revised for consistency with the FWPCA, 33 U.S.C. 1321(a)(7), 1323 and 1362(5). One commenter asked whether the rule applies to States. This change affirms that these rules apply to agencies of the Federal Government, as well as to those of States and their political subdivisions, and to non-commercial enterprises that offer oil for transportation or transport oil.

''Oil'' Includes Non-Petroleum Oil. Several commenters that ship or transport non-petroleum oil asserted that Congress, in enacting the OPA, did not intend that non-petroleum oil be included within the definition of ''oil'' subject to response planning requirements under the OPA.

The response planning requirements of the OPA were enacted as amendments to the FWPCA at 33 U.S.C. 1321(j). The meaning of the term ''oil'' as it appears in those requirements, accordingly, is governed by the FWPCA definition of oil applicable to § 1321(j):

> [O]il means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

33 U.S.C. 1321(a)(1). This definition was added to the FWPCA in 1972, Pub.L. 92–500, § 2, 86 Stat. 862, and has not been amended. In applying the definition for purposes of oil spill prevention, containment and removal programs under § 1321(j)(1), *see* 40 CFR 112, 33 CFR parts 153–156, EPA and the Coast Guard consistently have interpreted the term to encompass both petroleum and non-petroleum oil. *See* 40 FR 28849 (July 9, 1975) (EPA notice that it interprets ''oil'' under § 1321 to include non-petroleum oil, stating that the interpretation ''is neither a departure from prior agency views, nor a previously undisclosed position''). Non-petroleum oils fall within the plain meaning of the statutory language, and regulation of non-petroleum oils under 33 U.S.C. 1321 is in accord with the statutory purpose of affording broad protection to the navigable waters, shorelines and natural resources under Federal control.

''Oil'' Does Not Include Hazardous Substances. The definition of ''oil'' in § 130.5 is amended so as to be identical to the definition at § 1321(a)(1) of the FWPCA. A note is added to make clear, consistent with the FWPCA, that the requirements in Part 130 do not apply to materials that are hazardous substances as defined at 40 CFR part 116. The list of hazardous substances appears at 40 CFR part 116, Appendix.

''Petroleum Oil.'' Commenters suggested that the phrase ''derivatives thereof'' in the definition of ''petroleum oil'' is ambiguous and could be too broadly interpreted to include materials (such as ethylene glycol) that do not possess the properties of oil. RSPA agrees and has changed the definition of ''petroleum oil'' accordingly. The term ''fractions'' means oils produced by distillation or their refined products.

Requirements Limited to Transportation of ''Oil'' as Cargoes. Comments submitted by the U.S. Department of the Interior (DOI) contained a recommendation that the scope of these rules explicitly include oil contained in fuel tanks of diesel locomotives. The DOI cited two spills that resulted from train derailments and posed a potential threat of significant impact to natural resources. RSPA has not adopted this recommendation. RSPA notes that every railroad transporting oil in a tank car is required to prepare and maintain at least a basic spill response plan that may be employed to adequately address potential threats posed by oil contained in fuel tanks. Also, the limited scope of rules specified in Part 130 does not negate a railroad's responsibility for cleanup and liability, under the FWPCA, of oil discharged from a fuel tank.

Applicability to Oil in Liquid Form. In response to the numerous comments asking for clarification as to the applicability of these regulations to oil in its various forms, RSPA is amending § 130.2 (Scope) to provide that this rule applies to oil in the liquid form only. This provision is adopted so as to apply requirements for prevention, containment, and response planning in Part 130 to that form of oil which poses the greatest threat to the marine environment.

To assist shippers in determining if a material is a liquid, RSPA is adopting in this final rule a relatively simple test developed by the American Society for Testing and Materials in its standard ASTM D 4359–84, ''Standard Test Method for Determining Whether a Material is a Liquid or a Solid.'' Under this standard, many viscous materials, like number six diesel fuel and some grades of asphalt, are included in the definition of liquid. Conversely, on the basis of this standard, solidified tars and other oils having a relatively high melting point may not be subject to Part 130, nor will oil-containing materials like soybean meal and cotton seeds.

Mixtures and Solutions Containing Oil. A number of comments suggested that the rule exclude materials containing only a small proportion of oil in mixture or solution. RSPA's proposal at the June 28, 1993 public meeting to exclude mixtures and solutions in which oil is in a concentration by weight of less than 10 percent drew broad support from many persons commenting on IFR–2. This exclusion considers that the volume of oil contained in many products is at levels which pose no serious harm to the marine environment within the meaning of 33 U.S.C. 1321(j). This exception considers numerous comments to the docket, under IFR–1, that support adoption of an exception for oil in mixtures and solution.

RSPA's determination to apply a mixtures rule that uses a threshold value of 10 percent oil parallels its regulation under Federal hazmat law of hazardous substances that pose a threat to the marine environment. Since 1980, RSPA has provided an exception from application of the HMR for mixtures and solutions containing, in a concentration by weight of less than 10 percent, hazardous substances with an EPA-designated ''reportable quantity'' value of 5,000 pounds. This determination is specific to prevention, containment, and response planning requirements under Part 130. As noted above concerning application of the requirements in Part 130 to oil contained in integral fuel tanks of a locomotive, this action does not provide carriers with a general exception from responsibility for cleanup and liability under the FWPCA for the discharge of dilute mixtures containing oil. Therefore, we recommend that all carriers incorporate within their operations plans effective measures to prevent oil spills and to mitigate the effects of discharges of oil which do occur.

Container Residue. One commenter requested an exception for bulk packagings containing oil residue on the basis that the amount remaining in the packaging may be less than an unregulated quantity of oil in a non-bulk packaging. RSPA has not adopted that suggestion. The empty return of most bulk packagings is accomplished by the same carrier that transported the filled container. Thus, the relief available to the carrier is negligible, particularly when it would necessitate a requirement to determine and document the amount of residue. In addition, RSPA believes that an exception is not warranted because it is important that all closures remain properly secured, as required by § 130.21, even after unloading, as long as oil residue remains present.

C. Prevention and Containment Requirements

General. The bulk of oils transported by motor vehicle and railway, including petroleum oils like gasoline and fuel oil and some non-petroleum oils like turpentine, already are classed as hazardous materials under Federal hazmat law because of their threats to health and safety. RSPA's implementation of the § 1321(j)(1)(C) mandate to issue regulations to prevent and contain oil discharges in motor vehicle and railway transport proceeds from the fact that these oils, which also are the oils of greatest environmental concern, are subject to the comprehensive regulatory framework of the HMR. Transportation of these oils must meet detailed requirements in the HMR pertaining to specification packaging, hazard communication (marking, placarding, 24-hour emergency response telephone numbers, shipping papers, etc.), loading and unloading operations, and routing. *See generally* 49 CFR parts 171–180. In addition, each employee of a person offering for transportation or transporting an oil that is a hazardous material must receive training specific to the hazardous materials-related functions he or she performs. 49 CFR 172.700. Basic spill response planning and response plan implementation under § 1321(j)(1)(C) (in addition to comprehensive planning under § 1321(j)(5)) appropriately supplement these requirements. The record of safe transportation of these oils supports the conclusion that no additional spill prevention or containment requirements are necessary.

The volume of petroleum oil shipped by highway and rail not subject to the HMR is small by comparison with the total volume. Most of this oil is lubricating oil and includes an increasing amount of used oil intended for recycling. As noted by commenters, petroleum oil has toxic, solvent and physical properties that pose a threat to the marine environment which RSPA seeks to minimize through the prevention and containment requirements specified in Part 130. These regulations apply to petroleum oils offered for transportation or transported in bulk packagings having a capacity of 3,500 gallons or more. RSPA believes these requirements provide an adequate degree of protection for the marine environment at a cost commensurate with the risk posed by this class of oils.

The prevention requirements apply to non-petroleum oils, both because § 1321(j)(1)(C) mandates reasonable measures to prevent and contain discharges of these oils, and because their physical properties can harm the environment. On the basis of its review of reported incidents involving spills of non-petroleum oils on rail lines and public highways, RSPA determined that the frequency and volume of such discharges, generally does not support application of the rules and regulations in Part 130 to the same extent as required for petroleum oils. Thus, while the same prevention and containment requirements specified in Part 130 for petroleum oils pertain to non-petroleum oils, RSPA applies those rules at a higher threshold value (i.e., quantities greater than 42,000 gallons in a single packaging). These prevention and containment requirements complement the comprehensive response plan requirement triggered at the same quantity threshold.

Comments submitted to the docket suggest that some non-petroleum oil such as turpentine and tung oil possesses toxicity, solvent and physical properties warranting that its transportation be subject to spill prevention and containment requirements at the lower, 3,500-gallon threshold applicable to petroleum oil. While it may be appropriate to make regulatory distinctions among petroleum or non-petroleum oils to account for the different risks that particular oils present to the marine environment, the docket does not contain sufficient information on the properties of specific oils for RSPA to make substantive regulatory distinctions other than between petroleum and non-petroleum oil.

The rule adopts general definitions that establish three categories of non-petroleum oil: ''animal fat,'' ''vegetable oil'' and ''other non-petroleum oil.'' The last group includes, for example, synthetic oils, essential oils such as turpentine, and oils otherwise meeting the definition of an animal fat or a vegetable oil but specifically excluded from that category through rulemaking. This subcategorization of non-petroleum oils has no practical significance at this time, as all non-petroleum oils are subject to the same prevention and response planning requirements. It may provide an initial framework, however, for future RSPA rulemaking to refine the prevention and response planning regulations in Part 130.

Packaging. A number of commenters requested clarification regarding the packaging requirement for oil in bulk transport vehicles. Specifically, they questioned whether RSPA interprets § 130.21 to require DOT specification cargo tanks, such as the MC–306 commonly used for gasoline and other volatile liquids. Section 130.21 does not require specification containers. For those oils not subject to the HMR, a non-specification cargo tank that conforms to the basic requirements of § 130.21 is acceptable.

Basic Response Planning as an Element of Prevention Standards. Part 130 contains basic response plan requirements applicable to transportation of petroleum oil in a bulk packaging with a capacity of 3,500 gallons or more. The 3,500-gallon capacity threshold is the same threshold used to subject shippers and carriers to the registration requirement under Federal hazmat law, 49 U.S.C. 5108. Also, the Federal Highway Administration's financial responsibility requirement, 49 CFR part 387, applies to motor carriers that transport hazardous substances in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons.

In IFR–1, RSPA prescribed requirements for preparation of basic response plans as part of prevention and containment requirements applicable to shipments of oil in bulk packagings having a capacity greater than 119 gallons. Comments to the docket suggested that the 119-gallon threshold was unnecessarily low since, under conditions normally incident to transportation, a discharge of oil in that volume will not threaten the marine environment to an extent warranting mandatory spill response plan preparation.

On the basis of its review of those comments, RSPA revised the threshold for applying prevention and containment requirements, including the requirement to prepare a basic response plan, from all bulk packagings to those having a capacity of 3,500

gallons or more. The 3,500-gallon threshold was selected, in part, because of its use in related programs for emergency response and carrier liability. Specifically, registration requirements under Federal hazardous materials transportation law, 49 U.S.C. 5108, and Federal Highway Administration financial responsibility requirements for the transportation of hazardous substances, 49 CFR part 387, are keyed to the 3,500-gallon threshold.

Response Plan Implementation. With respect to the prevention, containment and cleanup of oil discharges, the scope of 33 U.S.C. 1321 extends to discharges into the navigable waters of the United States, the shorelines of those waters, and natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. 33 U.S.C. 1321(c)(1)(A); *see also* 33 U.S.C. 1321(b)(3) (prohibiting discharges to navigable waters, shorelines and natural resources). ''Navigable waters'' under this rule has the meaning given to it at 40 CFR 110.1. One commenter stated that response planning requirements should apply only to transportation where a discharge could reach one of these three areas. Because virtually all transportation of oil poses a potential risk to these areas, the response planning requirements of § 130.31 apply to the full range of transportation indicated in § 130.2. The § 130.33 requirement that the transporter implement its response plan to contain and remove a discharge, however, applies only when the discharge falls within the jurisdiction of § 1321, as described above and set forth at § 130.33.

RSPA recognizes that when a discharge has occurred, it may be difficult to determine immediately and with certainty that the discharge has not reached, or does not substantially threaten to reach, navigable waters, shorelines, or Federally controlled natural resources. Because the determination, for practical purposes, will be made by the Coast Guard (in the coastal zone) or EPA (in the inland zone), the operator is advised to begin to implement its response plan wherever a discharge occurs. In addition, Part 130 does not affect the applicability of other Federal, State, local or Indian tribe requirements that may impose response obligations on the transporter. Accordingly, while § 130.33 is binding only with respect to discharges that reach or threaten to reach navigable waters, shorelines or Federally controlled natural resources, RSPA strongly encourages transporters to take all appropriate response actions regardless of the location of a spill.

With respect to the comprehensive response plan at § 130.31(b), applicable to the transportation of more than 42,000 gallons of oil in a single packaging, § 1321(j)(5)(C)(i) mandates that a response plan shall be consistent with the National Contingency Plan (NCP). The requirement for a basic response plan for transportation of petroleum oil in bulk packagings of 3,500 gallons or greater (but in an amount not exceeding 42,000 gallons), is issued as a prevention and containment rule pursuant to § 1321(j)(1)(C). Nevertheless, 33 U.S.C. 1321(c)(3)(B) states that any action taken by a transporter in response to a discharge that reaches or threatens to reach navigable waters, shorelines or Federally controlled natural resources must be consistent with the NCP, or as directed by the President. (The President's authority is delegated, through the EPA Administrator and the Secretary of Transportation, to the Federal on-scene coordinator. E.O. 12777, 56 FR 54757, § 3.) Section 130.33 emphasizes that the transporter's obligation to implement its response plan does not excuse it from compliance with 33 U.S.C. 1321(c)(3)(B) or any other legal response obligations.

D. Response Planning Requirements Mandated by the OPA (33 U.S.C. 1321(j)(5))

Section 130.31(b) contains requirements for comprehensive response plans for oil transportation in bulk packagings in a quantity greater than 42,000 gallons (1,000 barrels) per packaging. Bulk packagings include cargo tanks (tank trucks), railroad tank cars and portable tanks. This section fulfills the FWPCA mandate for regulations requiring response plans to be prepared by an owner or operator of an onshore 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 or adjoining shorelines.'' 33 U.S.C. 1321(j)(5). The comprehensive response plan is more extensive than the basic response plan under § 1321(j)(l)(C); the comprehensive plan must meet the content and submission requirements of § 1321(j)(5)(C).

RSPA's identification of 42,000 gallons as the threshold for so-called ''substantial harm'' facilities received many comments. Those comments suggested alternate thresholds ranging from 10,000 to 1,000,000 gallons, as well as a finding that no motor vehicle or railway facility meets the ''substantial harm'' standard. Ten thousand gallons defines a major inland zone spill under the NCP. 40 CFR 300.5 (''Size classes of discharges''). The EPA selected one million gallons as the threshold for fixed ''substantial harm'' facilities under certain circumstances. 33 CFR 112.20(f)(1)(ii) (published at 59 FR 34099) (July 1, 1994).

None of the alternative thresholds suggested by commenters was accompanied by objective data that would support the threshold any commenter proposed. At the low end of the range, a standard of 250-barrel (10,500 gallon) vessel oil cargo capacity is applied by the U.S. Coast Guard for transfers of oil between vessels and mobile or fixed transfer facilities. The Coast Guard designated mobile transfer facilities as ''substantial harm'' facilities. It designated fixed facilities as facilities that could reasonably be expected to cause ''significant and substantial harm'' to the environment in the event of a discharge. 33 U.S.C. 1321(j)(5)(D). The response plan for a facility in this category, under § 1321(j)(5)(D), must be submitted to the Coast Guard for review and approval. A lower threshold is justified for these facilities by the fact that the probability of an oil spill to the marine environment is greater during oil transfer between land and a vessel than during transportation over railways and highways.

Conversely, the 1,000,000-gallon threshold adopted by EPA is contingent on several factors, including restrictive provisions that the facility may not transfer oil over water to or from vessels and that the facility's proximity to a public drinking water intake must be sufficiently distant to assure that the intake would not be shut down in the event of a discharge. Further, the EPA threshold refers to the capacity not of a single fixed storage tank, but of the entire facility, including barrels and drums stored at the facility. In summary, this example also is not analogous to hazards routinely encountered during transportation by railway and highway.

During the June 28, 1993 public meeting, the ''substantial harm'' threshold was discussed at length, but participants did not agree on what volume of oil reasonably could cause substantial harm to the marine environment. Also, the 42,000-gallon threshold is supported by a number of comments to the docket citing its use by the EPA in related sections of the Code of Federal Regulations. Consequently, RSPA believes its determination to use a threshold value of 42,000 gallons in a single packaging is appropriate and reasonable.

Regarding use of 42,000 gallons as the threshold for the comprehensive response plan requirement, the Association of American Railroads suggested that the rule discriminates against the railroad industry, as only it, and not the trucking industry, has the potential to transport that quantity of oil in a single packaging. The rule does not discriminate against the railroad industry. Rather, it operates differently as between the two industries due to the fact that the railroad industry is capable of transporting a larger quantity of oil in a single bulk packaging. The risk to the marine environment posed by oil in transport is proportional to the quantity of oil that could be discharged in an accident, and the rule, reasonably, regulates on that basis. Where other factors such as proximity to navigable waters gain in importance, both motor vehicle and railway transport are subject to comprehensive planning requirements. *See* 58 FR 7330 (Coast Guard interim final rule). RSPA notes again that, on the basis of available information, no rail carrier is transporting oil in a quantity greater than 42,000 gallons in tank cars.

E. Contents of Comprehensive and Basic Response Plans

Several commenters requested guidance for preparing spill response plans under § 130.31(a) and (b). The purposes of the response plan are to ensure: (1) that personnel are trained and available and equipment is in place to respond to an oil spill; and (2) that procedures are established before a spill occurs so that required notifications and appropriate response actions will follow expeditiously when there is a spill. The response plan, whether the basic plan under § 130.31(a) or the comprehensive plan under § 130.31(b), should be a complete and practical document that serves these purposes.

Neither the basic nor the comprehensive plan is required to address response on a vehicle- or location-specific basis. A nationwide, regional or other generic plan is acceptable, provided that it covers the range of spill scenarios that the owner or operator foreseeably could encounter. Thus, scenarios ranging from a minor discharge to a ''maximum potential discharge,'' § 130.31(a)(2), or a ''worst case discharge,'' § 130.31(b)(4), should be addressed, as well as the range of topographical and climatological conditions the owner or operator may face. The plan also should describe the response when the discharge results from, or is accompanied by, a complicating condition, such as explosion or fire.

The comprehensive plan should, at a minimum, specify and discuss the following:

(1) The range of response scenarios that foreseeably could occur.

(2) The qualified individual, the alternate qualified individual, and all other personnel with a role in spill response.

(3) The training, including drills, required for each of these persons.

(4) The equipment necessary for response to the maximum extent practicable in each of the identified scenarios.

(5) The means by which the availability of personnel and equipment will be ensured to respond to a spill to the maximum extent practicable.

(6) Governmental officials and others to be notified in the event of a spill, and the notification procedure to be followed.

(7) The means for communicating among responsible personnel and between personnel and officials during a response.

(8) The procedures to be followed during a response.

The basic response plan should address the same topics, with the exceptions that training and drills are not required for identified personnel and the owner or operator need not demonstrate by ''contract or other means'' the assurance of personnel and equipment availability. In this final rule, RSPA reiterates its intent that a basic response plan must identify private sector resources (personnel and equipment) that the carrier may immediately call upon to respond to a discharge of oil. This regulatory intent is clarified by amending § 130.31(a)(3) to require identification of ''private personnel and equipment available to respond to a discharge.''

The Independent Lubricant Manufacturers Association asked RSPA to provide model plans. RSPA does not believe this is necessary, but is allowing owners and operators the flexibility to develop plans that best address their circumstances. Following issuance of IFR–1, RSPA undertook an effort to develop a model plan, but subsequently learned that two industry associations were developing models that would be available to a large segment of the affected industries. Consequently, RSPA decided not to duplicate the private sector effort, and the project to develop a model plan was terminated. Owners and operators may wish to refer to the model plans developed by industry associations or they may refer to the model plan included by EPA at Appendix F of its July 1, 1994 final rule. 59 FR 34122.

Many owners and operators required to prepare and maintain a response plan under this rule also will be subject to EPA response plan requirements for fixed facilities, or Coast Guard response plan requirements for marine-related facilities. As RSPA stated in the preamble to the February 2, 1993 interim final rule, 58 FR 6866, it is intended that owners and operators subject to response planning requirements of both RSPA and another Federal agency be able to use response planning activities to fulfill both sets of requirements, with appropriate modification or supplementation as differences in spill scenarios dictate. Accordingly, RSPA will seek to maintain consistency with other agencies in its interpretation of terms and concepts contained in 33 U.S.C. 1321(j)(5). In addition, RSPA is including, in § 130.5, the following definitions:

Qualified individual is an individual familiar with the response plan, trained in his or her responsibilities in implementing the plan, and authorized, on behalf of the owner or operator, to initiate all response activities identified in the plan, to enter into response-related contracts and obligate funds for such contracts, and to act as a liaison with the on-scene coordinator and other responsible officials. The qualified individual must be available at all times the owner or operator is engaged in transportation subject to Part 130 (alone or in conjunction with an equally qualified alternate), must be fluent in English, and must have in his or her possession documentation of the required authority.

By contract or other means means (1) a written contract with a response contractor identifying and ensuring the availability of the necessary personnel or equipment within the shortest practicable time; (2) a written certification by the owner or operator that the necessary personnel or equipment can and will be made available by the owner or operator within the shortest practicable time; or (3) documentation of membership in an oil spill response organization that ensures the owner's or operator's access to the necessary personnel or equipment within the shortest practicable time.

Maximum extent practicable means the limits of available technology and the practical and technical limits on an owner or operator conducting response activities under a particular set of circumstances.

Worst-case discharge for an onshore facility is defined at 33 U.S.C. 1321(a)(24) as ''the largest foreseeable discharge in adverse weather

conditions.'' The largest foreseeable discharge from a motor vehicle or rail car is the capacity of the cargo container. The term ''maximum potential discharge,'' used in § 130.31(a), is synonymous with ''worst-case discharge.''

F. Federal Preemption

RSPA received two comments concerning the effect that the RSPA rule will have on the existing and future regulation of oil transportation by States and localities. Part 130 is issued under authority of 33 U.S.C. 1321(j)(1) (C) and 1321(j)(5). For this reason, it is subject to 33 U.S.C. 1321(o)(2), which states:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof 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.

This provision indicates that Federal regulation under 33 U.S.C. 1321 does not preempt, but rather accommodates, regulation by States and political subdivisions concerning the same subject matter. Thus, the establishment of oil spill prevention and response plan requirements in this rule will affect neither existing State and local regulation in the area, nor State and local authority to regulate in the future. RSPA has not received any comments from State or local governments on this issue.

The American Trucking Associations (ATA) requested that RSPA return to the approach abandoned in IFR–2 of designating oil transported in the relevant bulk quantity as a hazardous material, and issuing the final rule under joint authority of the FWPCA and Federal hazmat law. The ATA seeks in this way to give the rule the preemptive effect over non-Federal regulation that Federal hazmat law provides. Unlike the preservation of State and local authority under 33 U.S.C. 1321, Federal hazmat law provides for extensive preemption of non-Federal requirements. 49 U.S.C. 5125.

Promulgation of oil spill prevention and response planning regulations under both the FWPCA and Federal hazmat law would not necessarily result in the preemptive effect the commenter desires. Section 5125 provides for preemption of non-Federal requirements only to the extent those requirements are not otherwise authorized by Federal law. As cited above, 33 U.S.C. 1321(o)(2) explicitly preserves the authority of non-Federal jurisdictions to regulate oil spill prevention and response. Whether this constitutes Federal authority sufficient to insulate non-Federal requirements regulating in this area from Federal hazmat law preemption is a question that has not been decided and, as noted below, is not decided here.

More importantly, Federal oil transportation regulations should carry the preemptive force of Federal hazmat law only when they are issued to implement the mandate of that law.

As explained above, RSPA has determined not to exercise its authority under Federal hazmat law to regulate oil that does not meet the definition of any hazard-specific class under the HMR, and is not an elevated temperature material, a hazardous substance or a hazardous waste. Accordingly, Part 130 is issued solely under FWPCA authority, and the preemption standards of 49 U.S.C. 5125 do not apply.

The Chemical Waste Transportation Institute asks RSPA to clarify the extent to which 33 U.S.C. 1321(o)(2) authorizes non-Federal regulation of hazardous materials different from or additional to the HMR with respect to emergency response training, equipping vehicles with personal protective equipment, incident reporting, emergency drills, insurance, or response plan maintenance. Under 49 U.S.C. 5125, a non-Federal requirement that otherwise would be preempted is not preempted if it is otherwise authorized by Federal law. The commenter requests a finding that § 1321(o)(2) does not ''otherwise authorize'' non-Federal regulation of oils that are designated hazardous materials.

The commenter, in short, asks whether 33 U.S.C. 1321(o)(2) constitutes, under 49 U.S.C. 5125, an ''authorization'' of non-Federal regulation that otherwise would be preempted by the HMR. This question will become pertinent when a non-Federal requirement concerning oil spill prevention or response is challenged as contrary to the HMR. The rule issued today neither limits nor expands non-Federal authority to regulate oil transportation, and has no bearing on how § 1321(o)(2) is interpreted. The question the commenter poses, accordingly, is outside the scope of this rulemaking, and it is not appropriate for RSPA to decide it here.

Section 5125 provides for a formal administrative determination of preemption, on application of a party directly affected by a specific requirement of a State, State subdivision or Indian tribe. When an application is filed with RSPA concerning a specific non-Federal requirement regulating the transportation of oil designated as a hazardous material, and the jurisdiction maintaining that requirement claims that it is authorized by 33 U.S.C. 1321(o)(2), RSPA will examine the relationship between § 1321(o)(2) and 49 U.S.C. 5125.

G. Other Substantive Issues Addressed by Commenters

Linking FWPCA and Federal Hazmat Authority for Oils That Are Hazardous Materials. One commenter, a State agency, suggested that as to oils that already are designated hazardous materials, Part 130 be incorporated by reference into the HMR. According to the commenter, this would allow the State to enforce Part 130, with respect to oils designated as hazardous materials, directly through its existing regulatory structure. In addition, it would place the responsibility for enforcing Part 130, with respect to those oils, with the State agency responsible for enforcing the HMR as to those oils.

RSPA is not adopting this suggestion. Significant confusion could result from issuing Part 130 under the FWPCA as to certain oils and under both the FWPCA and Federal hazmat law as to certain other oils. In addition, the Federal authority to enforce oil transportation regulations under Federal hazmat law and those under the FWPCA lies with different agencies— in the former case, the Federal Railroad Administration, the Federal Highway Administration and RSPA and, in the latter, the Coast Guard and EPA. Incorporation by reference of some portion of Part 130 into the HMR would result in duplicative and potentially inconsistent enforcement, to the detriment of the regulated community. Under 33 U.S.C. 1321(o)(2), a State may adopt Part 130 verbatim, or may enact other laws with respect to oil spill prevention and response. The rule does not constrain the State's ability to regulate in this area or to determine what State body is to implement the regulations that are enacted.

Documentation to Accompany Shipments of Oil. Section 130.11(b) prohibits transporting oil subject to this part unless a readily available document indicating that the shipment contains oil is in the possession of the transport vehicle operator during transportation. This section drew comments from the Association of American Railroads and several railroad companies, contending that the requirement is burdensome and serves no purpose. They state that the predominant practice in the railroad industry is to generate commodity descriptions from a computerized Standard Transportation Commodity Code, but that system does not easily accommodate unique shipping paper information, especially for shipments

handled by several carriers. These commenters suggest that their response to any incident involving oil will be just as timely and appropriate absent the specific identification of each commodity that meets the definition of oil.

RSPA is retaining this requirement. It does not agree that the requirement is unnecessarily burdensome. Train crews currently carry a manifest that specifically identifies each car and its contents. Frequently the manifest is the only source of information available to first responders to an incident, and RSPA believes it is important that responders be able to immediately identify shipments of oil that potentially threaten the environment. RSPA emphasizes that this requirement can be met by an appropriate notation on currently used transportation documents. Thus, there is no need to create a new document.

The Association of American Railroads requests that the word ''knowingly'' be added between the words ''may'' and ''transport'' in § 130.11(b), so that a carrier would not be held responsible for identifying oil shipments unless the shipper has informed the carrier that the cargo presented for transport includes oil. The commenter states that the carrier depends on the shipper for commodity identification.

RSPA is not adopting this request. Sections 1321(b) (6) and (7) of 33 U.S.C. set forth the circumstances under which administrative and civil penalties may be levied for violation of Part 130. These sections do not provide that a carrier is subject to penalties for violating Part 130 only when it has knowledge of facts that bring it within the compass of the regulations. Rather, the statute imposes a strict liability standard, placing the burden on the carrier affirmatively to determine whether it is carrying cargo that subjects it to requirements under Part 130. Indeed, the change the commenter proposes, by excusing compliance with the regulation absent actual carrier knowledge that it was transporting oil, would encourage the carrier to remain ignorant of its cargo. This would not further the statutory goal of improving oil spill prevention and containment. Under § 130.11, the shipper must provide the carrier a document indicating that the shipment includes oil; at the same time, the carrier independently must take whatever steps it finds reasonable to satisfy itself that it either is or is not accepting oil for shipment.

In response to a question from a commenter, RSPA acknowledges that a shipper may use a Material Safety Data Sheet (MSDS) to notify a carrier that a shipment contains oil, and a carrier may use an MSDS to accompany a shipment during transportation. This acknowledgement presumes that the MSDS accurately and clearly identifies the material as an oil.

Several commenters requested clarification as to placing the ''oil'' notation on a hazardous materials shipping paper. If the proper shipping name or technical name of a hazardous material that meets the definition of ''oil'' does not reflect that it is an oil, then the word ''oil'' may be separately added or appear with the product name, trade name or other information associated with that material on the shipping paper in addition to required descriptions, consistent with 49 CFR 172.201(a)(4).

Finally, RSPA is adding a list of common shipping descriptions that it believes effectively communicate that the materials are oil, thereby precluding the need to specifically add the word ''oil'' to shipping documents. The list of common shipping names is added at § 130.11.

Requirements Based on Packaging Capacity vs. *Those Based on Volume.* Several comments suggested that the rule is inconsistent in applying basic response planning requirements and prevention and containment requirements to shipments of petroleum oil in packagings with a *capacity* of 3,500 gallons or larger and applying comprehensive response plan requirements, and prevention and containment requirements for non-petroleum oils, to shipments in a *volume* of more than 42,000 gallons in a single packaging.

Applying prevention and containment requirements for petroleum oil on the basis of the container capacity is warranted by the practical problems that would result from applying them on the basis of actual volume of oil present. Vehicles transporting petroleum oil in the volume range of 3,500 gallons typically make more than one stop in delivering the full cargo they are carrying. Determining the actual volume of oil present at any given time would require accurate flow metering devices capable of accounting for temperature variations. Further, Federal, State and local authorities conducting on-the-road enforcement inspections would be unable to determine whether the regulations applied to a given shipment absent a means to measure the volume of the cargo. RSPA expects that most petroleum oil cargo tanks and tank trucks with a capacity of 3,500 gallons or larger at some time will be used to transport 3,500 gallons or more of petroleum oil, so that the owner or operator will be required to prepare a basic response plan in any event. The burden of these vehicles' complying with packaging and communication requirements in those cases when they are carrying less than 3,500 gallons is small enough to justify the administratively simpler approach of basing the applicability of prevention and containment requirements on vehicle cargo capacity.

Conversely, oil shipments in single packagings of more than 42,000 gallons will be few and limited to railroad tank cars. Any shipment of this volume that does occur likely would be to a single consignee, so that in-transit volume measurements would not be necessary. Further, comprehensive response plan requirements under 33 U.S.C. 1321(j)(5) are addressed to oil transport that meets a specified (''substantial harm'') environmental risk threshold. RSPA's conclusion that oil volume is the relevant criterion in determining environmental risk makes it reasonable that the applicability of comprehensive response plan requirements depend on the volume of oil being transported in the tank car.

H. Interagency Coordination

In addition to RSPA's rulemakings in this docket (PC–1) and Docket PS–130, Response Plans for Onshore Oil Pipelines, three other Federal agencies recently have completed or presently are engaged in rulemaking to implement the spill response planning mandate of 33 U.S.C. 1321(j)(5) within their areas of jurisdiction. These Federal agencies are the U.S. Coast Guard (vessels and marine transportation-related facilities); the EPA (non-transportation-related onshore facilities); and the Department of the Interior's Minerals Management Service (DOI/MMS) (offshore oil production facilities). RSPA believes that the five sets of regulations should be consistent to the extent practicable, recognizing that the risk of and damage from spills from different types of facilities and vessels require that distinctions be made.

The importance of consistency among the regulations of the different agencies implementing § 1321(j) generally has been expressed in a September 10, 1993 letter to RSPA's Acting Administrator from the National Response Team (NRT). The NRT is responsible under the NCP for national coordination of oil spill response planning. 40 CFR 300.110. RSPA is the DOT representative on the NRT, and RSPA's Associate Administrator for Hazardous Materials Safety chaired the NRT Prevention Committee.

RSPA has met to discuss these issues with representatives of the USCG, EPA and MMS. The meetings have included participation by representatives of the trustees for natural resources managed or protected by the Departments of the Interior, Agriculture and Commerce. These meetings were informal sessions in which staff members of the interested agencies came together to discuss differences in regulations issued under the authority of 33 U.S.C. § 1321(j).

RSPA will continue to coordinate with the Coast Guard, EPA and MMS, as well as other member agencies of the NRT. In the future, RSPA may undertake rulemaking to consider modifications of the rule as a result of this coordination. In addition, RSPA may evaluate the adequacy of these rules and regulations in light of Area Contingency Plans (ACP's) prepared by representatives of Federal, State and local agencies. Under 33 U.S.C. 1321(j)(4)(C)(ii), each ACP shall describe the area covered by the plan, including the areas of specific economic or environmental importance that might be damaged by a discharge. Should it be determined that any of these specific environments may be inadequately protected against the threats posed by the transportation of oil in a motor vehicle or rail car, RSPA may reopen this docket to consider additional requirements for response planning, or spill prevention and containment, to address those threats. For example, RSPA could, through rulemaking, establish criteria and procedures for case-by-case designation of facilities subject to response planning requirements.

II. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget. The rule is considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of public and congressional interest. A regulatory evaluation is available for review in the docket.

B. Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. While this rule applies to numerous shippers and carriers of oil in bulk, some of whom are small entities, the spill prevention and response planning requirements contained herein will not result in a significantly adverse economic impact.

C. Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 12612 (''Federalism'') and does not have sufficient federalism impacts to warrant the preparation of a federalism statement.

D. Paperwork Reduction Act

Information collection requirements applicable to written oil spill response plans are unchanged in substance and amount of burden from those previously approved under Office of Management and Budget (OMB) control number 2137–0591 (extended to: June 30, 1996). RSPA will request reinstatement and revision of this approval from OMB and will display, through publication in the Federal Register, the valid control number upon approval by OMB. Public comment on this request was invited through publication of a Federal Register notice on March 5, 1996 (61 FR 8706). Under the Paperwork Reduction Act of 1995, no person is required to respond to a requirement for collection of information unless the requirement displays a valid OMB control number.

E. Regulation Identifier Number (RIN)

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

List of Subjects in 49 CFR part 130

Incorporation by reference, Oil, Response plans, Reporting and recordkeeping requirements, Transportation.

In consideration of the foregoing, 49 CFR part 130 is revised to read as follows:

PART 130—OIL SPILL PREVENTION AND RESPONSE PLANS

Sec.

130.1 Purpose.
130.2 Scope.
130.3 General requirements.
130.5 Definitions.
130.11 Communication requirements.
130.21 Packaging requirements.
130.31 Response plans.
130.33 Response plan implementation.

Authority: 33 U.S.C. 1321.

§ 130.1 Purpose.

This part prescribes prevention, containment and response planning requirements of the Department of Transportation applicable to transportation of oil by motor vehicles and rolling stock.

§ 130.2 Scope.

(a) The requirements of this part apply to—

(1) Any liquid petroleum oil in a packaging having a capacity of 3,500 gallons or more; and

(2) Any liquid petroleum or non-petroleum oil in a quantity greater than 42,000 gallons per packaging.

(b) The requirements of this part have no effect on—

(1) The applicability of the Hazardous Materials Regulations set forth in Subchapter C of this chapter; and

(2) The discharge notification requirements of the United States Coast Guard (33 CFR part 153) and EPA (40 CFR part 110).

(c) The requirements of this part do not apply to—

(1) Any mixture or solution in which oil is in a concentration by weight of less than 10 percent.

(2) Transportation of oil by aircraft or vessel.

(3) 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.

(4) 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).

(d) The requirements in § 130.31(b) of this part do not apply to mobile marine transportation-related facilities (see 33 CFR part 154).

§ 130.3 General requirements.

No person may offer or accept for transportation or transport oil subject to this part unless that person—

(a) Complies with this part; and

(b) Has been instructed on the applicable requirements of this part.

§ 130.5 Definitions.

In this subchapter: *Animal fat* means a non-petroleum oil, fat, or grease derived from animals, not specifically identified elsewhere in this part.

Contract or other means is:

(1) A written contract with a response contractor identifying and ensuring the availability of the necessary personnel or equipment within the shortest practicable time;

(2) A written certification by the owner or operator that the necessary

personnel or equipment can and will be made available by the owner or operator within the shortest practicable time; or

(3) Documentation of membership in an oil spill response organization that ensures the owner's or operator's access to the necessary personnel or equipment within the shortest practicable time.

EPA means the U.S. Environmental Protection Agency.

Liquid means a material that has a vertical flow of over two inches (50 mm) within a three-minute period, or a material having one gram or more liquid separation, when determined in accordance with the procedures specified in ASTM D 4359–84, ''Standard Test Method for Determining Whether a Material is a Liquid or a Solid,'' 1990 edition, which is incorporated by reference.

Note: This incorporation by reference has been approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A copy may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the Dockets Unit, Room 8421, DOT headquarters building, 400 7th St. SW, Washington, DC 20590 or at the Office of the Federal Register, 800 North Capitol St. NW, Room 700, Washington, DC.

Maximum extent practicable means the limits of available technology and the practical and technical limits on an owner or operator of an onshore facility in planning the response resources required to provide the on-water recovery capability and the shoreline protection and cleanup capability to conduct response activities for a worst-case discharge of oil in adverse weather.

Non-petroleum oil means any animal fat, vegetable oil or other non-petroleum oil.

Oil means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

Note: This definition does not include hazardous substances (see 40 CFR part 116).

Other non-petroleum oil means a non-petroleum oil of any kind that is not an animal fat or vegetable oil.

Packaging means a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the packaging requirements of this part. A compartmented tank is a single packaging.

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.

Petroleum oil means any oil extracted or derived from geological hydrocarbon deposits, including fractions thereof.

Qualified individual means an individual familiar with the response plan, trained in his or her responsibilities in implementing the plan, and authorized, on behalf of the owner or operator, to initiate all response activities identified in the plan, to enter into response-related contracts and obligate funds for such contracts, and to act as a liaison with the on-scene coordinator and other responsible officials. The qualified individual must be available at all times the owner or operator is engaged in transportation subject to part 130 (alone or in conjunction with an equally qualified alternate), must be fluent in English, and must have in his or her possession documentation of the required authority.

Transports or Transportation means any movement of oil by highway or rail, and any loading, unloading, or storage incidental thereto.

Vegetable oil means a non-petroleum oil or fat derived from plant seeds, nuts, kernels or fruits, not specifically identified elsewhere in this part.

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 from a motor vehicle or rail car is the capacity of the cargo container. The term ''maximum potential discharge,'' used in § 130.31(a), is synonymous with ''worst-case discharge.''

§ 130.11 Communication requirements.

(a) No person may offer oil subject to this part for transportation unless that person provides the person accepting the oil for transportation a document indicating the shipment contains oil.

(b) No person may transport oil subject to this part unless a readily available document indicating that the shipment contains oil is in the possession of the transport vehicle operator during transportation.

(c) A material subject to the requirements of this part need not be specifically identified as oil when the shipment document accurately describes the material as: aviation fuel, diesel fuel, fuel oil, gasoline, jet fuel, kerosene, motor fuel, or petroleum.

§ 130.21 Packaging requirements.

Each packaging used for the transportation of oil subject to this part must be designed, constructed, maintained, closed, and loaded so that, under conditions normally incident to transportation, there will be no release of oil to the environment.

§ 130.31 Response plans.

(a) After September 30, 1993, no person may transport oil subject to this part unless that person has a current basic written plan that:

(1) Sets forth the manner of response to discharges that may occur during transportation;

(2) Takes into account the maximum potential discharge of the contents from the packaging;

(3) Identifies private personnel and equipment available to respond to a discharge;

(4) Identifies the appropriate persons and agencies (including their telephone numbers) to be contacted in regard to such a discharge and its handling, including the National Response Center; and

(5) For each motor carrier, is retained on file at that person's principal place of business and at each location where dispatching of motor vehicles occurs; and for each railroad, is retained on file at that person's principal place of business and at the dispatcher's office.

(b) After February 18, 1993, no person may transport an oil subject to this part in a quantity greater than 1,000 barrels (42,000 gallons) unless that person has a current comprehensive written plan that:

(1) Conforms with all requirements specified in paragraph (a) of this section;

(2) Is consistent with the requirements of the National Contingency Plan (40 CFR part 300) and Area Contingency Plans;

(3) Identifies the qualified individual having full authority to implement removal actions, and requires immediate communications between that individual and the appropriate Federal official and the persons providing spill response personnel and equipment;

(4) Identifies, and ensures by contract or other means the availability of, private personnel (including address and phone number), and the 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;

(5) Describes the training, equipment testing, periodic unannounced drills, and response actions of facility personnel, to be carried out under the plan to ensure the safety of the facility

and to mitigate or prevent the discharge, or the substantial threat of such a discharge; and

(6) Is submitted, and resubmitted in the event of any significant change, to the Federal Railroad Administrator (for tank cars), or to the Federal Highway Administrator (for cargo tanks) at 400 Seventh Street SW, Washington, DC 20590–0001.

(Approved by the Office of Management and Budget under control number 2137–0591)

§ 130.33 Response plan implementation.

If, during transportation of oil subject to this part, a discharge occurs— into or on the navigable waters of the United States; 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 shall implement the plan required by § 130.31, in a manner consistent with the National Contingency Plan, 40 CFR part 300, or as otherwise directed by the Federal on-scene coordinator.

Issued in Washington, DC on June 3, 1996, under authority delegated in 49 CFR part 1.

D.K. Sharma,

Administrator, Research and Special Programs Administration .

[FR Doc. 96–14611 Filed 6–14–96; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Chapter VI

[Docket No. 960606161–6161–01; I.D. 051796E]

RIN 0648–XX63

Limit on Fishery Management Plan Development; Public Law 104–134; Interpretation

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interpretation.

SUMMARY: NMFS is issuing this document to provide its interpretation of the limitations placed on the use of appropriated funds by the Department of Commerce and Related Agencies Appropriations Act of 1996 (Act) for fiscal year 1996. The Act states that no appropriated funds may be used to develop or implement new fishery management plans (FMPs), FMP amendments, or regulations that create new individual fishing quota (IFQ), individual transferable quota (ITQ), or new individual transferable effort allocation programs, until offsetting fees to fund such programs are authorized under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The purpose of this interpretation is to provide guidance to the regional fishery management councils and the public on the programs for which funds may not be expended through the end of the fiscal year.

EFFECTIVE DATE: June 17, 1996.

FOR FURTHER INFORMATION CONTACT: Margaret F. Hayes, Assistant General Counsel for Fisheries, 301–713–2231.

SUPPLEMENTARY INFORMATION:

Background

The President signed the Act (Public Law 104–134) on April 26, 1996. The Act provides funds for the Department of Commerce through September 30, 1996. Section 210 of the Act states the following:

> None of the funds appropriated under this Act or any other Act may be used to develop new fishery management plans, amendments or regulations which create new individual fishing quota, individual transferable quota, or new individual transferable effort allocation programs, or to implement any such plans, amendments or regulations approved by a Regional Fishery Management Council or the Secretary of Commerce after January 4, 1995, until offsetting fees to pay for the cost of administering such plans, amendments or regulations are expressly authorized under the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). This restriction shall not apply in any way to any such programs approved by the Secretary of Commerce prior to January 4, 1995.

This provision is intertwined with bills currently pending in both Houses of Congress to reauthorize and amend the Magnuson Act. The House-passed bill, H.R. 39, would establish fees to be used to administer individual quota systems. The term ''individual quota'' is defined in section 16(b) of the House bill as ''a grant of permission to harvest or process a quantity of fish in a fishery, during each fishing season for which the permission is granted, equal to a stated percentage of the total allowable catch for the fishery.''

The Senate bill, S. 39, which has not yet passed the Senate, also would establish fees to fund an IFQ program. The bill (section 103) defines ''individual fishing quota'' to mean ''a revocable Federal permit under a limited access system to harvest a quantity of fish that is expressed by a unit or units representing a percentage of the allowable catch of a fishery that may be received or held for exclusive use by a person.''

Congress' intent in section 210 of the Act apparently was to halt the development and implementation of any individual quota system—whether the quotas are transferable or not—pending passage of a law amending the Magnuson Act to establish fees to finance such systems. The Senate added the term ''new individual transferable effort allocation program,'' to section 210 of the Act although that sort of effort control is not mentioned in either bill to amend the Magnuson Act.

Interpretation

NMFS interprets the term ''individual fishing quota'' as it is defined in S. 39. That definition is functionally similar to the definition of ''individual quota'' in H.R. 39. NMFS believes ''individual transferable quota'' is the same as an IFQ, with the additional aspect of transferability of quota among those eligible to hold ITQs. Neither term encompasses ''community development quotas,'' allocations to western Alaska communities that are treated separately in both bills.

NMFS interprets ''individual transferable effort allocation program'' to mean systems allowing fishermen to transfer among themselves or consolidate units of effort, such as days at sea (DAS) or number of traps. Proposals for such programs have been discussed by the New England Fishery Management Council for the Atlantic sea scallop and American lobster fisheries.

Programs Affected

Because they are funded through Federal appropriations, the regional fishery management councils must suspend work until the end of the fiscal year on portions of FMPs, amendments, or regulations that relate to new IFQs, ITQs, or individual transferable effort allocation programs. NMFS has notified each council of pending proposals it believes are within the scope of this restriction, as follows:

North Pacific Council: (1) IFQs for the Alaska pollock fishery, whereby a vessel owner would be allocated annually a certain percentage of the pollock total allowable catch. (2) Vessel bycatch accounts, allocations of an allowable take of prohibited species bycatch to an individual vessel owner or to groups of vessel owners.

Pacific Council: Cumulative trip limits in the non-trawl sablefish fishery, whereby an allowable catch would be divided among a fixed number of permit holders, based either on historic harvest of the vessel or on an equal allocation