the EPA document entitled "High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications", EPA–AA–EPSD–IM–93–1, April 1994.

(3) Within one year from September 30, 1994, the Commonwealth must submit the PADOT procedures manual for motorist compliance enforcement program oversight as an amendment to the SIP.

(4) Within one year from September 30, 1994, the Commonwealth must submit the PADOT procedures manual for quality assurance as an amendment to the SIP.

(b) The contingencies for approvability are as follows:

(1) If penalties are assessed against the contractor under the Contractor Responsibility Program in lieu of the penalties in 67 Pa Code § 178.602(b) of the Pennsylvania I/M regulation, the penalties must be equal to or more stringent than those in the Commonwealth's I/M regulation and

(2) The present contractor or any future contractors for the Pennsylvania I/M program may not have any business interest in a vehicle repair facility anywhere in the continental United States.

[FR Doc. 94–21589 Filed 8–30–94; 8:45 am]
BILLING CODE 6560–50–P

## 40 CFR Parts 52 and 81

**[TN123–1–6349–FRL–5062–5]**

## Designation of Areas for Air Quality Planning Purposes; State of Tennessee

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The purpose of this document is to accelerate the effective date for the redesignation of Memphis/Shelby County, Tennessee, from nonattainment to attainment for the carbon monoxide (CO) air quality standard. EPA previously published a direct final action redesignating the Memphis/Shelby County CO nonattainment area effective September 26, 1994. Since no comments were received during the public comment period on that notice and sanctions would otherwise be imposed for a brief period, this notice makes the redesignation effective immediately. This action stops the sanction clock and thus prevents sanctions from being imposed on the Memphis/Shelby County area.

**EFFECTIVE DATE:** This action will be effective on August 31, 1994.

**ADDRESSES:** Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street NE, Atlanta, Georgia, 30365.

**FOR FURTHER INFORMATION CONTACT:** Ben Franco of the EPA Region IV Air Programs Branch at (404) 347–3555 ext 4211, and at the above address.

**SUPPLEMENTARY INFORMATION:** On July 26, 1994, EPA published a direct final notice (see 59 FR 37939) redesignating the Memphis/Shelby County area from nonattainment to attainment for CO. That notice stated the effective date of the redesignation would be September 26, 1994, if no adverse comments were received. No adverse comments have been received. Subsequently, on August 4, 1994, EPA published a rule (see 59 FR 39832) identifying areas with findings in place that would be subject to sanctions under the Clean Air Act (the Act) as amended in 1990. This action becomes effective on September 6, 1994. The Memphis/Shelby County, Tennessee, CO nonattainment area was identified as one of the areas which would be subject to sanctions under section 179(A) of the Act beginning on September 6, 1994.

The 18-month clock leading to the imposition of these sanctions was started by a letter dated January 15, 1993, in which EPA found that the State of Tennessee had failed to submit a state implementation plan (SIP) for an oxygenated fuels program and corrections to a basic inspections/maintenance program by November 15, 1992. These sanctions would be lifted once the redesignation becomes effective.

Under the timetable established by the August 4, 1994, sanction rule and the July 26, 1994, redesignation notice, sanctions would be in place from September 6, 1994, to September 26, 1994, the effective date established in the July 26, 1994, redesignation notice. In order to prevent the imposition of sanctions for a three week period on an area whose redesignation to attainment has been approved, EPA is hereby accelerating the effective date of the redesignation and making it effective immediately upon publication of this notice. This will alleviate a restriction for which there is no useful purpose in this instance.

### Final Action

The EPA published this action on July 26, 1994, (see 59 FR 37939) without prior proposal because the Agency viewed this as a noncontroversial amendment and anticipated no adverse comments. Since no comments were received the final rule published on July 26, 1994 (59 FR 37939) amending 40 CFR 52.2220 and § 81.343 is effective August 31, 1994, under the authority of the Clean Air Act (42 U.S.C. 7401–7671q).

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

### List of Subjects

*40 CFR Part 52*

Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

*40 CFR Part 81*

Air pollution control, National parks, Wilderness areas.

Dated: August 22, 1994.

**Patrick M. Tobin,**

*Acting Regional Administrator.*

[FR Doc. 94–21411 Filed 8–30–94; 8:45 am]
BILLING CODE 6560–50–P

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

## 49 CFR Part 172

**[Docket No. HM–145J; Amdt. No. 172–135]**

**RIN 2137–AC56**

## Hazardous Substances

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

**ACTION:** Final rule; decision on petition for reconsideration.

**SUMMARY:** On June 20, 1994, RSPA amended the Hazardous Materials Regulations (HMR) by designating 15 hazardous substances as hazardous materials and amending the reportable quantity (RQ) for 34 other hazardous substances already designated as hazardous materials. Petitioners, metals mining and refining companies, requested that the rule modify the HMR to except from the hazardous material designation copper, molybdenum and zinc concentrates containing small amounts of lead sulfide, a hazardous substance. Alternatively, petitioners asked that the effective date of the rule be stayed to allow for the docket to be opened for public comment. The petition is denied. The effective date of

that part of the rule that reduces the RQ for lead sulfide is extended for 90 days.

**EFFECTIVE DATE:** August 31, 1994. The effective date of that part of the rule, published on June 20, 1994 (59 FR 31822) revising Table 1 in Appendix A to § 172.101 that reduces the RQ for lead sulfide is extended from August 29, 1994 to November 29, 1994.

**FOR FURTHER INFORMATION CONTACT:** John Gale, Office of Hazardous Materials Standards, RSPA, Department of Transportation, 400 Seventh Street SW, Washington, DC 20590–0001, Telephone (202) 366–4488 or Charles Holtman, Office of the Chief Counsel, RSPA, Department of Transportation, 400 Seventh Street SW, Washington, DC 20590–0001, Telephone (202) 366–4400.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On June 20, 1994 (59 FR 31822), RSPA amended the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180, by revising the "List of Hazardous Substances and Reportable Quantities," an Appendix to the Hazardous Materials Table at 49 CFR 172.101. The rule added 15 hazardous substances to the Appendix and, for 34 other hazardous substances, reduced the "Reportable Quantity" (RQ), the amount of a hazardous substance in a single package that, under 49 CFR 171.8, subjects it to regulation under the HMR.

The rule implements the mandate under section 306(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9656(a). Section 9602(a) of CERCLA directs the U.S. Environmental Protection Agency (EPA), through rulemaking, to: (1) Designate as "hazardous substances" materials that "when released into the environment may present substantial danger to the public health or welfare or the environment"; and (2) establish the RQ for each hazardous substance. The RQ is the amount of a hazardous substance that, if released, requires notification of the National Response Center. 42 U.S.C. 9603(a). Section 9656(a) directs that each hazardous substance designated by the EPA "shall . . . at the time of such listing or designation . . . be listed and regulated as a hazardous material" by the Secretary of Transportation under Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101 *et seq.*

The Research and Special Programs Administration (RSPA) carries out the rulemaking responsibilities of the Secretary of Transportation under 49 U.S.C. 5101 *et seq.* RSPA's June 20, 1994 rule revised the HMR to incorporate additional hazardous substance designations and RQ modifications made by the EPA in five rulemakings between November 1990 and June 1993 (55 FR 46354, Nov. 2, 1990; 55 FR 50450, Dec. 6, 1990; 57 FR 37194, Aug. 18, 1992; 57 FR 47376, Oct. 15, 1992; 58 FR 35314, June 30, 1993).

The final rule was issued without public notice or an opportunity for comment. The preamble stated:

In accordance with the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), RSPA has determined that a notice of proposed rulemaking and an opportunity for public comment and review are impracticable and unnecessary. [CERCLA] mandates that the Department of Transportation list and regulate, as hazardous materials under 49 CFR Parts 171–180, hazardous substances designated by the EPA under CERCLA. The EPA is the sole agency authorized to designate hazardous substances and their reportable quantities [RQ's]. Therefore, public comment and review are unnecessary because: (1) The public was afforded time to comment when the EPA published its notice of proposed rulemaking concerning that agency's change in the subject RQ's; and (2) RSPA does not have the authority to designate hazardous substances or determine their reportable quantities.

A hazardous substance listed in the Appendix to 49 CFR 172.101 is regulated under the HMR as a Class 9 hazardous material, when an amount equal to or exceeding the RQ of the substance is transported in a single package. 49 CFR 171.8. If the hazardous substance is in a mixture or in solution, it is regulated only when the concentration of the hazardous substance equals or exceeds a concentration that depends on the RQ of the substance, as follows:

| RQ, pounds (kilograms) | Concentration (by weight percent) |
|---|---|
| 5000 (2270) | 10 |
| 1000 (454) | 2 |
| 100 (45.4) | 0.2 |
| 10 (4.54) | 0.02 |
| 1 (0.454) | 0.002 |

*Id.* A hazardous substance regulated under the HMR as a Class 9 material is subject to requirements governing packaging, shipping papers, package marking and labelling, vehicle operation, employee training and registration. *See generally* 49 CFR subpart 107.600; subparts 172.100–172.700; 173.203–173.204; 173.240–173.241; part 177.

The rule is effective August 29, 1994.

## II. The Petition for Reconsideration

Petitioners ASARCO, Inc., Cominco Ltd., Cyprus Climax Metals Company, Magma Copper Company, Montana Resources, and Phelps Dodge Mining Company, collectively, engage in the exploration, mining, milling, smelting and refining of metals including copper, molybdenum and zinc. In the course of their activity, petitioners offer for transportation and transport significant quantities of copper, molybdenum and zinc concentrates. Petitioners' concentrates contain lead sulfide in a concentration between 0.001 and 2.0 percent.

Petitioners request reconsideration of the June 20, 1994 rule because it incorporates the EPA's reduction of the lead sulfide RQ from 5,000 to 10 pounds (58 FR 35314, June 30, 1993), and thereby, through operation of the § 171.8 mixture rule, subjects to regulation under the HMR certain of petitioners' copper, molybdenum and zinc concentrates that until now have not been regulated.

Petitioners represent that the lead sulfide in the copper, molybdenum and zinc concentrates is of low bioavailability [1] and that these concentrates currently are being shipped safely, and contend on that basis that there is no need to regulate the concentrates as hazardous materials. Petitioners cite several types of costs that they will incur from designation of the concentrates as hazardous materials and suggest that, contrary to RSPA's finding in the rule's preamble, 59 FR 31823, the economic impact of the rule is not minimal.

Petitioners assert that few U.S. ports accept bulk shipments of concentrates, and that of those that do, many would not if the concentrates were designated hazardous materials. Petitioners say they have been informed by officials of the Port of Corpus Christi, Texas, that the port no longer would accept bulk shipments of copper and zinc concentrates, if designated as hazardous materials. Petitioners state that if the rule is not modified to except their concentrates from the hazardous material designation, they might need to ship the concentrates through Canadian or Mexican ports, adding millions of dollars annually to their shipping costs. Petitioners suggest that this rerouting,

[1] According to EPA, "bioavailability" is "the rate and extent to which a substance is absorbed or otherwise assimilated into body tissue following exposure by various routes, such as ingestion." 58 FR 35318.

by increasing the distances over which the concentrates are shipped, would increase the risk of accident and release of these materials. Petitioners also suggest that a decision by U.S. ports not to handle these materials could result in job losses among port workers.

Second, petitioners predict that concentrates designated as hazardous materials would be subject to shipping surcharges and shipping rate increases.

Third, petitioners cite the general costs of compliance with HMR packaging, shipping paper, marking, labelling, placarding and employee training requirements. (Note: As Class 9 materials, petitioners' concentrates would not be required to be placarded in domestic transportation. 49 CFR 172.504(f)(9).)

Finally, petitioners suggest that the rule is inconsistent with international regulations that, according to petitioners, do not subject the concentrates in question to similar regulation. This, say petitioners, runs counter to RSPA's and DOT's policy to seek a uniform global regulatory framework for hazardous material transportation.

Petitioners assert that the 42 U.S.C. 9656(a) mandate to list and regulate hazardous substances as hazardous materials does not supersede RSPA's delegated authority under 49 U.S.C. 5103 to designate as hazardous materials those materials that "in a particular amount and form may pose an unreasonable risk to health and safety or property." Petitioners concede that § 9656(a) requires RSPA both to designate lead sulfide as a hazardous material and to recognize the 10-pound RQ for lead sulfide established by the EPA, but assert that this directive does not constrain RSPA's discretion to determine the threshold concentration at which a particular mixture containing lead sulfide is to be regulated as a hazardous material. Petitioners suggest that the mixture table at 49 CFR 171.8 is a comparable exercise of discretion, and that RSPA simply can modify the table in a way that excludes their concentrates from a hazardous material designation.

Procedurally, petitioners take issue with RSPA's failure to provide for public notice and comment before issuing the rule. They argue that notice and comment was not "impracticable" since the rule was not issued until a year after the EPA rule revising the RQ for lead sulfide. They contend that comment was not "unnecessary" because: (1) The opportunity to comment during the EPA rulemaking did not encompass the transportation-related ramifications of the EPA action; and (2) RSPA *does* have the statutory authority to decide what quantity and form of materials in transportation may pose an unacceptable risk to health, safety or property.

Petitioners request that RSPA modify the mixture table at 49 CFR 171.8 to provide that copper, molybdenum and zinc concentrates with less than 10 percent lead sulfide by weight are not hazardous materials. In the alternative, petitioners ask that the August 29, 1994 effective date of the rule be stayed, and that the docket be reopened for public notice and comment.

## III. Decision

The petition for reconsideration is denied. RSPA's statutory authority under 42 U.S.C. 9656(a) to "list[] and regulate[] as a hazardous material" each hazardous substance designated by the EPA under 42 U.S.C. 9602(a) does not give RSPA the discretion to grant the relief petitioners seek.

### *A. History of RSPA Hazardous Substance Regulation*

RSPA first subjected hazardous substances to regulation as hazardous materials in a May 22, 1980 final rule (45 FR 34560). This rule, issued before CERCLA was enacted, was to assist the transportation industry in complying with section 311(b)(5) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321(b). Section 1321(b)(2), a forerunner to 42 U.S.C. 9602(a) that remains as an independent EPA authority, directs the EPA Administrator to: (1) Designate as a hazardous substance any material that, when discharged to the navigable waters or contiguous zone, "present[s] an imminent and substantial danger to the public health or welfare"; and (2) establish as the RQ for each hazardous substance the quantity of that substance that, if discharged, "may be harmful" to the public health or welfare or the environment. Section 1321(b)(5) requires the operator of a facility from which a hazardous substance in excess of its RQ is discharged to report the discharge to the National Response Center. The statute imposes cleanup liability on the operator, and criminal and civil penalties for failure to report the discharge. Motor vehicles and rolling stock are "facilities" under the statute. 33 U.S.C. 1321(a)(10).

The 1980 RSPA rule sought to address transportation industry concerns that a motor vehicle or train operator might be subject to criminal penalties for failing to report a discharge without being clearly on notice that the cargo included hazardous substances. 44 FR 10676–77 (Feb. 22, 1979) (notice of proposed rulemaking). The rule amended the HMR to designate hazardous substances as hazardous materials, to require that a hazardous substance be identified on the shipping paper accompanying the package, and to impose a package marking requirement. These measures were to ensure the operator's awareness that a hazardous substance was on board. The rule also specified general standards of integrity for the container in which the hazardous substance is transported.

Because the FWPCA reporting requirement applies only to the discharge of a hazardous substance in an amount that exceeds its RQ, the rule limited the application of the HMR to hazardous substance transportation in two ways that remain in the rule today. First, a hazardous substance is a hazardous material, and therefore regulated under the HMR, only when the hazardous substance is being transported in an amount (in a single package) in excess of its RQ. 49 CFR 171.8. Second, whether transportation of a hazardous substance in a mixture or in solution is subject to the HMR as a hazardous material is determined by the concentration of the hazardous substance in the mixture or solution. *Id.* The minimum concentration subjecting the mixture or solution to regulation as a hazardous material is proportional to the RQ of the hazardous substance; the higher the RQ, the greater the concentration of hazardous substance permitted before the material is regulated. These two provisions are those to which petitioners point in arguing that RSPA has the discretion to exclude copper, molybdenum and zinc concentrates from the HMR.

CERCLA was enacted on December 11, 1980. Pub. L. 96–510, 94 Stat. 2767. The statute incorporates the FWPCA requirement to report a release of a hazardous substance in excess of its RQ and the sanctions for failing to do so. 42 U.S.C. 9603(a), 9603(b), 9609. It establishes, for discharge reporting and other purposes, a broader definition of "hazardous substance" than that under 33 U.S.C. 1321(b)(2). The definition includes hazardous substances designated by the EPA under 33 U.S.C. 1321(b)(2), but also specifies as hazardous substances materials of environmental concern listed under the FWPCA at 33 U.S.C. 1317(a); the Solid Waste Disposal Act at 42 U.S.C. 6921; the Clean Air Act at 42 U.S.C. 7412; and the Toxic Substances Control Act at 15 U.S.C. 2606. 42 U.S.C. 9601(14). Section 9602(a) of CERCLA, like 33 U.S.C. 1321(b)(2), authorizes the EPA Administrator to: (1) Designate as a hazardous substance any other material

that, in the Administrator's judgment, "may present substantial danger to the public health or welfare or the environment" if released; and (2) establish an RQ for that material. Section 9602(b) assigns to those hazardous substances incorporated into CERCLA from other Federal statutes a "default" RQ of one pound until the EPA, through rulemaking, specifies a different RQ.

Section 9656(a) of CERCLA, as enacted, directed the Secretary of Transportation as follows:

Each hazardous substance which is listed or designated as provided in section 101(14) of this Act (42 U.S.C. 9601(14)) shall, within ninety days after the date of enactment of this Act or at the time of such listing or designation, whichever is later, be listed as a hazardous material under the Hazardous Materials Transportation Act (now codified at 49 U.S.C. 5101 *et seq.*).

With the enactment of CERCLA, the section 9601(14) definition immediately added to the list of hazardous substances a number of substances with a default RQ of one pound. On March 19, 1981 (46 FR 17738), RSPA issued a final rule to implement the section 9656(a) directive. In the agency's judgment, regulating the transportation of a single pound of many of the listed hazardous substances would not be practical or cost-effective. To comply with the language of section 9656(a), RSPA listed these hazardous substances as hazardous materials, but did not regulate them. In denying a subsequent petition for reconsideration, RSPA explained its authority for listing but not regulating:

[I]t was the intent of Congress in enacting [§ 9656] that, once DOT has listed the materials subject to CERCLA as hazardous materials, DOT retain [sic] the discretion provided by the Hazardous Materials Transportation Act to determine whether, and to what extent, those materials should be regulated.

46 FR 58086 (Nov. 30, 1981); *see also* 48 FR 35965, 35969 (Aug. 8, 1983) (advance notice of proposed rulemaking) (affirming RSPA's discretion as to whether and how to regulate hazardous substances under Federal hazmat law).

In response to RSPA's decision not to regulate certain hazardous substances at a one-pound RQ, Congress amended section 9656(a) to direct that hazardous substances, when designated by the EPA, be "listed *and regulated*" as hazardous materials. Pub. L. 99–499, section 202 (Oct. 17, 1986) (emphasis added). This is the present language of the statute.

In accordance with the amendment, RSPA issued a final rule on November 21, 1986, subjecting all hazardous substances listed under 42 U.S.C. 9601(14) to the shipping paper, package marking and packaging requirements applicable to hazardous substances under the 1980 rule. The agency, citing its lack of discretion in complying with the statutory mandate, found that public notice and comment were unnecessary and issued the final rule directly.

As the EPA has designated additional hazardous substances or changed the RQ for those already designated, RSPA, without public notice or an opportunity for public comment, has issued final rules incorporating those changes into the HMR. The present rule is the fourth of these (see preceding rules at 54 FR 34666, Aug. 21, 1989; 54 FR 39500, Sept. 26, 1989; 55 FR 46794, Nov. 7, 1990). With the exception of training and registration requirements established by statute for hazardous materials as a whole, the HMR requirements that apply to the bulk transportation of hazardous substances designated as hazardous materials have not changed substantially since 1980.

*B. RSPA Discretion To Regulate Hazardous Substances*

RSPA's discretion in implementing 42 U.S.C. 9656(a) is limited in two important respects.

First, the directive to "list and regulate" each hazardous substance as a hazardous material requires RSPA, at the least, to provide a regulatory framework to ensure that a motor vehicle or train operator has a means to know when the cargo includes a reportable quantity of a hazardous substance. As discussed above, RSPA's May 1980 rule, subjecting hazardous substance transportation to hazardous material shipping paper and package marking requirements, was issued to this end in order to implement FWPCA discharge reporting requirements. Seven months later, Congress enacted CERCLA, essentially incorporating the FWPCA hazardous substance discharge reporting requirement. Furthermore, the CERCLA legislative history reveals a congressional intent to adopt and enhance the FWPCA framework for preventing and mitigating oil and hazardous substance spills. *See generally* H.Rep. 96–1016(II), 1980 USCCAN 6151, 6160–6223 (incorporating H.Rep. 96–172). Therefore, RSPA reads section 9656(a) to have codified the basic purpose of the RSPA rule, that of providing carriers the knowledge of their cargo needed to comply with CERCLA reporting requirements. Accordingly, RSPA has no discretion to modify the HMR framework in a way that undermines the operator notification function of the shipping paper and marking requirements. Congress' 1986 amendment to require both listing *and regulation* of EPA-designated hazardous substances is further evidence of RSPA's limited discretion.

Second, the regulatory framework under Federal hazmat law historically has been oriented toward those materials that, in transportation, present immediate hazards to public health, safety and property by virtue of qualities such as explosivity, flammability, reactivity, acute toxicity, radioactivity and corrosivity. RSPA, in coordination with the Department of Transportation (DOT) modal administrations (Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, and Federal Aviation Administration), possesses the expertise and the resources to assess the physical and chemical properties of materials in transportation; to weigh the costs and benefits of proposed regulations; and to make considered regulatory judgments.

RSPA exercises its discretion more narrowly in regulating materials that may pose longer-term harm to humans or other animals, or harm to the environment. As RSPA noted in 1980, in its first notice of proposed rulemaking to regulate hazardous substances as hazardous materials:

DOT should not attempt to develop the criteria for materials that are subject to the FWPCA unless they fall within the realm of the existing defining criteria for materials presently designated as hazardous materials. (RSPA) believes the EPA has both the expertise and the technical resources necessary to deal with the determination and designation of those materials which should be considered for inclusion in the reporting requirement mandated by the FWPCA. 44 FR 10677.

The assignment of authority under the FWPCA and CERCLA between DOT and the EPA reflects the agencies' relative areas of expertise and resources. Both 33 U.S.C. 1321(b)(2) and 42 U.S.C. 9602(a) direct the EPA Administrator to designate as hazardous substances those materials that may substantially endanger public health or the environment, and to establish for each the RQ that determines which hazardous substance releases must be reported. Both the decision to designate a material as a hazardous substance and the choice of an RQ are matters for the exercise of the EPA Administrator's broad discretion. The assignment to

RSPA under 42 U.S.C. 9656(a), conversely, is strictly confined: if the EPA has designated a material as a hazardous substance, RSPA must list it and regulate its transportation.

The rulemaking challenged by petitioners was preceded by a notice and comment rulemaking in which the EPA affirmed its designation of lead sulfide as a hazardous substance, and determined that on the basis of chronic toxicity, the lead sulfide in petitioners' concentrates warranted assignment of an RQ of 10 pounds. 58 FR 35316. If RSPA were to consider petitioners' argument that the low bioavailability of the lead sulfide in their concentrates justifies excepting the concentrates from the hazardous material designation, the result would be untenable. In every rulemaking under section 9656(a), RSPA would be required to consider, on a cost-benefit basis, the appropriate level of Federal hazmat regulation for each hazardous substance designated by the EPA and the appropriateness of excluding certain forms of hazardous substances from regulation entirely. Costs and benefits could not be estimated without RSPA independently assessing the health and environmental risks that a hazardous substance posed. The statute cannot reasonably intend that each hazardous substance and RQ designation, determined by the EPA through consideration of public comment and the exercise of its own expert judgment, be subject to full reconsideration by RSPA before it is incorporated into the HMR. This reading would be contrary to the statutory recognition of agency expertise and all notions of executive branch efficiency and consistency.

RSPA does have discretion as to precisely how it regulates hazardous substances in transportation. Regulation may be extensive or minimal. Vehicle operating requirements, segregation requirements and routing restrictions might be imposed, or shipping paper and package notations might suffice. RSPA's task is to formulate a principle that reconciles (1) the EPA's authority to adjudge public health and environmental risk by designating hazardous substances and their RQ's with (2) RSPA's inescapable discretion to determine the specific requirements that apply to the transportation of each hazardous substance.

The guiding principle is this: RSPA, in its discretion, may prescribe reasonable requirements to govern the safe transportation of hazardous substances, so long as those requirements do not, in effect, revisit the EPA's assessment of health and environmental risks. In practice, this means that RSPA may exercise discretion under 42 U.S.C. 9656(a) in three respects: (1) It may prescribe regulations for the transportation of hazardous substances *as a class*; (2) it may regulate differently hazardous substances with different RQ's; and (3) it may regulate hazardous substances by class on the basis of shared characteristics other than the degree of health or environmental risk posed.

*C. Petitioners' Substantive Claims*

Petitioners contend that although RSPA must "list and regulate" all hazardous substances as hazardous materials, it has the discretion to except copper, molybdenum and zinc concentrates from the hazardous material designation. In support of this claim, petitioners suggest that RSPA already has exercised this sort of discretion under 49 CFR 171.8, by: (1) Regulating hazardous substances only when transported in excess of their RQ's; and (2) not regulating mixtures and solutions containing a hazardous substance, when the hazardous substance is below a specified concentration. Petitioners ask that RSPA merely amend the rule governing mixtures and solutions to increase the concentration of lead sulfide that must be present in their concentrates before they are considered hazardous materials.

Petitioners argue that the exception from regulation for hazardous substances in amounts below their RQ's and for those in mixtures or solutions below the specified concentration proves that RSPA has the discretion to disregard the 42 U.S.C. 9656(a) command to "list and regulate" each hazardous substance. These exceptions, however, do not contravene the statute, but implement it. As discussed above, the primary purpose of section 9656(a) is to provide for identification of cargo subject to CERCLA reporting requirements if released. There is no need to regulate a hazardous substance being transported in an amount below its RQ, because no reportable release could occur during transportation. 42 U.S.C. 9603(b); *cf.* 33 U.S.C. 1321(b)(5). The provision setting a minimum concentration for designating as a hazardous material a hazardous substance in a mixture or in solution is to simplify the operator's task of determining whether an RQ of a hazardous substance is present. 45 FR 34569; 44 FR 10676–77.

Further, the statute requires reporting of a hazardous substance release only when the release equals or exceeds the RQ of the substance. 42 U.S.C. 9603(a). This is an implied finding that the release of a limited quantity of a hazardous substance is of lesser regulatory concern. *Cf.* 33 U.S.C. 1321(b)(4) (defining the RQ as the quantity of a hazardous substance "which may be harmful" to the public health or welfare or the environment).

Thus, the command to regulate the transportation of "each hazardous substance" need not be read to require the regulation of hazardous substances transported in any amount or concentration. In view of the costs attending regulation, § 9656(a) is best read to require the regulation of hazardous substances in transportation only in amounts that, if spilled, require notification of the National Response Center. For shipments in a single package of 50,000 pounds or less, the § 171.8 rule for mixtures and solutions is a simple means to determine that the lading does not amount to an RQ of a hazardous substance. A small number of shipments of more than 50,000 pounds of a hazardous substance in a mixture or in solution may be excluded from regulation despite containing more than an RQ of the hazardous substance. A regulation that implements a general statutory command, however, cannot avoid some degree of both over- and underregulation. In light of the operator liability concerns underpinning the § 9656(a) mandate, underregulation was remedied by the EPA's concurrence in the rule, and its issuance of a notice that carriers complying with reporting requirements in accordance with the RSPA rule would be deemed to have met FWPCA reporting requirements. 45 FR 61617 (Sept. 17, 1980); *see also* 45 FR 74642 (Nov. 10, 1980). The two limitations of 49 CFR 171.8 establish, directly or by approximation, a regulatory threshold at the RQ, and are a reasoned interpretation of the 42 U.S.C. 9656(a) mandate.

The EPA treats mixtures and solutions of a hazardous substance differently under CERCLA than RSPA treats them under 49 CFR 171.8. *See* 40 CFR 302.6. RSPA's and the EPA's approaches differ not because RSPA is second-guessing the EPA as to the health and environmental risks posed by hazardous substances in mixture or solution, but because the agencies simplified in different ways the operator's determination of whether an RQ of a hazardous substance is present. Congress amended § 9656(a) in 1986 to correct RSPA's failure to regulate hazardous substances with statutory one-pound RQ's, but did not take issue with these two aspects of 49 CFR 171.8. This is further evidence that the regulation is consistent with statutory intent.

With respect to the allocation of authority between RSPA and the EPA, these two elements of § 171.8 are consistent with the principle set forth in section III.B, above. The RQ is the regulatory threshold for all hazardous substances; the treatment of hazardous substance mixtures and solutions makes distinctions only between hazardous substances with different RQ's. Each element fully respects the EPA's hazardous substance and RQ designations and its assessment of the comparative health and environmental concerns of each hazardous substance.

In contrast, the action that petitioners ask RSPA to take is not within RSPA's discretion in either respect. Petitioners concede that RSPA is obligated to list lead sulfide as a hazardous material with an RQ of 10 pounds, but ask that certain lead sulfide mixtures be designated as hazardous materials only at a concentration of 10 percent or greater, while other lead sulfide mixtures, as well as other mixtures containing a hazardous substance with an RQ of 10 pounds, are hazardous materials at a hazardous substance concentration of 0.02 percent. Contrary to the section 9656(a) mandate, this would permit the transportation of up to 500 times the RQ of lead sulfide in a single packaging (more, if concentrates are transported in bulk in a quantity above 50,000 pounds) without requiring identification of the lading as a hazardous substance. Carriers nevertheless would remain subject to the CERCLA reporting requirement, and to civil and criminal sanctions for failing to comply with it. As well, it would convert the § 171.8 mixture rule from a means to simplify the operator's computation of whether an RQ is present to a means of disregarding the EPA's conclusion, expressed in the designation of a 10-pound RQ, as to the relative risks that lead sulfide poses to the public health and the environment.

The foundation of petitioners' claim is that the lead sulfide in their copper, molybdenum and zinc concentrates is not bioavailable, and that these concentrates are being subjected to a regulatory regime not warranted by the public health and environmental risk that they pose. RSPA's discretion does not extend to excepting lead sulfide from the hazardous material designation on the basis of its own assessment of health and environmental risks. Petitioners' claim properly was before the EPA during its rulemaking to consider adjusting the RQ for lead sulfide. In that rulemaking, the issue of lead sulfide bioavailability was directly raised by commenters and considered by the EPA. *See* letters in EPA Docket 102RQ–31L from the American Mining Congress (July 7, 1992; document 3–22); Hecla Mining Company (June 17, 1992; document 3–6); Lead Industries Association (July 7, 1992; doc. 3–21); Charlotte Biblow (July 7, 1992; doc. 3–13); EPA responses to comments at document 4–1 and 58 FR 35319–20. The EPA determined not to except petitioners' form of lead sulfide from designation as a hazardous substance, and assigned lead sulfide in all forms, including petitioners', an RQ of 10 pounds. 58 FR 35314. RSPA may not revisit the EPA's conclusion.

Petitioners argue that the 42 U.S.C. 9656(a) mandate does not supersede RSPA's delegated authority to designate as hazardous materials only those materials that "in a particular amount and form may pose an unreasonable risk to health and safety or property." 49 U.S.C. 5103. Petitioners are correct that RSPA's designation of a hazardous material under § 5103 must rest on a finding that the material may pose the type and degree of risk stated. The authority to make that finding carries with it a range of discretion, so that ordinarily a rulemaking to designate a hazardous material under § 5103 requires public notice and an opportunity for comment. Section 9656(a) of CERCLA, however, does not compel RSPA to designate hazardous substances as hazardous materials under 49 U.S.C. 5103. Rather, it imposes an independent, direct rulemaking mandate. Under a section 9656(a) rulemaking, RSPA need not, and indeed may not, inquire as to whether a particular hazardous substance, in a particular amount and form, "may pose an unreasonable risk to health and safety or property." Section 9656(a) already has decided the substance's status as a hazardous material.

As stated above, RSPA does have the authority under 42 U.S.C. 9656(a) to modify the set of HMR requirements applicable to hazardous substances as a class. In a rulemaking to consider modifying the HMR, RSPA would examine both the statutory purposes of the hazardous material designation under section 9656(a) (e.g., providing a means for motor vehicle and train operators to know that potentially they are subject to CERCLA reporting requirements) and the costs and benefits of regulatory alternatives. These options are not within the scope of this rulemaking and, to the extent petitioners seek to avoid the hazardous material designation entirely, would not provide petitioners the relief they seek.

Petitioners do not document their claims as to the safe transportation history of copper, molybdenum and zinc concentrates; the limited public health and environmental risk of those concentrates; or the consequences of the June 20, 1994 rule for, and significance of the costs to, the mining industry. Further, it is not at all clear that the bulk of petitioners' alleged costs, attributable to the voluntary business decisions of private port operators, are cognizable in an agency's consideration of the costs and benefits of its rules. Regardless, because RSPA does not have the discretion to consider the factual basis for petitioners' request, the lack of documentation and the question of the status of petitioners' costs are not material.

### *D. Procedural Claims*

Petitioners object to RSPA's failure to provide public notice and an opportunity for comment before issuing the final rule. Specifically, they challenge RSPA's finding, under 5 U.S.C. 553(b)(3)(B), that public notice and comment were not required because notice and comment would have been impractical and unnecessary.

Petitioners assert that because the rule was issued nearly a year after the EPA rulemaking establishing the reduced lead sulfide RQ, allowing for notice and comment would not have been impractical. Section 9656(a) mandates that the RSPA final rule designating a hazardous substance as a hazardous material be issued "at the time" that the EPA publishes the hazardous substance designation. It can be argued that this language establishes the impracticality of public notice and comment as a matter of law. Nevertheless, petitioners' argument that an opportunity for public comment could have been provided *in this case* certainly is correct. Regardless, public notice and an opportunity for comment were not required because they were unnecessary.

As elaborated above, RSPA, contrary to petitioners' argument, does not have the authority in this rulemaking to decide, on the basis of health and environmental effects, what quantities and forms of lead sulfide should be designated as hazardous materials. Public comment was unnecessary because it could not have changed the final rule.

## IV. Extension of Effective Date

Petitioners indicate that it may be necessary to adjust shipping arrangements for copper, molybdenum and zinc concentrates that as a result of the rule will be designated as hazardous materials. The effective date of that part of the rule that reduces the lead sulfide RQ from 5,000 to 10 pounds is changed from August 29, 1994 to November 29,

1994, to allow petitioners sufficient time to make the necessary arrangements and otherwise to prepare to comply with the rule. No other regulated party has indicated that the August 29, 1994 effective date poses a problem. Therefore, except with respect to the RQ reduction for lead sulfide, the effective date of the rule remains August 29, 1994.

Dated: August 25, 1994.

**D. K. Sharma,**

*Administrator.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 672

[Docket No. 940835–4235; I.D. 081294B]

RIN 0648–AH22

### Groundfish of the Gulf of Alaska

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

**ACTION:** Emergency interim rule; request for comments.

**SUMMARY:** NMFS has determined that an emergency exists in the groundfish fisheries being conducted in the Gulf of Alaska (GOA). To preserve a significant economic opportunity that otherwise might be foregone, NMFS is reopening the sablefish hook-and-line fishery in certain areas of the GOA during the September 12–14, 1994, opening of the Pacific halibut fishery. NMFS is also increasing the directed fishing standard for sablefish in the Southeast Outside District of the GOA during this same time period and is establishing the framework authority to allow an increase in the directed fishing standard for sablefish during any subsequent opening of a Pacific halibut fishery.

**DATES:** Effective September 12, 1994 through December 10, 1994. Comments must be received by September 15, 1994.

**ADDRESSES:** Comments should be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668, Attention: Lori Gravel. Copies of the Environmental Assessment prepared for the emergency rule may be obtained from the same address.

**FOR FURTHER INFORMATION CONTACT:** Kaja Brix, 907–586–7228.

**SUPPLEMENTARY INFORMATION:**

#### Background

Fishing for groundfish by U.S. vessels in the exclusive economic zone of the GOA is managed by the Secretary of Commerce (Secretary) according to the Fishery Management Plan (FMP) for Groundfish of the GOA. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) (Magnuson Act), and is implemented by regulations governing the U.S. groundfish fisheries at 50 CFR part 672. General regulations that also pertain to U.S. fisheries are codified at 50 CFR part 620.

At times, amendments to the FMP or its implementing regulations are necessary to respond to fishery conservation and management problems that cannot be addressed within the time frame of the normal procedures provided for by the Magnuson Act. Section 305(c) of the Magnuson Act authorizes the Secretary to implement emergency regulations necessary to address these situations. These emergency regulations may remain in effect for 90 days, with a possible 90-day extension.

The 1994 directed sablefish hook-and-line fishery was open for 10 days in May. During this opening the halibut prohibited species catch (PSC) limit was reached, but the full sablefish hook-and-line total allowable catch (TAC) amount in the GOA was not harvested. Regulations at § 672.20(f)(3)(ii) prohibit directed fishing for groundfish by vessels using hook-and-line gear once the halibut PSC limit, annually specified for vessels using this gear type, is reached.

Accordingly, the GOA was closed to directed fishing for groundfish by vessels using hook-and-line gear (other than demersal shelf rockfish in the Southeast Outside District) under § 672.20(f)(3)(ii) from May 28 to December 31, 1994 (59 FR 17737, April 14, 1994; 59 FR 43296, August 23, 1994). However, 6,479 metric tons (mt), or 30 percent, of the 1994 sablefish hook-and-line quota share remains unharvested. Regulations implementing directed fishing standards for sablefish (§ 672.20(g)(4)(i)) limit retention of this species on a vessel in the hook-and-line fisheries to less than 4 percent of the total amount of all other fish species retained at the same time on the vessel during a fishing trip. The remaining amount of sablefish TAC specified for vessels using hook-and-line gear exceeds potential bycatch needs in the hook-and-line fisheries for nongroundfish.

The International Pacific Halibut Commission (IPHC) has announced a 48-hour opening of the Pacific halibut fishery from 12 noon Alaska local time (A.l.t.) September 12, 1994 to 12 noon A.l.t. September 14, 1994. The halibut opening provides the opportunity for NMFS to reopen the sablefish fishery to allow some of the remaining sablefish TAC to be harvested and revenue to be generated that would otherwise be foregone had the halibut fishery not been opened in September. The IPHC supports a concurrent halibut/sablefish opening in September.

This emergency rule: (1) Opens the GOA sablefish hook-and-line fishery in the Western and Central Regulatory Areas and the West Yakutat district of the Eastern Regulatory Area for the duration of the September Pacific halibut fishery opening, (2) increases the directed fishing standard for sablefish in the Southeast Outside District of the Eastern Regulatory Area of the GOA for the duration of the September Pacific halibut fishery opening, and (3) establishes authority for the Regional Director to increase the directed fishing standard for sablefish during any subsequent opening of the halibut fishery. Details of this emergency rule follow.

#### Sablefish Management

This emergency rule: (1) Opens the sablefish hook-and-line fishery to directed fishing in the Western and Central Regulatory Areas and in the West Yakutat District of the Eastern Regulatory Area from 12 noon A.l.t. September 12, 1994, to 12 noon A.l.t. September 14, 1994; and (2) increases the retainable bycatch amounts of sablefish to 30 percent in the Southeast Outside District of the Eastern Regulatory Area from 12 noon A.l.t. September 12, 1994, to 12 noon A.l.t. September 14, 1994.

The unanticipated circumstances of the May 1994 sablefish fishery left a significant amount (6,479 mt) of sablefish TAC unharvested. A concurrent halibut/sablefish opening would allow optimum utilization of both species. The legal-sized halibut that might be caught in the directed sablefish fishery would be attributed to the IPHC halibut quota.

Sablefish will remain closed to directed fishing with hook-and-line gear in the Southeast Outside District of the Eastern Regulatory Area of the GOA during the September 12–14 halibut opening. Not enough sablefish TAC remains in the Southeast Outside District to support a directed fishery