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**49 CFR Parts 171, 173, 174, 175, etc.
Applicability of the Hazardous Materials
Regulations to Loading, Unloading, and
Storage; Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration**

49 CFR Parts 171, 173, 174, 175, 176, 177, and 178

[Docket No. RSPA-98-4952 (HM-223)]

RIN 2137-AC68

Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage

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

ACTION: Notice of proposed rulemaking.

SUMMARY: RSPA is proposing to clarify the applicability of the Hazardous Materials Regulations (HMR) to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation. We propose to list in the HMR pre-transportation and transportation functions to which the HMR apply. Pre-transportation functions are functions performed to prepare hazardous materials for movement in commerce by persons who offer a hazardous material for transportation or cause a hazardous material to be transported. Transportation functions are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading, and storage of hazardous materials that is incidental to their movement. We propose to clarify that "transportation in commerce," for purposes of applicability of the HMR, begins when a carrier takes possession of a hazardous material and continues until the carrier delivers the package containing the hazardous material to its destination as indicated on shipping papers.

DATES: *Comments.* Submit comments by October 12, 2001. To the extent possible, we will consider comments received after this date in making our decision on a final rule.

ADDRESSES: *Written comments.* Submit comments to the Dockets Management System, U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW., Washington, DC 20590-0001. Comments should identify Docket Number RSPA-98-4952 (HM-223) and be submitted in two copies. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. You may also submit comments by e-mail by accessing the

Dockets Management System web site at "http://dms.dot.gov/" and following the instructions for submitting a document electronically.

The Dockets Management System is located on the Plaza level of the Nassif Building at the Department of Transportation at the above address. You can review public dockets there between the hours of 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. You can also review comments on-line at the DOT Dockets Management System web site at "http://dms.dot.gov/."

FOR FURTHER INFORMATION CONTACT: Susan Gorsky (202) 366-8553, Office of Hazardous Materials Standards, Research and Special Programs Administration; or Nancy Machado (202) 366-4400, Office of the Chief Counsel, Research and Special Programs Administration.

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I. Background

The Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) are promulgated under the mandate in 49 U.S.C. 5103(b) that the Secretary of Transportation "prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate."

"Transportation" is defined as "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. 5102(12).

"Commerce" is defined as "trade or transportation in the jurisdiction of the United States between a place in a State and a place outside of the State; or that affects trade or transportation between a place in a State and a place outside of the State." 49 U.S.C. 5102(1). Neither the statute nor the HMR defines the terms "loading incidental to movement," "unloading incidental to movement," or "storage incidental to movement." The legislative history of the statute does not clarify this matter.

The Research and Special Programs Administration (RSPA, we) has issued a number of interpretations, inconsistency rulings, and preemption determinations in response to requests from the public for clarification regarding the meaning of "transportation in commerce" and whether particular activities are covered by that term and, therefore, are subject to regulation under the HMR. Loading, unloading, and storage of hazardous materials are areas of particular confusion and concern.

On July 29, 1996, we published an advance notice of proposed rulemaking (ANPRM) seeking comments on the applicability of the HMR to loading, unloading, and storage of hazardous materials (61 FR 39522). We also hosted three public meetings at which interested persons were invited to present ideas, proposals, and recommendations on the applicability of the HMR. Representatives of the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and DOT's Federal Railroad Administration (FRA) participated in the public meetings. In addition to DOT, EPA, and OSHA, more than 200 interested persons participated in the public meetings. They included representatives of shippers, carriers, warehouses, state and local public safety agencies, and building and fire code safety organizations. We also received more than 70 written comments.

On April 27, 1999, we published a supplemental ANPRM (64 FR 22718), highlighting comments received in response to the 1996 ANPRM and requesting additional information. In particular, the supplemental ANPRM discussed the three approaches most commonly suggested by commenters to the 1996 ANPRM for applying the HMR to hazardous materials loading, unloading, and storage operations and asked a number of questions focused on the details of each approach. We

received more than 60 comments in response to the supplemental ANPRM.

In addition to the above referenced comments, the docket for this rulemaking also includes over 40 comments originally submitted under Docket HM-212. On March 27, 2000, we withdrew the NPRM issued under Docket HM-212 that addressed cargo tank loading and tank car unloading requirements (65 FR 16161). At the same time, we announced that tank car unloading issues would be addressed as part of Docket No. RSPA-98-4952 (HM-223) and comments submitted to Docket HM-212 would be added to this docket.

The docket for this rulemaking also includes 84 comments and docket submissions related to a request for a preemption determination applicable to certain California and Los Angeles County requirements for handling and transportation of hazardous materials (Docket Nos. PDA-9(R), PDA-7(R), PDA-10(R), and PDA-11(R); February 15, 1995; 60 FR 8773). The preemption determination addressed state and county requirements for rail car storage and unloading of hazardous materials on consignee property.

II. Summary of Issues

Federal hazardous materials transportation law (federal hazmat law), codified at 49 U.S.C. 5101 et seq., authorizes the Secretary of Transportation to establish regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. The regulations apply to persons who: (1) Transport hazardous materials in commerce; (2) cause hazardous materials to be transported in commerce; or (3) manufacture, mark, maintain, recondition, repair, or test packagings or containers (or components thereof) that are represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce. 49 U.S.C. 5103(b)(1)(A). The regulations govern any safety aspect of hazardous materials transportation that the Secretary considers appropriate. 49 U.S.C. 5103(b)(1)(B). As noted above, the law defines "transportation" to mean "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. 5102(12). Nevertheless, Congress does not define with specificity the particular activities that fall within the terms "loading," "unloading," and "storage" used in the statutory definition of "transportation."

It is clear that federal hazmat law directs the Secretary of Transportation to address the safety of hazardous materials transportation, that is, the actual movement of hazardous materials

in commerce and the activities related to that movement that are performed by persons who transport hazardous materials in commerce. At the same time, federal hazmat law recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce or by persons who manufacture and maintain containers that are represented or sold as qualified for use for such transportation.

In conformance with federal hazmat law, the HMR currently impose regulatory requirements on persons who: (1) Perform functions in advance of transportation to prepare hazardous materials for transportation; (2) perform transportation (i.e., movement and incidental loading, unloading, and storage) functions, or (3) manufacture or maintain containers that are represented or sold as qualified for use for transportation of hazardous materials in commerce. Functions performed in advance of transportation to prepare hazardous materials for transportation—"pre-transportation functions"—include determining the hazard class of a material, preparing a shipping paper, providing emergency response information, selecting an appropriate packaging, filling a packaging, marking and labeling a package, and placarding a transport vehicle. "Transportation functions" include the movement of a hazardous material by rail car, motor vehicle, aircraft, or vessel and certain aspects of loading, unloading, and storage operations that are "incidental" to such movement. Under the HMR, training requirements apply to persons who perform pre-transportation and transportation functions and to persons who manufacture or maintain packagings certified or sold as qualified for use in transportation in commerce.

There is confusion in the regulated community and among federal, state, and local agencies with hazardous materials safety responsibilities concerning whether and to what extent the HMR apply to particular operations and activities related to the transportation of hazardous materials in commerce. The most obvious area of confusion was identified in the 1996 and 1999 ANPRMs—which loading, unloading, and storage activities are incidental to the movement of hazardous materials in commerce and therefore subject to the HMR. In addition, there is uncertainty concerning the extent to which state and local agencies may regulate hazardous materials safety, particularly at fixed facilities where the lines between pre-transportation, transportation, and non-

transportation operations are not clearly articulated. Although the interpretations and administrative determinations we have issued are publicly available, the regulated industry, government agencies, and Indian tribes have not been consistently aware of their existence and availability. Further, some of the interpretations and decisions we have issued need to be revised in light of changes in the Secretary of Transportation's and other federal agencies' statutory authority. In this rulemaking, we intend to consolidate, clarify, and revise, as necessary, these interpretations and administrative decisions and make them part of the HMR.

In developing this rulemaking, we have four goals. First, we want to maintain nationally uniform standards applicable to pre-transportation functions. Second, we want to maintain nationally uniform standards applicable to transportation functions. Third, we want to distinguish functions that are subject to the HMR from functions that are not subject to the HMR. Finally, we want to clarify that facilities with functions subject to the HMR may also be subject to federal, state, or local regulations governing occupational safety and health or environmental protection.

To achieve these goals, in this NPRM we propose a list of specific functions to which the HMR apply and we identify the types of persons or entities responsible for compliance with the HMR. In addition, we propose to include in the HMR an indication that facilities at which functions regulated by the HMR occur may also be subject to applicable standards and regulations of other federal agencies. We also propose to include in the HMR the statutory criteria under which non-federal governments may be precluded from regulating in certain areas under the preemption provisions of federal hazmat law.

III. Analysis of Comments

The 1999 supplemental ANPRM discussed in detail the comments we received in response to our 1996 ANPRM on this issue. There was no consensus position among commenters to the 1996 ANPRM as to how the HMR should apply to hazardous materials loading, unloading, and storage operations. Commenters generally stated that activities performed in advance of transportation in commerce to prepare hazardous materials for transportation should be under the exclusive regulatory jurisdiction of the Secretary of Transportation. Commenters further stated that activities related to the

development of specifications for packagings authorized for transportation of hazardous materials, including all testing, retesting, reconditioning, and reuse requirements, should be subject to the Secretary's exclusive regulatory jurisdiction. Similarly, commenters generally stated that the Secretary of Transportation should have exclusive regulatory jurisdiction over the movement of hazardous materials in commerce. However, there was no consensus from commenters as to which loading, unloading, and storage activities are incidental to the movement of hazardous materials in commerce and, therefore, subject to regulation under federal hazmat law and the HMR.

Commenters to the 1996 ANPRM generally supported one of three different approaches for defining the transportation functions that fall under the HMR. Many commenters representing hazardous materials manufacturers, shippers, and transporters suggested that "transportation in commerce" begins with an intent to ship a hazardous material and that transportation functions subject to HMR requirements should therefore include all activities related to the handling and storage of such a hazardous material. Other commenters, primarily representing state and local government environmental protection agencies, suggested that "transportation in commerce" does not begin until a hazardous material is moving on public roads or rights-of-way and that only activities involving such movement should be subject to the requirements in the HMR. Still other commenters, representing a mix of industry, labor, and state governments, suggested that "transportation in commerce" begins when a carrier accepts a hazardous material for transportation and that transportation functions subject to HMR requirements should thus include only carrier activities related to transportation of the hazardous material.

Most commenters to the 1999 supplemental ANPRM offer amplifications and clarifications of positions and recommendations submitted in response to the 1996 ANPRM. As with the comments to the 1996 ANPRM, commenters emphasize that the HMR should apply to functions performed in advance of transportation in commerce to prepare a hazardous material for transportation. However, commenters have fundamental disagreements as to the specific activities that fall under the term "transportation in commerce" and

whether and to what extent the HMR should apply to specific activities.

A. Agency Interpretation of Authorizing Statute

Several commenters assert that "DOT cannot administratively determine its own jurisdiction. Jurisdiction, for scope of the regulations, is determined by Congress, not the agency * * *" (FMC Corporation) These commenters suggest that "each Federal agency's jurisdiction is determined based upon the intent of Congress when it passes statutes for that agency to implement. It seems to be unusual for a Federal agency to seek input from the general public about what its jurisdiction should be * * *" (HM-223 Working Group, an *ad hoc* organization representing a number of hazardous materials shippers and carriers) For these commenters, the definition set forth in the law is sufficient to determine the extent of the Secretary of Transportation's jurisdiction over hazardous materials transportation. "The law makes abundantly clear that DOT's jurisdiction applies to loading, unloading, and storage incidental to transportation activities." (HM-223 Working Group)

Courts have recognized that where a definitional issue is not squarely addressed by the plain words of a statute or its legislative history, the agency administering the statute may exercise its judgment as to the best means of carrying out the act. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). See also *Morton V. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill in any gap left, implicitly or explicitly, by Congress."). Courts give considerable weight to executive department construction of a statutory scheme it is entrusted to administer—unless the construction is directly contrary to clear congressional intent. *Chevron* at 843, 844. See also *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

In ascertaining the best means of carrying out its statutory authority, it is not unusual for an agency to use the rulemaking process to solicit ideas from the public. In fact, the Court in *Chevron* recognized that an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Chevron* at 863, 864. Congress gave the Secretary authority to apply the HMR to the safety aspects of hazardous materials transportation the Secretary considers

appropriate. 49 U.S.C. 5103(b)(1)(B). Through this rulemaking, we are asking for public input regarding the wisdom of extending, narrowing, or simply clarifying where the HMR apply.

In this instance, federal hazmat law defines transportation as the "movement of property and loading, unloading, or storage incidental to the movement." Neither the statute nor its legislative history define which loading, unloading or storage activities or functions are "incidental" to the movement of hazardous materials in commerce. Consequently, as discussed earlier, RSPA has issued numerous interpretations, inconsistency rulings, and preemption determinations in response to public requests for clarification regarding the meaning of "transportation in commerce" and whether particular activities are covered by that term and, as such, covered by the HMR. The lack of clarity in RSPA's statute and the HMR regarding this issue, as well as changes in the Secretary of Transportation's and other federal agencies' statutory authorities, make it necessary for RSPA to reevaluate and codify its position regarding which loading, unloading, and storage activities and functions fall within the term "transportation" as set forth in federal hazmat law.

B. Bulk Versus Non-Bulk Issues

Several commenters recommend that we focus this rulemaking on bulk transportation issues only. "We strongly encourage the agency to separate bulk handling questions in this rulemaking from those involving the handling of non-bulk and intermediate bulk packages * * * [I]t is our view that the vast majority of interest shown by nonfederal and other federal agencies has been in the handling of bulk loads, primarily in temporary storage and during unloading of tank cars and cargo tanks. Here is where the greater risk is perceived * * * In addition * * * here is where the DOT requirements are perceived as lacking sufficient detail." (The Conference on Safe Transportation of Hazardous Articles, Inc.) Another commenter states, "During the 1996 meetings and comments, virtually all concerns expressed by non-federal and other federal agencies focused on bulk transportation, and almost all of this concern was concentrated on the highway and rail modes * * * [W]e recommend that DOT take a phased approach and, in its initial decisions regarding this docket, address only bulk transport by rail and highway." (FMC Corporation)

While it is true that the initial ANPRM published in 1996 was

prompted primarily by concerns related to loading, unloading, and storage of hazardous materials in rail tank cars and, to a lesser extent, cargo tanks, we do not agree that this rulemaking should be limited to issues related to bulk transportation of hazardous materials. Our goal is to articulate a statement of the applicability of the HMR that will apply across all modes of transportation and to all types of packagings. The answer to the question of when the regulation of transportation under the HMR begins and ends should be the same for all hazardous materials shipments.

C. Preemption

Congress enacted the Hazardous Materials Transportation Act (HMTA) in 1975 to give the Secretary of Transportation greater authority "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." A statutory provision for federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, a Federal Court of Appeals found that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments that expanded the preemption provisions. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

The 1990 amendments to the HMTA codified the "dual compliance" and "obstacle" criteria that RSPA applied in issuing inconsistency rulings before 1990. As now set forth in 49 U.S.C. 5125(a), these criteria provide that, in the absence of a waiver of preemption by the Secretary under 49 U.S.C. 5125(e) or unless it is authorized by another federal law, a requirement of a state, political subdivision of a state, or Indian tribe is explicitly preempted if:

(1) Complying with a requirement of the state, political subdivision or Indian tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or

(2) The requirement of the state, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

In the 1990 amendments to the HMTA, Congress also added additional preemption provisions on certain

"covered subject" areas and with regard to fees imposed by a state, political subdivision, or Indian tribe on the transportation of hazardous material. The covered subject areas are:

(a) The designation, description, and classification of hazardous material.

(b) The packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(c) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(d) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(e) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material. 49 U.S.C. 5125(b).

Unless it is authorized by another federal law or a waiver of preemption from the Secretary of Transportation, a non-federal requirement in any of these areas is preempted when it is not "substantively the same" as federal hazmat law or a regulation issued under it. 49 U.S.C. 5125(b)(1). RSPA has defined "substantively the same" to mean "conforms in every significant respect to the federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

Industry commenters to the two ANPRMs published under this docket state that "national uniformity of hazardous materials regulations is critical" (American Forest and Paper Association) and support a broad application of the federal hazmat law's preemption provisions. "DOT should continue to preempt non-federal requirements when they frustrate the safe and efficient transportation of hazardous materials." (Association of Waste Hazardous Materials Transporters) "DOT is the only agency with a legislative mandate to be the preeminent authority [for all transportation activities that impact the safe movement of hazardous materials]. This mandate must guarantee that the safe transportation of hazardous materials will take place without being encumbered by any local, state, or federal regulations that would interfere with such transportation." (CF Industries) Further, DOT should "[d]evelop instructive guidelines on preemption that track the functions of a hazmat employee. DOT is the only agency with Federal preemption

authority over state and local regulations and without it, shippers and carriers alike would be required to comply with many differing and often conflicting state and local regulations that would cause confusing and burdensome regulatory schemes." (FMC Corporation) Indeed, "DOT's failure to assert jurisdiction [with regard to loading and unloading of bulk containers] invite[s] state and local agencies to promulgate their own regulations for the loading, unloading, and incidental activities related to the transportation of hazardous materials in contravention of the statutory preemption provisions of [federal hazmat law] * * * Such an invitation is contrary to the goal of providing uniform national regulations for the safe and efficient transportation of hazardous materials." (National Paint and Coatings Association)

State and local government agency commenters to the two ANPRMs have a different view of the preemption provisions of federal hazmat law. Several of these commenters believe that "it is imperative that the HMR not preempt * * * necessary [state or local] regulations, rather the HMR should establish a minimum standard." (New Jersey Department of Environmental Protection) Other commenters suggest that "it is important to distinguish between state standards that are *an obstacle to compliance with HMR* and state standards that *fill gaps in HMR without being an obstacle to compliance*." (California Department of Toxic Substances Control) Moreover, "the HMR should at the very least defer to state and local control. RSPA should respect the rights of local control. Furthermore, this local control should not be subject to preemption petitions. Local citizens mandate the involvement of state and local regulatory agencies." (Maine Department of Environmental Protection) "DOT should not preempt federal, state, or local authorities unless it is clearly authorized to do so and provides for protections at least as stringent as those deemed necessary by federal, state, and local authorities * * * [G]reat deference should be shown to other federal, state, and local authorities by DOT, especially regarding measures designed to protect health, safety, and the environment. Finally, even where preemption is clearly called for and authorized, we would urge that other authorities be allowed to address special, unique local circumstances and conditions." (Northeast Waste Management Officials' Association)

As we have stated, one of the goals of this rulemaking is to assure nationally uniform standards applicable to

functions related to preparation for and the actual movement of hazardous materials in commerce. We agree with industry commenters that the preemption provisions of federal hazmat law are critical to achievement of this goal. However, we also agree with state and local government commenters that state and local governments have a legitimate role in the regulation of hazardous materials at fixed facilities and that this role should be accommodated to the extent possible within the context of a nationally uniform hazardous materials transportation safety regulatory program.

D. Pre-Transportation Activities and Specification Packagings

Most commenters to both the 1996 and the 1999 ANPRMs state that activities performed in advance of transportation to prepare a shipment of hazardous materials for transportation in commerce should be subject to exclusive federal regulation under the HMR. Such activities include determining the hazard class of a material, preparing shipping papers, selecting appropriate packaging, marking and labeling the package, and placarding the transport vehicle. Similarly, commenters state that activities related to the specifications for packagings authorized for transportation of hazardous materials in commerce, including all testing, retesting, reconditioning, and reuse requirements, should be subject exclusively to the HMR.

E. "Transportation in Commerce"

Commenters to the supplemental ANPRM generally indicate that the major issue for this rulemaking is how the term "transportation in commerce" is applied for purposes of regulation under the HMR. Thus, commenters addressed questions related to this definition in considerable detail.

Offeror intent. Commenters who support a broad application of the term "transportation in commerce" to include all activities related to the handling and storage of a hazardous material that is intended for shipment generally state that such a broad application is necessary to assure national uniformity of regulations applicable to the transportation of hazardous materials. One commenter states that, absent national uniformity, "shippers and carriers would be required to comply with a myriad of different and often conflicting state and local regulations that would substantially burden the free flow of goods in * * * commerce, and cause

potentially conflicting and confusing regulatory schemes." (HM-223 Working Group) Another suggests that "[a]llowing multiple agencies to regulate various aspects of hazmat transportation (a) unduly burdens interstate commerce, (b) increases the risk to public safety, (c) increases costs to transporters, shippers, consignees, and ultimately consumers, and (d) creates excessive administrative burdens." (American Trucking Associations)

For these commenters, transportation in commerce is a continuum that begins with an intention to ship a hazardous material and ends when that hazardous material is unloaded at its ultimate destination. Included on this continuum are all activities related to preparation of the hazardous material for shipment; loading of the hazardous material into a packaging or container authorized for transportation by the HMR; storage of the package at the offeror's facility prior to its acceptance by a carrier; intra-facility movements of the package; movement of the package by rail car, motor vehicle, aircraft, or vessel to its ultimate destination; storage of the package at any point prior to its delivery; storage of the package at the facility that is its ultimate destination; intra-facility movements of the package at its ultimate destination; and unloading of the hazardous material at its ultimate destination.

To assure national uniformity, these commenters believe that all of the above activities should be under the exclusive regulatory authority of the HMR. We disagree. This approach significantly expands the scope of the HMR as currently applied to activities that arguably are not part of "transportation" as that term is commonly understood. Specifically, some activities to which these commenters suggest that the HMR should apply are neither pre-transportation activities performed to prepare hazardous materials for transportation in commerce nor transportation activities that involve the actual movement of hazardous materials in commerce. For example, storage of a hazardous material at an offeror facility is not a pre-transportation activity conducted to prepare the hazardous material for transportation in commerce. Similarly, storage of a hazardous material at a consignee facility after delivery by a carrier but before the hazardous material is removed from a package is not movement of that material in commerce since movement in commerce is complete.

If we apply the HMR broadly as suggested by some commenters, this "offeror intent" approach would have

the effect of limiting and, perhaps, precluding regulation of hazardous materials at fixed facilities by state and local governments and could affect other federal programs, as well. Federal, state, and local programs for environmental protection, worker protection, community right-to-know, fire protection, building codes, and zoning could be adversely affected by extending the Secretary of Transportation's regulatory authority to an expanded set of hazardous materials activities at fixed facilities. For example, one commenter opposed to this approach suggests that, if implemented, "this option would essentially remove all hazardous waste storage and generator facilities from having to comply with [Resource Conservation and Recovery Act] storage and accumulation requirements, allowing unlimited storage in areas [that] might not have secondary containment or other release controls, simply because the hazardous waste is packaged in preparation for shipment at some future date." (Arkansas Department of Environmental Quality)

Further, the "offeror intent" approach to clarifying the term "transportation in commerce" could result in a regulatory regime that would be very difficult both to comply with and enforce. Commenters who support the "offeror intent" approach state that "intent is a legal standard. While evidence of intent may not be established by direct proof, it can be inferred from facts and circumstances." (Association of Waste Hazardous Materials Transporters) Commenters suggest several possible indicia of "intent" for compliance and enforcement purposes—placing a hazardous material in an authorized packaging or container, preparing shipping papers, affixing labels to packages, or statements by the offeror. One commenter states that "[t]he combination of packaging marking and labeling/placarding is a clear indication that the hazardous material is intended for transportation. There would be no reason to go through this step if the product is not intended to be transported. The expense associated with selection of a specification [packaging] is typically greater than non-specification packaging. Materials, not intended for transportation, would not [be placed in] specification packaging for intra-plant transfers." (Farmland) We do not agree.

An approach to compliance and enforcement that offers no clear standards either for regulated entities or enforcement officials would be highly subjective and would require a case-by-case analysis in almost every instance to

determine if a particular hazardous materials package was intended for transportation in commerce and, thus, subject to the requirements of the HMR. For example, as one commenter states, storing a hazardous material "in a DOT approved container does not always signify intent to transport. Often a 55-gallon drum is an ideal accumulation container for material [that] may or may not be intended for transportation." (Pennsylvania Department of Environmental Protection) Another commenter notes that "[m]any facilities accumulate hazardous materials in 'DOT approved' containers, but do not intend to 'offer it for transportation' at that time. Additionally, facilities receive hazardous materials in DOT approved packaging." (Arkansas Department of Environmental Quality) Further, "a facility may decide to use DOT specification packaging to protect employees and patients when moving waste from healthcare treatment rooms to on-site storage areas even if disposing of the waste on-site. In addition, a facility may use DOT specification packaging to fulfill the requirements in OSHA's Bloodborne Pathogens Standard in a cost-effective manner regardless of transport." (Medical Waste Institute) Using a properly labeled and marked container also assures compliance with OSHA's hazard communication regulations, which require consignees to retain the labels and placards required by the HMR on packages until they have been emptied.

Similarly, preparation of shipping papers does not always indicate an imminent intent to transport a hazardous material in commerce. Shipping papers may be prepared well in advance of package preparation or, in the case of multiple shipments of the same material, a single permanent shipping paper may be used for a number of shipments. In the case of hazardous waste shipments, hazardous waste generators may "complete a hazardous waste manifest (hazardous materials shipping paper) days or weeks prior to a prearranged site pick-up * * * some times without even contacting the transporter." (New Jersey Department of Environmental Protection)

We do not believe that it is possible to develop an enforceable means of determining the applicability of the HMR to a given shipment based solely on "intent." As a commenter notes, basing this determination on an offeror's intent for the package could result in the following enforcement scenario:

(a) If hazardous materials are on a transportation vehicle at a loading dock, but

fail to have proper USDOT marking, then the offeror can allege to a USDOT inspector that the materials are not intended for transportation and are not subject to HMR. Although this may subject the offeror to requirements of local or state government, the USDOT inspector is not empowered to enforce those requirements * * *

(b) Likewise if the inspector was a local or state government agency inspecting for [hazardous waste compliance] then the offeror can allege the materials are intended for transportation and are not subject to local or state government regulations. (New Jersey Department of Environmental Protection)

It is true that a person's statement with respect to his intent to offer a package for transportation that contradicts all other facts and circumstances related to that shipment need not frustrate enforcement efforts. For example, if a shipper denies that a shipment sitting on a loading dock with shipping documentation is in fact intended for transportation, an enforcement official is free to consider that statement in combination with other facts and circumstances in determining appropriate enforcement action. However, basing the applicability of the HMR solely on a determination of a shipper's intent would generally result in a regulatory regime that would be confusing for both the regulated industry and federal and state enforcement personnel.

For the reasons outlined above, we do not agree with commenters who suggest that offeror intent should be the determining factor for applicability of the HMR. The "intent" approach is inconsistent with federal statutes that provide OSHA with broad authority to protect workers from the risks associated with hazardous materials at fixed facilities. OSHA's authorizing legislation generally prohibits OSHA from imposing regulations where other federal agencies exercise statutory authority to issue or enforce regulations applicable to worker safety. Expanding the scope of the term "transportation in commerce" and, thus, the applicability of the HMR, to include activities such as storage at offeror or consignee facilities could hinder OSHA in exercising its statutorily granted authority with respect to such activities. A broad interpretation of "transportation in commerce" might also adversely affect several EPA programs. (See "OSHA and EPA Regulations," "OSHA Programs and Regulations," and "EPA Programs and Regulations" below for a more detailed discussion of EPA and OSHA statutory authorities and regulatory programs.)

Further, the "intent" approach limits the ability of state and local governments to develop community-

based solutions to issues such as zoning and community right-to-know. Strong preemption authority under federal hazmat law requires DOT to preempt many state and local laws and regulations concerning hazardous materials transportation that are not the same as the federal requirements. Expanding the scope of the term "transportation in commerce" to include the activities proposed by commenters who advocate the "intent" approach would extend the applicability of the HMR and, consequently, federal hazmat law's preemption provisions to areas traditionally regulated by state and local governments. (See "State/Local Requirements and Preemption" below for a more detailed discussion of the preemption provisions in federal hazmat law.)

Movement on public rights-of-way. Most commenters from state and local government agencies with responsibility for environmental protection support a narrow application of the term "transportation in commerce." In their view, transportation in commerce begins when a transportation vehicle physically leaves an offeror's place of business. As one commenter states, "49 U.S.C. 5102(12) defines transportation as the 'movement of property * * *' not the selection of packaging materials, etc. 'Movement of property' constituting transportation does not occur until the property is on a transport vehicle. DOT regulations should not apply until 'movement' begins on a public right-of-way, railroad or water or air route." (Pennsylvania Department of Environmental Protection)

Under this approach, transportation in commerce would begin when a shipment exits an offeror facility and enters a public right-of-way and ends when the shipment exits the public right-of-way at a facility that may or may not be the destination indicated on shipping documentation. Loading of a hazardous material onto a transport vehicle or into a bulk packaging, unloading of a hazardous material from a transport vehicle or a bulk packaging, storage of a hazardous material at an offeror facility, and storage of a hazardous material at a consignee facility would not fall within the scope of the term "transportation in commerce" and, thus, would not be subject to the HMR. Commenters who support this approach are concerned that the scope of the HMR not be so broad as to preempt "any state, county, or city [hazardous materials] storage requirement * * * This includes secondary containment, transfer equipment, operation of transfer

equipment, storm water systems, storage of incompatible chemicals and site operating procedures that would protect public health and safety and the environment.” (Washington State Department of Ecology)

This approach provides a clear dividing line for determining when a hazardous material is in transportation in commerce and subject to the HMR and when such materials are out of transportation and potentially subject to regulations of EPA, OSHA, or state and local governments. Thus, this approach enhances both compliance and enforcement. Further, this approach provides communities with wide latitude to develop community- or site-specific solutions to threats to safety posed by hazardous materials. In the words of one commenter, this approach “respects the rights of states and local governments to maintain their own regulatory programs, designed to fit their own needs and priorities. These programs cover a broad range of issues, such as emergency planning, fire protection, building codes, and hazardous materials handling safeguards.” (Maine Department of Environmental Protection)

However, the flexibility this approach provides to state and local governments also has the potential to compromise safety by undermining the national uniformity of the HMR. By narrowly applying the term “transportation in commerce” to exclude carrier loading and unloading operations, for example, this approach permits state and local governments to regulate such operations and, thus, could subject hazardous materials carriers to a number of different requirements as they transport hazardous materials from community to community or from state to state. Such an outcome would defeat one of the chief purposes of federal hazmat law, the HMR, and this rulemaking—that is, promotion of a national, uniform set of standards that apply to the transportation of hazardous materials in commerce. As one commenter notes, “The principle of regulatory uniformity has been the basis for the safe, efficient transportation of hazardous materials since the Hazardous Materials Transportation Act * * * was enacted in 1975. Only DOT has been specifically directed by Congress to provide ‘greater uniformity’ in the regulation of hazardous materials while in transportation in order to promote ‘the public health, welfare, and safety.’ * * * The underlying principle of [federal hazmat law] is that regulatory uniformity facilitates compliance and enhances safety, particularly as the law relates to non-federal requirements.

[Federal hazmat law] is not structured as other environmental or worker safety laws that set minimum standards that can be exceeded by non-federal entities.” (Association of Waste Hazardous Materials Transporters)

Further, this approach, like the offeror intent approach discussed above, is not consistent with federal hazmat law. Under this option, all loading and unloading operations would be excluded from regulation under the HMR. However, in defining “transportation” as “the movement of property and loading, unloading, and storage incidental to the movement,” the law clearly intends the Secretary of Transportation’s jurisdiction over hazardous materials in transportation to include those loading, unloading, and storage operations that are part of the transportation process.

Carrier possession. Some commenters advocate an approach to defining transportation in commerce that is keyed to a carrier’s possession of hazardous materials for purposes of transporting it. “‘Transportation’ * * * occurs when a carrier (that is, the entity used or engaged for the purpose of transport) has control over activities in which the hazardous material is handled, regardless of mode of transportation or location of the activity being performed.” (American Forest and Paper Association) Under this approach, “transportation in commerce” begins when a carrier accepts and exercises control over a hazardous material for purposes of transporting it and ends when the carrier relinquishes control of the shipment. “Transportation in commerce” would include hazardous materials loading and unloading operations when performed by a carrier and temporary storage of a hazardous material while in the care, custody, and control of a carrier. “Care, custody, and control” would be defined as “having the hazardous materials physically on or in a transport vehicle * * * [I]n the instances where a * * * carrier controls the loading and/or unloading operations, the * * * carrier should be held responsible for the process * * *” (American Trucking Associations)

This approach provides a definitive line for determining the applicability of the HMR. Hazardous materials in the care, custody, and control of a carrier, when acting as such, for purposes of transportation would be clearly in transportation in commerce and subject to the HMR. Hazardous materials at offeror or consignee facilities clearly would not be in transportation in commerce and subject to applicable state and local government requirements

for storing and handling hazardous materials at fixed facilities.

Further, keying “transportation in commerce” to carrier custody and control of a hazardous material provides hazardous materials carriers with a nationally uniform transportation safety standard. The HMR would apply to the transportation operations of hazardous material carriers. States and local governments could not impose requirements on these carriers that conflicted with or were inconsistent with the HMR.

At the same time, this approach accommodates state and local government regulation of hazardous materials at fixed facilities within their jurisdictions. Issues related to fire protection, emergency preparedness, community right-to-know, zoning, and building codes, for example, could be handled by state and local government agencies in the best position to evaluate problems and develop community-based solutions. “State and local laws and ordinances are usually tailored to meet localized concerns, conditions, and appetencies [that] cannot be addressed effectively by substituting a one-size-fits-all preemptive regulation.” (Arkansas Department of Environmental Quality)

Finally, this approach is consistent with the definition of “transportation” contained in federal hazmat law—“the movement of property and loading, unloading, and storage incidental to the movement.” Movement of property necessarily involves a carrier. Elsewhere, as one commenter notes, Congress stated, “The phrase ‘services in connection with’ as used in the definition of transportation * * * has been uniformly construed to mean services rendered while [a] shipment is in custody and control of [a] carrier, or service [that a] carrier is legally obligated to perform (49 USCS 10102, n 6).” (American Forest and Paper Association)

F. OSHA and EPA Regulations

On December 29, 1970, Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act) for the purpose of assuring safe and healthy workplaces. Under the OSH Act, every employer engaged in a business affecting commerce has a general duty to furnish each of its employees a workplace free from recognized hazards causing, or likely to cause, death or serious physical harm. In addition, employers are required to comply with all safety and health standards issued under the OSH Act that are applicable to working conditions involved in their businesses.

OSHA has promulgated a number of regulations that address the handling of hazardous materials at fixed facilities. These include regulations governing process safety management of highly hazardous chemicals and requirements for handling and storage of specific hazardous materials, such as compressed gases, flammable and combustible liquids, explosives and blasting agents, liquefied petroleum gases, and anhydrous ammonia. OSHA regulations also address hazard communication requirements at fixed facilities, including container labeling and other forms of warning, material safety data sheets, and employee training. In addition, facilities that handle and store hazardous materials must comply with OSHA regulations that address more general types of workplace hazards, such as walking and working surfaces, means of egress, noise, air quality, environmental control, personal protective equipment, and fire protection.

The mission of the U.S. Environmental Protection Agency is to protect human health and the natural environment from pollution. More than a dozen major statutes or laws form the legal basis for EPA's programs. Several of these statutes establish programs covering facilities that handle hazardous materials. They include:

- The Emergency Planning and Community Right-to-Know Act (EPCRA; 42 U.S.C. 11011 *et seq.*) requires facilities to provide information concerning the hazardous materials they have on site to states, local planners, fire departments, and, through them, to the public. This information provides the foundation for both community emergency response plans and public-industry dialogues on risks and risk reduction. EPCRA also requires facilities to report releases of certain hazardous materials to state and local emergency responders.

- The Clean Air Act (42 U.S.C. 7401 *et seq.*) establishes a general duty for facility owners or operators to identify hazards that may result from accidental releases of extremely hazardous substances, design and maintain a safe facility as needed to prevent such releases, and minimize the consequences of releases that do occur. EPA has promulgated a list of substances that, in the event of an accidental release, are known to cause or may be reasonably expected to cause death, injury, or serious adverse effects to human health or the environment. EPA also has established a threshold quantity for each listed chemical. Stationary sources that have more than a threshold quantity of a regulated

substance in a process are subject to the accident prevention regulations promulgated by EPA, including the requirement to develop risk management plans.

- The Resource Conservation and Recovery Act (RCRA; 42 U.S.C. 321 *et seq.*) gave EPA the authority to control hazardous waste from "cradle to grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA requires hazardous waste transportation regulations to be consistent with transportation regulations issued under federal hazmat law.

- The Clean Water Act (33 U.S.C. 1251 *et seq.*) establishes authority for the Spill Prevention, Control, and Countermeasure (SPCC) program for non-transportation-related facilities. The SPCC regulations are designed to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or onto the navigable waters of the United States or adjoining shorelines.

Commenters to the 1996 and 1999 ANPRMs have varied opinions as to the appropriate relationships between the HMR and the OSHA regulations and the HMR and EPA regulations. Commenters generally state that "workers need to be protected from harm in the workplace and that OSHA is the lead agency for workplace safety." (American Trucking Associations) In addition, commenters generally recognize the "importance of protecting against degradation of air, water, and land (the 'total environment') * * * as it relates to the public's well-being (i.e., beyond the fence line)." (American Forest and Paper Association) Commenters further state that "[a]ll affected agencies should share a common goal to avoid duplicative or inconsistent rules that are often the consequence of competing jurisdictional authority." (Association of Waste Hazardous Materials Transporters) However, commenters do not agree on how this goal can be achieved.

Most commenters accept a degree of shared RSPA-OSHA-EPA jurisdiction where hazardous materials safety is concerned because "[t]ransportation of hazardous materials affects and is affected by regulations of other Federal agencies addressing worker safety and environmental protection." (Utility Solid Waste Activities Group) RSPA and OSHA may share regulatory responsibility for certain activities involving hazardous materials because "[o]ther regulations, not in conflict with the HMR may enhance safety of the workers, and general public." (Farmland) Thus, "[w]hen a consignor designates a material as 'hazardous' and

classifies it according to the HMR, no other government agency should be allowed to alter the class or name as a condition for transport. However, other aspects of the material's environment can be regulated by other government agencies." (Association of Waste Hazardous Materials Transporters) Similarly, "storage of non-bulk packages in warehouses on the plant site are subject to applicable fire and building code standards, OSHA and EPA requirements, and applicable state and local requirements (although clearly the package itself would remain subject to the HMR). Operational standards for use of mechanical package handling equipment should be prescribed by agencies other than DOT, though those agencies should consult with DOT when developing those standards. Workers who handle packages after filling on the chemical plant site are subject primarily to OSHA worker safety standards, but also to DOT standards, such as training requirements and attendance requirements." (HM-223 Working Group) In addition, "storage at an interim transfer facility [is] transportation-related and subject to RSPA packaging standards, [but] the fixed facility itself should not be subject to the HMR, as standards of other agencies * * * adequately cover this." (California Department of Toxic Substances Control) Further, "[f]ire codes, zoning laws, right-to-know, and risk management requirements should apply to storage of hazardous materials. However, such shipments must remain under DOT's jurisdiction." (E.I. Dupont de Nemours and Company) Another commenter declares, "Federal, state, and local agencies must be allowed to fulfill their administrative functions in protecting human health, safety, and the environment * * * Altogether, these requirements create safer environments and more effective responses to discharges." (New Jersey Department of Environmental Protection) Where OSHA and EPA have established comprehensive regulatory programs, such as OSHA's process safety management program and EPA's risk management program for manufacturing processes, "[a]dditional requirements under the HMR for * * * manufacturing processes would be burdensome and create confusion by the overlapping of jurisdictional boundaries that are specifically identified by the preeminent authorities as delineated for each government agency." (PCS Nitrogen)

The relationship of the HMR to the OSHA worker protection regulations is complicated by a provision in federal

hazmat law that expressly gives OSHA shared jurisdiction with the Secretary of Transportation in four specific areas: training, handling criteria, registration, and motor carrier safety permits. 49 U.S.C. 5107(f)(2). Several commenters believe that this broadening of OSHA's jurisdiction to non-training areas of hazardous materials transportation safety resulted from a drafting error that occurred when Congress enacted the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. 101-615 (HMTUSA) and was perpetuated when HMTUSA subsequently was codified at 49 U.S.C. 5101-5127. As one commenter states, "[w]hile there was general agreement in 1990 to grant shared jurisdiction for training with OSHA, it was never intended for DOT to relinquish its authority in any of the affected areas nor to have shared jurisdiction in any area besides training. Therefore, before RSPA can answer the question, in rulemaking, where jurisdictional lines should be drawn, Congress should amend section 5107 to reflect its original intent." (American Trucking Associations) Another commenter asserts that those who wrote the 1990 law that allows this shared jurisdiction agree that the broad grant of authority is the result of a typographical error. "At the federal level, there is a presumption that Congress enacts law with full knowledge of existing law. However, that is not always the case and unintended consequences can result. Those who wrote the 1990 provision of law, now codified at 49 U.S.C. 5107(f)(2), which allows OSHA to share jurisdiction with DOT over hazmat worker training, hazardous materials handling criteria, permitting of motor carriers of hazardous materials, and the registration of persons engaged in the transportation of these materials, have stated this broad grant of authority was the result of a typographical error and that Congress only intended to affirm OSHA shared jurisdiction in the area of hazmat worker training. Others may wish history to be otherwise, but it is not." (Association of Waste Hazardous Materials Transporters)

On the other hand, several commenters see no sound reason for changing the joint authority in section 5107 by eliminating, altering, or confusing the current regulatory scheme. "The law is clear in its determination of joint responsibility for the training of hazmat employees * * * We believe the issue was contemplated when Congress crafted the law and intended there be joint responsibility to ensure hazmat employers provided the

necessary training to provide maximum coverage for the employee's protection." (Brotherhood of Locomotive Engineers) Some commenters believe that a line of separation to delineate activities and/or facilities over which the HMR should apply to the exclusion of OSHA requirements could adversely affect worker safety. "[I]t is inevitable that confusion or degradation of existing requirements could arise if shared jurisdictions are changed. The training perspective offered by OSHA and its associated requirements for personal protective equipment; monitoring; medical surveillance; evacuation for hazmat employees; and hazard communication must be uniformly administered to all elements of industry. In the haste to eliminate regulatory overlaps among regulatory agencies it must not be forgotten that OSHA requirements place an emphasis on employee safety and that focus should not be diluted to promote more efficient and effective compliance with safety standards." (Brotherhood of Locomotive Engineers) Another commenter agrees and states, "[w]ith respect to the relationship between RSPA and OSHA regulation, [we] particularly [draw] to RSPA's attention the provision at section 5107(f)(2) of Title 49 of the U.S. Code. That section expressly provides that regulation by the Secretary of Transportation with respect to hazmat handling, training, permitting, and other activities does not oust OSHA from concurrent jurisdiction over those subjects." (International Brotherhood of Teamsters)

Based on their respective statutory authorities, both DOT and OSHA regulate hazardous materials. Prior to 1990, to the extent that DOT's regulation of hazardous materials and OSHA's regulation of hazardous materials overlapped, DOT's regulations took precedence. Section 4(b)(1) of the OSH Act provides that nothing in that Act applies to working conditions of employees where other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653(b)(1). Consequently, where DOT exercised its authority to prescribe or enforce standards or regulations affecting occupational safety or health in a particular area, OSHA was precluded from regulating in that same area, without exception.

In 1990, Congress enacted HMTUSA. Among other things, HMTUSA limited the preemptive effect of the HMR on OSHA regulations in certain specified areas. Specifically, section 1805 of the Act was amended to read as follows:

For purposes of section 653(b)(1) of title 29, no action taken by the Secretary [of Transportation] pursuant to this section shall be deemed to be an exercise of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 49 U.S.C. App. 1805(b)(3). (Emphasis added.)

This is the so-called "reverse 4(b)(1)" provision.

The words "pursuant to this section," found in section 1805(b)(3) referred to the entirety of § 1805, entitled "Handling," and not solely to subsection 1805(b)(3), which pertained to training. Proponents who believe this is a drafting error contend that Congress intended to use the word "subsection" instead of "section" in section 1805(b)(3). They argue that the references back to highway safety permits and registration make no sense and demonstrate their point.

The 1994 codification of federal hazmat law, however, reinforced the interpretation that the words "pursuant to this section" referred to former section 1805 in its entirety. The purpose of this action was to "clean-up" several related federal transportation laws, "restating" them in a format and language intended to be easier to understand without changing substantive content.

The "reverse 4(b)(1)" provision was codified at 49 U.S.C. section 5107(f)(2). The language was revised to read as follows:

An action of the Secretary of Transportation under subsections (a)-(d) of this section and sections 5106, 5108(c)-(g)(1) and (h), and 5109 of this title is not an exercise, under section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

49 U.S.C. section 5107(f)(2).

Section 5107(f)(2) indicates that RSPA's exercise of authority under section 5106 ("Handling Criteria") of federal hazmat law, as well as under other specified sections, does not constitute an exercise of authority under section 4(b)(1) of the OSH Act that would result in preemption of OSHA regulations. Those other specified areas are: (1) registration under 49 U.S.C. section 5108(c)-(g)(1) and (h); (2) motor carrier safety permits under 49 U.S.C. section 5109; and (3) hazmat employee training requirements under 49 U.S.C. section 5107(a)-(d). Consequently, the plain language of section 5107(f)(2) nullifies the HMR's preemptive effect on OSHA regulations in the specified areas. The legislative history of federal hazmat law sheds no light on whether the 1990 extension of OSHA authority was

intentional. In these circumstances, RSPA is bound by the literal language of section 5107(f)(2).

EPA is also authorized to regulate hazardous materials, and its statutes do not expressly preclude EPA from regulating hazardous materials activities regulated by RSPA, although EPCRA does exempt "transportation, including the storage incident to such transportation" from many of its requirements. While most of EPA's programs focus on fixed facilities, EPA also regulates transportation of hazardous wastes under RCRA, as noted above. Moreover, loading, unloading, and storage of hazardous materials generally occur at fixed facilities. Recognizing the potential for regulatory overlap, EPA has taken into account RSPA regulation of hazardous materials in deciding whether and how to regulate. Consequently, the decisions RSPA makes in this rulemaking may affect some EPA programs. The nature and extent of that effect will depend on EPA's interpretation and implementation of its statutes and regulations, some of which we describe further below.

Some commenters suggest that regulatory inconsistencies among agencies with responsibilities for hazardous materials safety could be avoided if RSPA incorporated "within 49 CFR a reference to pertinent regulations or regulatory codes developed by other entities" for application to hazmat employees. (FMC Corporation) "Where there is a need for an OSHA standard to protect a hazmat employee of a motor carrier during the normal course of transportation * * * RSPA should adopt that standard, by reference, into the HMR. By doing so, the standard adopted would prevail and be uniform throughout the United States * * * Similarly, RSPA should consider incorporating EPA's environmental regulations that impact hazardous materials during the normal course of transportation." (American Trucking Associations) We do not agree.

First, OSHA and EPA are authorized by statute to develop broad programs for worker safety and environmental protection. OSHA is the agency tasked by Congress with ensuring safety in the workplace. EPA is the agency tasked with protecting human health and the natural environment. RSPA lacks the expertise and the resources to establish a credible OSHA safety program within RSPA for all workers who perform functions under the HMR. RSPA has a narrower role to play in the area of transportation worker safety—ensuring that there are adequate protections for transportation employees during the

transportation of hazardous materials in commerce. Similarly, RSPA has neither the resources nor the expertise to address in a credible manner all the environmental hazards posed by the transportation of hazardous materials. Again, RSPA has a more limited environmental role—ensuring that hazardous materials transported in commerce are moved without release under normal conditions of transport from their point of origin to their destination.

Second, the OSH Act and many of EPA's authorizing statutes permit states to adopt and enforce regulations for worker safety and environmental protection that may be more stringent than the federal regulations promulgated by OSHA and EPA. By contrast, federal hazmat law preempts many state and local laws and regulations applicable to hazardous materials transportation that are not the same as the federal requirements in the HMR.

The relevant federal statutes do not provide clear guidance as to the preemptive effect OSHA and EPA standards would have if RSPA incorporated them into the HMR. Incorporating OSHA and EPA requirements into the HMR may prevent states from adopting more stringent worker safety and environmental protection standards and would thus undermine the intent of Congress as expressed in the OSH Act and in EPA's authorizing legislation. On the other hand, because the OSHA regulations are promulgated under authority of the OSH Act and EPA regulations under authority of EPA's authorizing statutes, states may be permitted to adopt more stringent requirements irrespective of the preemption provisions of federal hazmat law. Consequently, we do not believe that incorporating certain OSHA or EPA standards into the HMR would result in uniform federal regulation of transportation worker safety or environmental protection in a manner consistent with federal hazmat law, the OSH Act, and the statutes authorizing EPA's programs.

Other commenters suggest that RSPA and OSHA negotiate a memorandum of understanding (MOU) that would delineate each agency's areas of responsibility for worker protection at hazardous materials facilities. We are not convinced that such an effort is necessary or desirable. MOU negotiations can be lengthy and resource-intensive. An MOU may be difficult to develop to all parties' satisfaction and may omit resolution of facts and conditions that inevitably arise, thereby failing to prevent the

problems it is designed to avoid. Further, an MOU is a static document and can require amendments when policies change or its provisions become outdated; while such amendments are negotiated, application of the MOU may have to be suspended for extended periods of time. However, we agree with commenters that RSPA and OSHA should cooperate to assure that the HMR and the OSHA regulations are complementary, consistent, and clear. We will consider all possible avenues for enhancing our cooperative relationship, including negotiation of an MOU if both agencies agree that an MOU is practicable and necessary.

We believe that a clarification of the applicability of the HMR and how that may affect the application of OSHA and EPA regulations to specific hazardous materials activities or facilities must be made within the context of each program's authorizing statutes and regulations. This approach involves looking to Congressional and agency intent as expressed in the body of statutes and regulations exercising federal jurisdiction over hazardous materials where transportation and non-transportation activities intersect. The OSH Act, EPA's authorizing statutes, and federal hazmat law express different statutory purposes. Our task is to interpret and implement federal hazmat law in a way that fulfills its statutory purpose and is consistent with the statutory purposes of the OSH Act and EPA's statutes.

IV. Proposal

We agree with commenters that the major issue for this rulemaking is how the term "transportation in commerce" is applied for purposes of the HMR. For the reasons stated above, we are proposing to key this application to a carrier's possession of a hazardous materials shipment. We believe that this approach is most consistent with the intent of federal hazmat law and with other federal statutes governing the regulation of hazardous materials at fixed facilities. Further, we believe that this approach assures national uniformity of hazardous materials transportation safety regulations while permitting states, local governments, and Indian tribes sufficient latitude to develop community-specific regulations to address local problems and issues.

The HMR would continue to apply to certain activities performed by offerors to prepare a hazardous material for transportation. We propose a new term to describe these activities—"pre-transportation functions." "Transportation in commerce" would begin when a carrier takes physical

possession of a hazardous materials package or shipment for purposes of transporting it and would continue until delivery of the package to its consignee or destination as evidenced by the shipping documentation under which the hazardous material is moving, such as shipping papers, bills of lading, freight orders, or similar documentation. The HMR would apply to all carrier activities after the carrier takes possession of the hazardous material from an offeror for purposes of transporting it until the package is delivered to its destination, including loading and unloading activities conducted by carrier personnel. For purposes of the HMR, such activities would be considered loading or unloading "incidental to movement." In addition, the HMR would apply to storage of a hazardous materials package by any party between the time that a carrier takes possession of the hazardous material for purposes of transporting it until the package is delivered to its intended destination, as evidenced by the shipping documentation under which the package is moving. Except for rail cars stored on leased track, such storage would be considered storage "incidental to movement." We are proposing and requesting comment on two alternatives for applying the HMR to rail cars stored on leased track (see "Storage Incidental to Movement" below for alternatives discussion).

Federal hazmat law does not preempt other federal statutes nor does it preempt regulations issued by other federal agencies to implement statutorily authorized programs. The proposals in this rulemaking are intended only to clarify the applicability of the HMR to specific functions and activities. It is not appropriate for DOT to attempt to clarify the applicability of other federal agencies' statutes or regulations to particular functions or activities. However, it is important to note that facilities at which pre-transportation or transportation functions are performed must comply with applicable OSHA and state or local regulations applicable to physical structures—for example, noise and air quality control standards, emergency preparedness, fire codes, and local zoning requirements. Facilities must also comply with applicable state and local regulations for hazardous materials handling and storage operations.

Facilities at which pre-transportation or transportation functions are performed may also be subject to EPA and other OSHA regulations. For example, facilities that store hazardous materials may be subject to EPA's risk

management, community right-to-know, hazardous waste tracking and disposal, and spill prevention, control and countermeasure program requirements and OSHA's process safety management and emergency preparedness requirements. Questions as to the applicability of EPA or OSHA regulations to particular facilities or operations should be directed to the appropriate EPA or OSHA office.

Our proposal is described in more detail in the following sections.

A. Packaging Specifications

Federal hazmat law and the HMR will continue to apply, as they do currently, to persons who manufacture, mark, maintain, recondition, repair, or test packagings or components thereof that are represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce. Packaging integrity is critical to safe transportation of hazardous materials; therefore, it is imperative that DOT exercise jurisdiction over packaging requirements to the exclusion of state and local governments. Further, uniformity of packaging specifications assures the safe and efficient movement of hazardous materials across state lines and international boundaries. Thus, consistent with the preemption provisions of federal hazmat law, the Secretary's regulatory jurisdiction in this area must preempt state and local law. It is important to note that a packaging marked to certify that it conforms to HMR requirements must be maintained in accordance with applicable specification requirements whether or not it is in transportation in commerce at any particular time.

B. Pre-Transportation Functions

The HMR currently apply to a number of activities performed before a hazardous materials shipment is transported in commerce. Such activities—or functions—include: (1) Determining the hazard class of a hazardous material; (2) selecting a hazardous materials packaging; (3) filling a hazardous materials packaging; (4) securing a closure on a filled hazardous materials package or container or on one containing a residue of a hazardous material; (5) marking a package to indicate that it contains a hazardous material; (6) labeling a package to indicate that it contains a hazardous material; (7) preparing a hazardous materials shipping paper; (8) providing and maintaining hazardous materials emergency response information; (9) reviewing a hazardous materials shipping paper to verify compliance with the HMR or

international equivalents; (10) for persons importing a hazardous material in to the United States, providing the shipper and the forwarding agent at the place of entry into the United States with information as to the requirements of the HMR that apply to the shipment of the material while in the United States; (11) certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR; (12) blocking and bracing a hazardous materials package in a freight container or transport vehicle; (13) segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo; and (14) selecting, providing, or affixing placards for a transport vehicle to indicate that it is carrying hazardous materials.

These functions occur before transportation in commerce begins, i.e. before a carrier takes possession of the hazardous material, but, as most commenters agree, they have a direct bearing on the safety of a hazardous materials shipment in commerce and, thus, should be subject to the HMR. Further, regulation of these functions must be uniformly applied and enforced if a hazardous materials shipment is to move smoothly, efficiently, and safely from its point of origin to its destination. Congress recognized the importance of national uniformity in these areas by creating a specific preemption provision in section 5125(b) applicable to state, local, and Indian tribe requirements on: (1) the designation, description, and classification of hazardous material; (2) the packing, repacking, handling, labeling, marking, and placarding of hazardous material; (3) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents; (4) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and (5) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

In this NPRM, we propose to define a new term—"pre-transportation function"—to cover activities performed prior to the transportation of a hazardous material and to which the HMR apply. The requirements in the HMR for pre-transportation functions apply to persons who offer hazardous materials for transportation in

commerce or who cause hazardous materials to be transported in commerce. Persons who "cause" hazardous materials to be transported in commerce include freight forwarders, non-vessel operating common carriers, freight brokers, and other entities that may perform pre-transportation functions. Any person who performs a pre-transportation function is subject to applicable requirements of the HMR. We also propose to define "offer a hazardous material" to mean the performance of a pre-transportation function under the HMR. In this way, we intend to clarify that, consistent with federal hazmat law, the HMR apply to functions performed to prepare hazardous materials for transportation in commerce as well as to the actual transportation of hazardous materials in commerce.

Under this proposal, we would continue to exercise our statutory authority to inspect for compliance with the HMR requirements applicable to pre-transportation functions. We would also continue to exercise our authority to take appropriate enforcement action when we discover that a pre-transportation function has been performed in a manner that does not comply with the HMR, even if transportation of the hazardous material in commerce has not yet begun (i.e., the carrier has not yet taken possession of the material) or has not been performed at all (i.e., undeclared shipments offered for transportation). This approach is consistent with our authority under section 5103 of federal hazmat law (49 U.S.C. 5103) to regulate activities that affect the safe transportation of hazardous materials in commerce. Also, as stated above, this approach is consistent with Congress' intent that the HMR requirements applicable to the activities we propose to define as "pre-transportation functions" be applied and enforced in a manner that promotes uniformity in those areas.

It should be noted that several of the pre-transportation functions identified in our proposed definition generally relate to loading of hazardous materials into packagings or transport vehicles, including filling of a packaging (including a bulk packaging), securing closures on a filled hazardous materials package (including a bulk package) or on one containing a residue of a hazardous material, blocking and bracing hazardous materials in a freight container or transport vehicle, or segregating hazardous materials packages in a freight container or transport vehicle from incompatible cargo. These activities are regulated as pre-transportation functions and not as

activities incidental to movement because the carrier has not yet taken possession of the material. In these cases, transportation in commerce has not yet begun. (See "Transportation Functions Subject to the HMR" below for a proposed definition of "loading incidental to movement.")

C. Transportation That Is "in Commerce"

In this NPRM, we propose several definitions to clarify the applicability of the HMR to transportation functions and the persons who perform them. Federal hazmat law requires the Secretary of Transportation to establish regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. As noted above, the law defines "transportation" and "commerce" separately. Further, federal hazmat law authorizes the Secretary of Transportation to apply these regulations to persons who transport hazardous materials in commerce or cause hazardous materials to be transported in commerce. Thus, in a number of letters of interpretation issued over the years, we have explained that our statutory authority to issue hazardous materials transportation safety regulations extends, in addition to pre-transportation and packaging functions, only to transportation in commerce or transportation for commercial purposes. Persons who transport hazardous material in commerce or cause hazardous material to be transported in commerce are subject to the federal hazmat law and the HMR. However, a government entity, such as a state-chartered and -funded university, is not subject to the HMR as a carrier unless it transports hazardous materials in furtherance of a commercial enterprise (April 23, 1991 RSPA letter to the Department of Energy; June 1, 1994 RSPA letter to The Honorable Ronald V. Dellums; June 3, 1993 RSPA letter to the U.S. Department of Energy; September 26, 1994 RSPA letter to California Environmental Protection Agency; August 12, 1999 RSPA letter to University of Colorado, Boulder Campus). Similarly, we have stated that the transportation of hazardous materials by private individuals in personal vehicles for personal use is not subject to the HMR (October 1, 1999 RSPA letter to Raymond K. Barwin).

While we have declared in these and other letters of interpretation that the HMR do not apply to transportation of hazardous materials in private motor vehicles by private individuals for personal use, or transportation of hazardous materials by government

entities for noncommercial purposes, this statement of applicability is not formally expressed in the HMR. We therefore propose to include in HMR a section specifically stating that noncommercial transportation of hazardous materials is not subject to the HMR. Noncommercial transportation includes transportation of hazardous materials by government employees for government purposes and by private individuals in private motor vehicles for personal use.

We have historically considered commerce to include all private—that is, non-governmental—transportation of hazardous materials except for transportation in a personal vehicle for the personal use of an individual. Thus, noncommercial transportation does not include transportation of hazardous materials by not-for-profit entities. In general, we regard the activities of an entity to be its "business," regardless of whether it is organized for profit or not. To the extent that an entity performs activities for others, including its shareholders and employees, it is engaged in commerce. Thus, the fact that an entity is established as a non-profit organization is not relevant to the determination of whether it performs activities "in commerce." A non-profit entity may engage in commercial activities to the same extent as a for-profit company. Not-for-profit entities that offer or transport hazardous materials are subject to all applicable requirements of the HMR.

In letters of interpretation, we also have clarified that the HMR do not apply to intra-facility movements of hazardous materials that take place entirely on private property where public access is denied or restricted. We have explained that movements of hazardous materials that take place entirely within a private facility are not subject to the HMR. If such movements utilize or cross public roads, however, they are subject to the HMR. (May 3, 1979 Materials Transportation Bureau [RSPA predecessor agency] to the Olin Corporation; September 15, 1981 FHWA letter to Hooker Chemical Company; March 25, 1983 RSPA letter to the Assistant Fire Marshall for the State of Kentucky; April 23, 1991 RSPA letter to the Department of Energy; April 19, 1994 RSPA letter to California Department of Justice; July 2, 1999 RSPA letter to Mr. Mark R. Maki; and August 19, 1997 RSPA letter to Lockheed Martin Energy Systems, Inc.) It should be noted, however, that these letters of interpretation do not concern baggage or packages offered to airlines for transportation that are moved within the contiguous boundaries of an airport.

Baggage and packages that contain hazardous materials are subject to applicable HMR requirements even when moving within the confines of an airport facility.

One commenter suggests that the HMR incorporate an exception from regulation for the movement of containerized, non-bulk hazardous materials from one part of a facility to another part across a public road. "Extensive DOT regulation under the HMR is not needed to protect public safety during such crossing * * * The movement * * * associated with the proposed road crossing exception would occur only at the point of origin * * * The personnel involved would be trained per OSHA and EPA requirements on how to handle hazardous materials safely and how to respond in the unlikely event of an incident. On-site emergency response personnel would be immediately available to respond. Those facts warrant the exclusion of a larger quantity of material from the HMR requirements during such crossings." (The Boeing Company) We do not believe such an exception is necessary. In letters of interpretation, we have indicated that use of a red traffic signal or road closure to deny public access to a public highway utilized for movements of hazardous materials between areas of the same facility makes the portion of the highway to which access is restricted private and that movements of hazardous materials in such circumstances would not be subject to the HMR (December 30, 1998 RSPA letter to General Electric Company). We have further explained that "[i]f a road is used by members of the general public (including dependents of Government employees) without their having to gain access through a controlled access point, transportation on (across or along) that road is in commerce. On the other hand, if access to a road is controlled at all times * * * transportation on that road is not in commerce." (December 30, 1998 RSPA letter to General Electric Company) Signs and automated access control systems that warn the public that an area is restricted and prevent access to restricted areas are methods that can be used to control public access (December 12, 1997 RSPA letter to Richland Operations Center, Department of Energy). This NPRM proposes to add a statement to the HMR indicating that the HMR do not apply to rail and motor vehicle movements of a hazardous material that occur entirely within a contiguous facility boundary, other than at a transportation facility as

defined in this NPRM, where public access is controlled even when such movements are performed by a for-hire carrier.

D. Transportation Functions Subject to the HMR

As discussed above, in addition to pre-transportation and packaging functions, only transportation that is "in commerce" is subject to regulation under federal hazmat law. Federal hazmat law defines "transportation" as "the movement of property and loading, unloading, or storage incidental to the movement." However, federal hazmat law does not define "movement" nor does it define "loading, unloading, or storage incidental to movement." Neither do the HMR currently define these terms.

Movement. Clearly, the key word in the definition of "transportation" included in federal hazmat law is "movement." We propose to define "movement" to mean "the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel." A carrier "moves" a hazardous material; thus, transportation in commerce necessarily involves activities performed by a carrier in connection with the movement of a hazardous material. In this NPRM, we propose that, for purposes of applicability of the HMR, transportation in commerce begins when a carrier takes physical possession of a hazardous material for the purpose of transporting it and continues until the package containing the hazardous material is delivered to its destination as indicated on the shipping paper under which the hazardous material is moving. All loading, unloading, and storage functions performed by a carrier in the course of transporting a hazardous material in commerce would be subject to the requirements of the HMR.

Many hazardous materials shipments are transported by private motor carriers—companies that own the hazardous materials they transport and transport them in company-operated vehicles driven by company personnel. Commenters to the 1996 ANPRM and the 1999 supplemental ANPRM state that the HMR should apply in the same manner to private and for-hire carriers. As one commenter notes, "Distinctions should not be made between private and common carriers, as the function of the activity is the same whether private or common." (HM-223 Working Group) However, the nature of private carriage makes it difficult to identify a point at which a private carrier makes the transition from offeror to carrier to

consignee for the purpose of determining when the "carrier" takes possession of a hazardous materials shipment from the "offeror." In this NPRM, we propose that, for private motor carriers, transportation in commerce begins when a motor vehicle driver takes possession of a hazardous material for the purpose of transporting it and continues until the motor vehicle driver relinquishes possession of the package at its destination and is no longer responsible for performing functions subject to the HMR.

Under this NPRM, a hazardous material would be in transportation in commerce until it reaches the final destination as indicated on the shipping paper under which the hazardous material is moving, except where the hazardous material is repackaged prior to delivery or stored for purposes other than transportation. For example, when a hazardous material transported in a rail tank car arrives at an intermodal transfer facility where the material will be transferred to several cargo tanks for delivery to a consignee, transportation in commerce ends when the rail carrier relinquishes possession of the tank car at the transfer facility. The transfer facility will perform pre-transportation activities in the process of transferring the material to the cargo tanks and preparing them for transportation. Transportation in commerce would begin when a highway carrier takes possession of the hazardous material from the transfer facility. Similarly, when a hazardous material is transported to and held at a storage facility at the request of the consignor or consignee, as indicated on shipping papers under which the hazardous material is moving, transportation in commerce ends when the carrier places the material in the storage facility, even if it is owned by the carrier. Note, however, that we are proposing and requesting comment on two alternatives for applying the HMR to rail cars stored on leased track (see "Storage Incidental to Movement" below for alternatives discussion).

This proposal is consistent with current HMR requirements and letters of interpretation we have issued to clarify the meaning of the term "transportation in commerce." For example, we have explained that "a hazardous material is considered 'in transit' * * * until it reaches its final destination, provided it has not been repackaged." (December 17, 1990 letter to David K. Lindemuth Company, Inc.)

Loading and Unloading Incidental to Movement. Loading and unloading "incidental to movement" of a hazardous material is loading or

unloading *associated* with such movement. We therefore propose to define these terms based on whether the activities to which they refer are associated with a carrier's movement in commerce of a hazardous material. Using this approach, we propose to define "loading incidental to movement" to mean loading of a hazardous material onto a transport vehicle, aircraft, or vessel or into a bulk packaging for purposes of transporting it when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle into which the hazardous material is being loaded immediately prior to movement in commerce of the hazardous material. We propose to define "unloading incidental to movement" to mean unloading of a hazardous material from a transport vehicle, aircraft, or vessel or from a bulk packaging when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement in commerce is completed. Loading and unloading incidental to movement in commerce would also include loading and unloading of packaged hazardous materials at facilities where such packages are transferred from one transport vehicle to another or from one mode of transportation to another.

As proposed in this NPRM, hazardous materials unloading operations performed by consignees would not be subject to the HMR. Consignee unloading is not part of transportation in commerce as we propose to apply that term because it occurs after movement in commerce is completed.

For the most part, this proposal is consistent with current HMR requirements and letters of interpretation and administrative decisions we have issued to clarify the applicability of the HMR to unloading operations from transport vehicles and bulk packagings other than tank cars. As long ago as 1978, we stated that requirements in the HMR applicable to cargo tank unloading end when the activities of the carrier relative to a given shipment end (November 24, 1978 Materials Transportation Bureau letter to Dow Chemical). More recently, we explained that the HMR requirements governing cargo tank unloading operations do not apply when the cargo tank has been placed on the consignee's premises and the motive power has been removed from the premises (March

23, 1999 RSPA letter to Great Lakes Chemical Corporation).

For hazardous materials transportation by rail tank car, however, the proposals in this NPRM applicable to hazardous materials unloading operations represent a change from current practice and interpretation. Historically, the tank car unloading requirements included in Part 174 of the HMR have been applied to all unloading operations. These requirements are set forth in section 174.67 of the HMR and include procedural and attendance requirements. The requirements date back to a time when tank cars were unloaded while on a carrier's track or public siding in the center of or adjacent to a populated area. Interpretations and administrative determinations issued by RSPA and FRA reflect this historical application of the HMR. Thus, in an administrative determination of preemption applicable to certain California and Los Angeles County requirements for handling and transportation of hazardous materials (February 15, 1995; 60 FR 8773) and in informal letters of interpretation (February 14, 1984 FRA letter to W.R. Grace & Co.), we recognized that section 174.67 applies to consignee unloading and, therefore, that consignee unloading of tank cars is "unloading that is incidental to transportation" and subject to requirements of the HMR.

Today, a large proportion of hazardous materials tank cars are unloaded by consignees over extended periods of time directly into manufacturing processes at privately owned facilities where public access is restricted. As one commenter states, "The transfer of cargo into, and out of, tank cars is primarily a shipper activity. We are not aware of any circumstances in which rail carriers are responsible for loading or unloading, except in emergency operations where the carrier is the consignor or consignee of the tank car." (Chemical Manufacturers Association; comments originally submitted under Docket HM-212) Another commenter suggests that the current tank car unloading requirements in the HMR are biased "toward the old, obsolete, and inappropriate regulatory requirements that only carriers are responsible for unloading. In the majority of cases, the shipper has total control over the unloading process and has established, safe, proven practices to accomplish the load and unload product transfer process." (Akzo Chemicals, Inc., comments originally submitted under Docket HM-212).

We agree that hazardous materials tank car loading and unloading operations generally are part of the

manufacturing process and, as such, are inappropriate for regulation as transportation functions under the HMR. In this NPRM, we propose that loading of a tank car by a shipper and unloading of a tank car by a consignee within a facility would not be subject to the HMR. This approach is consistent with RSPA's current regulation of cargo tank loading and unloading and takes into account the changes in industry rail tank car unloading practices since the regulations in section 174.67 were promulgated. Accordingly, we propose to remove the obsolete requirements relating to tank car unloading from section 174.67.

While hazardous materials tank car loading and unloading operations *per se* are more appropriately regulated as manufacturing rather than transportation operations, FRA believes that unique features of rail tank car loading and unloading facilities and of rail tank cars themselves require continued application of certain HMR requirements related to the protection of train and engine crews operating within a shipper or consignee facility. For example, a rail tank car on a gentle slope can move without being attached to motive power. Rail tank cars that do not have their brakes set or wheels blocked have rolled out through plant fence lines; such unrestrained movements have fouled railroad trackage and caused accidents.

In addition, rail carriers routinely enter and exit loading and unloading facilities to pick up or drop off rail cars. Further, facilities frequently contract with rail carriers to move rail cars within a facility. Rail tank cars with hoses attached may be buried within a string of similar cars and not visible to a train and engine crew tasked with switching or relocating the cars. FRA wants to assure that, at the point of physical interface between the general system of rail transportation and the facility rail system, train and engine crews do not make inappropriate assumptions about the status of a particular rail car or series of rail cars and attempt to move cars that are attached to facility storage tanks or manufacturing processes, thereby endangering train and engine crew safety or adversely affecting movement along the general system of rail transportation.

Therefore, in this NPRM we propose to consolidate requirements related to the protection of train and engine crews operating within a shipper or consignee facility in Part 173 of the HMR. Specifically, requirements for posting warning signs, setting hand brakes, and blocking the wheels of hazardous

materials tank cars placed for unloading with closures open would be moved from section 174.67(a)(2) and (a)(3) and added to section 173.31. We further propose to require application of these protective measures whenever a tank car is placed for loading with a closure open. The risk to the general system of rail transportation and to train and engine crews operating within a facility is the same whether a hazardous materials tank car is placed for either loading or unloading with a closure open. The HMR include a requirement at section 174.9 for a rail carrier to inspect at ground level hazardous materials rail cars accepted for transportation or placed in a train for required markings, labels, placards, securement of closures, and leakage. The requirements we are proposing for section 173.31 will serve to reinforce the more general provision in section 174.9.

In addition to the above requirements, hazardous materials rail tank car loading and unloading operations, including unloading operations conducted by railroad employees on railroad property of, typically, diesel fuel for locomotives, are subject to applicable regulations of OSHA, EPA, and state and local governments and Indian tribes.

Storage incidental to movement.

Storage "incidental to movement" of a hazardous material is storage undertaken by a carrier as part of the essentially uninterrupted movement of a hazardous material in commerce. In general, this would not include the directed holding of a hazardous material by the shipper (offeror) at an en route point until its further movement is requested. (But see the discussion, below, of storage of rail tank cars on leased track.) We propose to define "storage incidental to movement" to mean temporary storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material to transport it in commerce until the package containing the hazardous material is delivered to its destination as indicated on shipping documentation. As a specific alternative concerning railroad tank cars stored on railroad property that is the shipping paper destination but not the ultimate destination where the car will be unloaded, we also propose to consider such storage as storage incidental to movement.

Thus, "storage incidental to movement" in commerce would include temporary storage at a carrier's terminal where the package containing the hazardous material is to be transferred

from one transport vehicle to another or from one transportation mode to another. (Note, however, that, as discussed above, storage of a hazardous material at a carrier's terminal where a hazardous material is repackaged prior to re-shipment is not storage incidental to transportation as we propose to define it in this NPRM.) Storage incidental to movement of a hazardous material in commerce would also include the period during which a transport vehicle carrying hazardous materials is parked temporarily at an en route point, e.g., safe haven, a rail yard, a marine terminal, or at a truck stop, motel, restaurant, rest area, or similar location.

Storage incidental to movement in commerce would include temporary storage of a hazardous material at a carrier's facility after the carrier takes possession of the package for purposes of transporting it with reasonable dispatch to a specifically identified destination and prior to delivery of the package to its consignee. We recognize, however, that a carrier may store hazardous materials under circumstances in which such storage is not incidental to movement as we propose to define it in this NPRM. For example, if a hazardous materials package is consigned to a storage facility operated by a carrier—that is, if the shipping documentation accompanying the shipment indicates a carrier-operated storage facility as the destination—then, movement in commerce ends when the shipment arrives at the storage facility. Subsequent storage of the hazardous material at the storage facility is not storage incidental to movement as proposed in this NPRM. Again, we propose an alternative for railroad tank car storage at interim locations that would consider such cars as in storage incidental to transportation even if the shipping paper shows the interim location as the car's destination.

The temporary holding of a package containing hazardous materials at a motor carrier terminal for consolidation with other packages is clearly within the meaning of storage incidental to movement of a hazardous material in commerce as proposed here. Further, for through shipments, storage incidental to movement in commerce as proposed in this NPRM also includes the temporary holding of a package, freight container, rail car, or other instrument of containment of a hazardous material at a marine terminal pending the arrival of a vessel onto which it will be loaded or prior to its inland movement by rail or highway. Similarly, the holding of a freight container or trailer at a carrier's

intermodal container transfer facility is within the meaning of storage incidental to movement of a hazardous material in commerce as proposed here. Storage incidental to movement of hazardous materials in commerce is subject to requirements in the HMR.

As proposed in this NPRM, neither storage of a hazardous material at an offeror facility prior to its acceptance by a carrier nor storage of a hazardous material at a consignee facility after it has been delivered by a carrier would be subject to the HMR. Offerors sometimes store hazardous materials, except for hazardous wastes, in authorized packagings for weeks or even months prior to shipment; similarly, consignees sometimes store hazardous materials in authorized packagings for extended periods after delivery. In the case of a shipper, transportation in commerce has yet to begin because a carrier has not yet taken physical possession of the package; in the case of a consignee, transportation in commerce is completed because the carrier has relinquished physical possession of the package. For a hazardous material that is consigned by an offeror to a storage facility rather than to an end user, the material is no longer in transportation in commerce once it has been delivered to the storage facility even if the storage facility is owned or operated by the carrier. (Under our alternative proposal, tracks of the general railroad system at interim locations where tank cars are stored would not be considered such a storage facility.) Similarly, a hazardous material that is delivered to a transfer facility for repackaging and is stored temporarily pending its repackaging is not in storage incidental to movement and, thus, not subject to the requirements of the HMR.

Generally, this proposed definition of "storage incidental to movement" of hazardous materials in commerce is consistent with current HMR requirements and previous interpretations and administrative decisions issued by RSPA. In IR-28, City of San Jose, California; Restrictions on Storage of Hazardous Materials (March 8, 1990; 55 FR 8884), we stated that consignor and consignee storage of hazardous materials is not incidental to transportation in commerce. Similarly, in an administrative determination of preemption applicable to certain California and Los Angeles County requirements for handling and transportation of hazardous materials (February 15, 1995; 60 FR 8773), we stated that "storage that is incidental to transportation includes storage by a carrier that may occur between the time a hazardous material is offered for

transportation to a carrier and the time it reaches its intended destination and is accepted by the consignee * * * [C]onsignor and consignee storage of hazardous materials is not incidental to transportation in commerce * * * Further, "hazardous materials that are stored at a manufacturing facility awaiting consumption in the manufacturing process are not stored incidental to transportation in commerce, and are beyond the reach of federal hazmat law." This position is reiterated in a number of letters of interpretation. (See, for example, an April 4, 1992 RSPA letter to Adcom Express Incorporated, an October 13, 1992 RSPA letter to North American Transportation Consultants, Inc., and an April 23, 1993 RSPA letter to the Southeastern Association of Fire Chiefs Incorporated.)

In the 1999 supplemental ANPRM, we asked whether the HMR should specify a time limit on storage incidental to movement in commerce after which the material would no longer be considered to be "in transportation in commerce" and subject to the requirements of the HMR. Most industry commenters opposed a time limit. Typical of their position is the following comment: "Any time limit is an arbitrary assignment. An arbitrary time limit could increase the risk of a hazardous materials incident because it would force extra handling of hazardous materials * * * It is inappropriate for RSPA (or any other agency) to prescribe a time limit for storage incidental to transportation as it is the reason for the standstill and not the duration that determines whether the storage is incidental to transportation or not." (HM-223 Working Group)

On the other hand, many state environmental agencies strongly believe that there should be a time limit on storage incidental to movement of hazardous materials in commerce. "[I]t is reasonable to expect that the hazardous materials transportation must resume within a specific time frame, from when the hazardous materials transportation ceased [its] movement, to remain subject to the HMR. If the hazardous materials are not being actively transported from one place to another within 24 hours of transportation ceasing, then the materials are no longer in transportation * * * If [the time frame is] exceeded, then the materials are not being transported and 'storage incidental to transportation' has also ceased, and the materials are in non-transportation related storage. The hazardous materials are no longer subject to the HMR * * *"

(New Jersey Department of Environmental Protection)

In this NPRM, we are not proposing to limit the time that a hazardous material shipment may remain in storage incidental to movement of hazardous materials in commerce. We agree with commenters that such a time limit could have an adverse effect on transportation safety. To comply with a time limit, for example, carriers might move hazardous materials from one storage location to another, increasing public exposure and the risk of an incident. Moreover, placing a time limit on the applicability of the HMR to storage of hazardous materials during transportation in commerce could subject carriers to a myriad of different state and/or local hazardous materials labeling, packaging, or other requirements on packages held in incidental storage beyond the specified time limit and could obstruct or unduly burden interstate commerce. As explained later in this preamble, however, facilities at which hazardous materials are held in storage incidental to movement in commerce are not exempt from OSHA requirements governing the safety of workers and the facility, nor are they exempt from state and local fire and building code standards and similar requirements. EPA regulations may also apply. For example, hazardous wastes stored incidental to movement in commerce are subject to EPA RCRA regulations, including time limits for shipment and disposal.

For one aspect of rail transportation, special clarification may be necessary. We have said that storage of rail cars containing hazardous materials on leased track is storage incidental to transportation in commerce and subject to regulation under the HMR; in such instances, the leased track is considered to be carrier property, and any storage of hazardous materials on leased track is considered storage prior to delivery of the hazardous materials to a consignee (see February 14, 1994 letter from FRA to Wheeling and Lake Erie Railway). As we examined storage issues related to this NPRM, we have re-evaluated our previous interpretations concerning storage of hazardous materials in rail cars on leased track.

Leased track may be located directly adjacent to a shipper or consignee facility or within a rail carrier facility some distance from either the shipper or ultimate consignee. The lessee may have exclusive use of the leased track, or the leased track also may be used for movement of rail cars other than those of the shipper or consignee. In some situations, the lease is a "rolling" one,

comprised of the track beneath a particular rail car. Railroads often agree to store cars along the route to their ultimate destinations due to fluctuation in seasonal demand for the commodities and limited track space at a consignee's facility. Examples are liquefied petroleum gas, often held at locations distant from its end user pending the demand for the product in cold weather, and anhydrous ammonia, often held until the agricultural cycle requires forwarding to a consignee. In these situations, tank cars may be consigned to interim storage locations on leased track. Where that is true, the cars arguably have reached the destination shown on the shipping papers and, under our first alternative, would be considered not in storage that is incidental to transportation. However, these interim storage locations are not the ultimate destination of the shipments, and the railroad maintains effective custody and control of the shipments, which, as proposed in this NPRM and explained earlier in this preamble, is the primary consideration for determining the applicability of the HMR to transportation functions.

Under the Federal Railroad Safety Act (FRSA) and other rail safety laws, FRA has treated leased track as being outside the general rail system and, thus, outside the scope of FRA's rail safety regulations only if such track is "immediately adjacent" to a plant facility and the "lease provides for, and actual practice entails, exclusive use of that trackage by the plant railroad * * *" 49 CFR part 209, Appendix A. (For a discussion of FRA's jurisdiction over leased track, see Appendix A to Part 209. Like RSPA, FRA has a functional view of safety and relies more on the activities being performed in a particular context than on the job title or facility name to determine if its regulatory authority applies.) Cars on railroad tracks in railroad yards or sidings distant from the consignee are, in FRA's view, still on the general railroad system and within the care, custody, and control of the railroad. Even if a shipper or consignee leases such track, it is rarely for the exclusive use of the shipper's or consignee's cars, and, even if so restricted, the track is not in any practical sense controlled by the distant shipper or consignee.

Current HMR requirements, previous interpretations, and related proposals in this NPRM suggest two possible approaches for addressing storage of rail cars on leased track. First, storage on leased track could be considered storage by a consignee after movement in transportation of the rail car has been completed, as indicated by the

destination on shipping documentation. In such situations, the rail carrier is acting as a storage facility on behalf of the shipper or consignee rather than performing transportation functions as a carrier. Alternatively, storage of rail cars on leased track (other than leased track immediately adjacent to the shipper or consignee facility and exclusively for the shipper or consignee's use) could be considered storage incidental to movement because the cars have not been physically delivered to the consignee, and the carrier retains physical possession of the shipment.

Under the first alternative, which is reflected in the proposed rule text, storage of rail cars on leased track would not be considered "storage incidental to movement" in commerce subject to applicable HMR requirements as we propose to define the term in this NPRM. In situations where rail cars stored on leased track have been delivered to the destination indicated on the shipping documentation, new shipping documentation must be prepared before the rail cars can be moved to the consignee location where they will be unloaded. Under this alternative, rail cars stored on leased track would be subject to relevant railroad safety rules administered by FRA. However, because such storage would not be subject to applicable HMR requirements, FRA hazardous materials inspectors could not apply rules concerning proper shipping papers, securement of closures, or placarding of such cars while they were in storage. Moreover, this alternative could present FRA inspectors with the difficult practical problem of determining which railroad cars on a particular general railroad system track or in a railroad yard are subject to the HMR by obtaining shipping papers and lease information on all of the cars before beginning an inspection. Of course, if a shipper or consignee orders the movement of a rail car containing hazardous materials from a leased track where it has been stored to a facility where it will be unloaded, the rail car is subject to the HMR with regard to the performance of all pre-transportation and transportation functions related to its movement. This approach is consistent with the proposals applicable to storage incidental to movement in other modes of transportation and would make clear that relevant rules of other agencies apply to cars in such storage because it is not storage incidental to transportation.

Under the second alternative, which is not reflected in the proposed rule text, rail cars stored on leased track not immediately adjacent to a plant facility

would be considered in storage incidental to movement and subject to all applicable HMR requirements even if the leased track is the destination shown on the shipping documents. This would ensure that any rail car subject to the railroad safety laws would also be subject to pertinent hazardous materials requirements. We recognize that this alternative is an exception to the general principle enunciated in this NPRM that storage of a shipment of hazardous materials at the destination indicated on the shipping document is not storage incidental to transportation. However, this alternative would be consistent with the NPRM's proposal that the question of whether a given shipment is moving in transportation in commerce should be answered based in part on whether the shipment is in the physical possession of a carrier. It also would be consistent with FRA's regulation of those cars under FRSA. Further, it can be argued that the risks associated with rail transportation of hazardous materials exist whenever a rail car loaded with hazardous materials is on the general railroad system.

Generally, continuing the current policy that rail cars stored on leased track are stored incidental to movement could be accomplished without changing current regulatory language. However, if the final rule in this proceeding adopts this alternative for rail tank cars but retains the general proposal for other modes, proposed sections 171.1(c)(4), 171.1(d)(3), and 171.8 would be amended to make clear that such interim storage is storage incidental to movement.

Moreover, if we continue the current policy, then separate rulemaking may be necessary to address related safety and emergency response issues. For example, we would need to consider the continued applicability of the section 174.14 expedited movement requirements to such incidental storage. Further, we would need to consider how to assure that emergency response information relevant to the specific hazardous materials stored in rail cars on leased track is available as needed to assist local officials in planning for and responding to incidents involving such rail cars. In addition, we may need to consider imposing a time limit on rail cars stored on leased tracks after which such storage would not be considered storage incidental to movement for purposes of the HMR. Although we generally oppose the imposition of time limits for storage incidental to movement for the reasons stated above, for specific materials stored on leased track a time limit on storage could enhance federal, state, and local

government efforts to plan for emergencies.

Commenters are invited to address the alternatives outlined above for applying the HMR to rail cars containing hazardous materials that are consigned to and stored on leased track. Should the HMR continue to apply to rail cars stored on leased track in a manner consistent with FRA's application of its rail safety regulations, as described in the second alternative? If so, what would be the effect of such application on hazardous materials shippers and railroads? What would be the effect on federal, state, and local government regulation for emergency response planning and community right-to-know purposes? Is the 48-hour limit on holding a shipment at any point short of its destination reasonable? If a rail shipment has arrived at the destination shown on the shipping documents, or at the nearest railroad facility, should the railroad be permitted to store it indefinitely? Should a time limit be imposed on the length of time rail cars could be stored on leased track for such storage to be incidental to movement? If so, should such a time limit be commodity specific? What would be the impact of such a time limit?

If, as described in the first alternative, rail cars stored on leased track that is not adjacent to the shipper's or consignee's facility are not considered to be in storage incidental to movement, what would be the effect of such application on hazardous materials shippers and rail carriers? What would be the effect on federal, state, and local government regulations for emergency response planning and community right-to-know purposes? Would placing such storage on leased track outside the HMR present safety issues in terms of FRA's inability to inspect cars in such storage and/or to investigate incidents related to them? How would FRA inspectors be able to readily distinguish cars that are not subject to the HMR from cars that are?

E. State/Local Requirements and Preemption

One of the primary purposes of federal hazmat law is to assure national uniformity of regulations applicable to the transportation of hazardous materials in commerce. Thus, the preemption provisions of federal hazmat law generally preclude non-federal governments from imposing requirements applicable to hazardous materials transportation if complying with the non-federal regulation and complying with federal hazmat law or the HMR is not possible (dual compliance test) or if the non-federal

requirement is an obstacle to carrying out federal hazmat law or the HMR (obstacle test). Further, federal hazmat law preempts a non-federal requirement applicable to any specified covered subject if it is not substantively the same as federal hazmat law or the HMR (covered subjects test). The HMR are not minimum requirements that other jurisdictions may exceed if local conditions warrant; rather, the HMR are national standards and must be uniformly applied across jurisdictional lines. However, non-federal requirements may be authorized by another federal law. Also, RSPA may waive preemption of a non-federal requirement if it: (1) provides the public with at least as much protection as requirements of federal hazmat law and the HMR, and (2) does not impose an unreasonable burden on commerce. 49 U.S.C. 5125(e).

The preemption provisions of federal hazmat law effectively preclude state, local, and tribal governments from regulating pre-transportation functions, as defined in this NPRM, in a manner that differs from the federal requirements if the non-federal requirement is not authorized under another federal law and the non-federal requirement fails the dual compliance, obstacle, or covered subject test. Examples of such pre-transportation functions include: (1) Determining the hazard class of a hazardous material; (2) selecting a hazardous materials packaging; (3) filling a hazardous materials packaging; (4) securing a closure on a filled hazardous materials package or container or on one containing a residue of a hazardous material; (5) marking a package to indicate that it contains a hazardous material; (6) labeling a package to indicate that it contains a hazardous material; (7) preparing a shipping paper; (8) providing and maintaining emergency response information; (9) reviewing a shipping paper to verify compliance with the HMR or international equivalents; (10) for persons importing a hazardous material in to the United States, providing the shipper and the forwarding agent at the place of entry into the United States with information as to the requirements of the HMR that apply to the shipment of the material while in the United States; (11) certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR; (12) blocking and bracing a hazardous materials package in a freight container or transport vehicle; (13) segregating a hazardous materials package in a freight

container or transport vehicle from incompatible cargo; and (14) selecting or providing placards for a transport vehicle to indicate that it is carrying hazardous materials. Note that we have not attempted, in this NPRM, to identify every function that is a pre-transportation function—that is, a function performed in advance of transportation in commerce to prepare a shipment for transportation in commerce or that affects the safety of the shipment in transportation in commerce. State, local, or Indian tribe regulation of pre-transportation functions not specifically identified in this NPRM may also be preempted under federal hazmat law.

Unless the Secretary waives preemption, the preemption provisions of federal hazmat law effectively preclude state, local, and tribal governments from regulating transportation functions, as defined in this NPRM, in a manner that differs from the federal requirements if the non-federal requirement is not authorized by another federal law and the non-federal requirement fails the dual compliance, obstacle, or covered subject test. Examples of such transportation functions include: (1) Movements of hazardous materials in commerce—that is, the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel; (2) loading and unloading of a hazardous material onto or from a transport vehicle, aircraft, or vessel or into or from a bulk packaging when performed by carrier personnel; and (3) storage of a hazardous material between the time that a carrier takes possession of the material until it is delivered to its destination as indicated on shipping documentation.

State, local, and tribal governments may impose regulations on hazardous materials-related functions that are not covered by the HMR or federal hazmat law, except where RSPA has specifically determined that regulation of a hazardous materials-related function is not necessary. For example, hazardous materials that are not being transported in commerce as defined in this NPRM could be subject to non-federal regulations applicable to community right-to-know, fire protection, worker protection, building codes, and zoning requirements. Moreover, although the HMR apply to pre-transportation functions as defined in this NPRM, the facilities within which pre-transportation functions are performed could be subject to non-federal regulations that do not affect the performance of the pre-transportation

function—again, fire protection, worker protection, building codes, and zoning requirements may apply. Thus, state and local regulations applicable to hazardous materials stored at a consignee's facility or at a manufacturing facility awaiting use in a manufacturing process would not be preempted (PD-9(R), 60 FR 8787). Similarly, the HMR do not apply to regulation of consignee storage tanks; therefore, state or local requirements as to the types of storage tanks into which a hazardous material may be unloaded from a tank car are not preempted (PD-9(R), 60 FR 8788). Further, local fire code requirements that do not apply to the transportation of hazardous materials in commerce are not preempted (PD-14(R), 63 FR 67506).

The above discussion is intended as general guidance only. We will continue to make preemption determinations applicable to specific non-federal requirements on a case-by-case basis, using the obstacle, dual compliance, and covered subjects tests provided in federal hazmat law. RSPA's preemption determinations are legally binding, subject to judicial review.

F. OSHA Programs and Regulations

The OSH Act vests OSHA with primary responsibility for promulgating and enforcing workplace safety and health standards. Under the OSH Act, every employer has a general duty to provide its employees with a workplace free from recognized hazards that are likely to cause death, illness, or injury. Federal hazmat law authorizes the Secretary of Transportation to develop and enforce regulations for the safe transportation of hazardous materials in commerce. The HMR apply to persons who transport hazardous materials in commerce; cause the transportation of hazardous materials in commerce; and manufacture, repair, or test packagings or packaging components that are certified or sold as qualified for use in the transportation of hazardous materials in commerce. In addition, the "reverse 4(b)(1)" provision of federal hazmat law (49 U.S.C. 5107(f)(2)) provides for shared regulatory jurisdiction with OSHA for hazardous materials handling, registration, motor carrier safety permits, and hazmat employee training requirements. As we noted above, in exercising our authority under federal hazmat law to regulate hazardous materials transportation in commerce, we must be consistent with both the statutory purposes of federal hazmat law and OSH Act requirements. Requirements in the HMR applicable to pre-transportation functions, such as determining the hazard class of a

material, selecting a packaging, and preparing shipping papers, set forth the procedures that must be followed for the performance of specific functions. Thus, the regulations explain how to determine a material's hazard class, how to select an appropriate packaging, and how to complete a shipping paper. One commenter suggests that the existence of a hazmat employee function should determine "the scope of the agency's preemptive effect * * * No action of a hazmat employee in performing a function under the DOT hazardous materials regulations should be affected or influenced by the requirements of another agency, whether federal or non-federal." (The Conference on Safe Transportation of Hazardous Articles, Inc.) We agree that functions under the HMR should not also be subject to conflicting regulation by state and local governments and that other federal requirements should not conflict with the HMR. At the same time, the HMR do not address the work environment within which such functions are performed nor do the HMR address the working conditions applicable to employees performing such functions. It is not appropriate for RSPA to become extensively involved in developing and enforcing a complex regulatory scheme covering working conditions for hazardous materials employees who, although performing various functions regulated under the HMR, are located in facilities that have characteristics similar to those of many industrial workplaces. If RSPA were to address all occupational safety and health issues that arise in facilities where regulated functions are performed, as some commenters have suggested, the agency would need to develop a staff and field capability already possessed by OSHA.

OSHA has concurrent authority in this area and regulates to protect the workers who perform pre-transportation functions. Further, Congress authorized OSHA, rather than the Secretary of Transportation, to promulgate regulations applicable to workplace safety and occupational health, even in facilities where pre-transportation functions are performed. Such facilities are not excepted from OSHA requirements merely because certain of the activities performed at the facility are subject to HMR requirements. The facility must assure that functions subject to the HMR are performed in accordance with the HMR and must also assure that the workplace in which the functions are performed conforms to applicable OSHA requirements for occupational health and safety and that

workers who perform such functions are protected from hazards.

Where hazmat employees perform pre-transportation functions as defined in this NPRM, the HMR apply to the function being performed and OSHA's regulations for occupational safety and health apply to the working conditions applicable to the hazmat employee performing the function. Examples include hazmat employees working in chemical plants, manufacturing facilities, and warehouses who determine a material's hazard class under the HMR and prepare packages for shipment. Preparation of hazardous materials packages for shipment must be performed in accordance with the HMR; however, OSHA regulations apply to the working conditions under which the function is performed and to measures necessary to protect the employee performing the function.

The relationship between the OSHA regulations and the HMR for transportation functions is more complex. Congress reauthorized federal hazmat law in 1994 to "provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce." The "risks to life inherent in the transportation of hazardous material" include risks to both the general public and to transportation workers, such as airline, railroad, maritime, and motor carrier employees. Protection of the public generally and employees in particular is necessarily an integrated undertaking. Thus, the HMR include requirements aimed at protecting both the general public and employees of hazardous materials carriers who perform transportation functions.

In carrying out the mandate to prescribe regulations for the safe transportation of hazardous materials, the Secretary of Transportation, through the DOT operating administrations, has developed a special expertise that makes the Department uniquely qualified to play the primary federal regulatory role in the protection of workers who operate motor vehicles, trains, aircraft, and vessels used to transport hazardous materials. Further, the preemption provisions in federal hazmat law provide the agency with the statutory authority to promulgate nationally uniform regulations, thereby assuring that carriers are not forced to comply with a number of different and perhaps inconsistent regulatory requirements applicable to the safety of their employees who transport hazardous materials by air, highway, water, or rail in different state or local jurisdictions. Thus, we believe that the

proper role for RSPA in the area of occupational safety is to focus our resources on carrier operations, an area in which we have specialized competence and for which uniform national standards are key to safe and efficient transportation.

FRA's approach to assuring the occupational safety and health of railroad employees provides an excellent model for assuring the occupational safety and health of hazmat employees. FRA regulations issued under authority of the Federal Railroad Safety Act of 1970 generally address worker safety in the context of railroad operations. Thus, the FRA regulations cover occupational safety and health issues that are so intimately intertwined with the integrated rail transportation system that they cannot be addressed satisfactorily apart from that system—hours of service requirements, for example. OSHA regulations apply to railroad worker occupational safety and health issues that are not addressed by FRA; these are areas that are not intrinsic to rail operations, but apply generally to all industrial workplaces. For the most part, the FRA regulations prescribe working conditions applicable to train and engine employees. Working conditions applicable to rail carrier employees who work at fixed facilities are regulated by OSHA. (For a more complete discussion of FRA's policy on occupational safety and health regulations applicable to railroad workers, see FRA's policy statement, published in the **Federal Register** on March 14, 1978 (43 FR 10583), a copy of which appears in the public docket to this rulemaking.)

Similarly, the Coast Guard and OSHA have a long-standing working relationship stemming from their separate statutory roles to prescribe and enforce regulations affecting the safety of those on board vessels. The distinguishing factor as to whether OSHA can regulate the working and safety conditions of marine employees on a vessel is determined by the status of the vessel. If the vessel is subject to inspection under sub-title II of Title 46, U.S. Code, hereafter referred to as the Vessel Inspection Laws of the United States, it is "inspected". The Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the safety of those on board vessels. Under the Vessel Inspection Laws of the United States, the Coast Guard has issued comprehensive standards and regulations concerning working conditions affecting mariners aboard inspected vessels. Consequently,

OSHA is prohibited from regulating conditions affecting occupational safety and health of marine employees under section 4(b)(1) of the OSH Act of 1970. With respect to those vessels not subject to the Vessel Inspection Laws of the United States or "uninspected" vessels, OSHA may regulate the working conditions of marine employees except in very limited instances. (For a more complete discussion of Coast Guard's policy on occupational safety and health regulations applicable to seamen aboard inspected vessels see MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES COAST GUARD, U.S. DEPARTMENT OF TRANSPORTATION, AND THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, CONCERNING THEIR AUTHORITY TO PRESCRIBE AND ENFORCE STANDARDS OR REGULATIONS AFFECTING THE OCCUPATIONAL SAFETY AND HEALTH OF SEAMEN ABOARD VESSELS INSPECTED AND CERTIFICATED BY THE UNITED STATES COAST GUARD dated March 8, 1983, a copy of which appears in the public docket to this rulemaking.)

Our current approach for dividing the responsibility for the occupational safety and health of hazmat employees between OSHA and RSPA is similar. Where the functions performed by hazmat employees are intrinsic to the operations of carriers that transport hazardous materials in commerce, the Secretary of Transportation exercises regulatory authority under federal hazmat law for occupational safety and health issues related to those hazmat employees. Examples include airplane pilots and crews; truck drivers, co-drivers, and other motor carrier employees who load or unload motor vehicles; locomotive engineers and train crews; and marine employees. These hazmat employees perform transportation functions as defined in this NPRM. Thus, when the driver of a cargo tank motor vehicle loads the vehicle at a fixed facility immediately prior to movement in commerce of the vehicle or unloads the vehicle at a fixed facility immediately after movement in commerce is completed, the loading and unloading functions are regulated under the HMR, including requirements applicable to the health and safety of the worker performing the function.

We believe that the current application of the HMR and OSHA regulations to hazmat employees is consistent with the underlying goals of both federal hazmat law and the OSH Act, Congress's recognition of the need for uniformity in hazardous materials

transportation in commerce, and the "reverse 4(b)(1)" provision of federal hazmat law. Consequently, we are proposing no changes in this division of responsibilities.

G. EPA Programs and Regulations

The concurrent applicability of EPA's regulations and the HMR to loading, unloading, and storage of hazardous materials has caused significant confusion. The clarifications we are proposing in this NPRM concern the applicability of the HMR to specific functions and activities. Entities involved with handling and transporting hazardous materials should be aware that a number of EPA requirements may also apply to their operations. Following are descriptions of some EPA programs that apply to facilities that handle and store hazardous materials.

EPCRA (SARA Title II). The Emergency Planning and Community Right-to-Know Act, enacted by Congress in 1986 as Title III of the Superfund Amendments and Reauthorization Act (SARA; 42 U.S.C. 11011 *et seq.*) requires states to establish state and local emergency planning groups to develop chemical emergency response plans for each community. EPCRA also requires facilities to provide information regarding the hazardous materials they have on site to states, local planners, fire departments and, through them, the public. In addition, EPCRA requires notification of releases of certain hazardous substances. This information forms the foundation of both the community emergency response plans and the public-industry dialogue on risks and risk reduction. EPCRA emphasizes prevention, preparedness, and response as key factors in reducing the hazards associated with chemical releases.

Pursuant to EPCRA requirements, EPA has issued a list of extremely hazardous substances and threshold planning quantities for each substance. A facility is subject to a one-time emergency planning notification if a substance on the list is present at the facility in an amount in excess of the threshold planning quantity established for the substance. 42 U.S.C. 11002(b)(1).

Among other requirements, facilities where hazardous chemicals, as defined by OSHA, are present must prepare and submit an emergency and hazardous chemical inventory form to the appropriate local emergency planning committee (LEPC), state emergency response commission (SERC), and fire department with jurisdiction over the facility. 42 U.S.C. 11022(a)(1). EPCRA also specifically requires the owner or

operator of a facility to promptly provide to an LEPC, on request, information that the LEPC believes is necessary for developing and implementing an emergency plan. 42 U.S.C. 11003(d)(3). Thus, certain hazardous materials that are on site at a facility, in above-threshold quantities, awaiting consumption in the manufacturing process, are regulated under EPCRA.

Except for the release reporting requirements under EPCRA 304, EPCRA does not apply to the transportation in commerce, including storage incident to that transportation, of any substance or chemical subject to EPCRA. 42 U.S.C. 11047. In its regulations implementing EPCRA, EPA states that a substance is stored "incident to transportation" in commerce if the stored substance is moving under active shipping papers and has not reached the ultimate consignee. 40 CFR 355.40(b)(4)(ii). Consequently, hazardous materials that are stored incident to transportation in commerce, as defined by EPA, are not subject to the requirements of EPCRA. On the other hand, regulated materials that have been delivered to the ultimate consignee's facility are not stored "incident to transportation" in commerce and are subject to EPCRA requirements.

Although its terminology differs, EPA's definition of "storage incident to transportation" in commerce for purposes of EPCRA is generally the same as the definition we propose in this NPRM for "storage incidental to movement" of a hazardous material in commerce. For both definitions, a hazardous materials package, freight container, or transport vehicle is stored incidental to movement in commerce if it is en route to, but has not yet reached, its consignee. For these situations, most of the EPCRA requirements do not apply. Similarly, EPA agrees with the proposed definition in this NPRM that regulated materials that have been delivered to their consignee are not in transportation in commerce and, thus, are subject to EPCRA requirements.

Based on the proposals in this NPRM, hazardous materials in the following non-transportation situations could be subject to EPCRA requirements:

(1) Hazardous materials stored at an offeror's facility prior to a carrier taking possession of the hazardous material for movement in transportation in commerce.

(2) Hazardous materials being unloading from a transport vehicle or bulk packaging by a person employed by or under contract to the consignee following delivery, including unloading into a manufacturing process.

(3) Hazardous materials stored at a consignee facility after delivery, including hazardous materials stored on track leased from a rail carrier by the consignee.

Clean Air Act, Section 112(r) (Risk Management Program). Although EPCRA governs emergency response planning, it does not mandate that facilities establish accident prevention programs. The CAA Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399, amended section 112 of the Clean Air Act, 42 U.S.C. 7412, by adding, among other things, a new subsection (r), which includes requirements related to chemical accident prevention. The goal of section 112(r) is to prevent accidental releases of extremely hazardous substances from "stationary sources" and to minimize the consequences of any accidental releases that do occur.

Section 112(r) establishes a general duty for facility owners or operators of stationary sources to identify hazards that may result from accidental releases, design and maintain a safe facility, and minimize the consequences of releases when they occur. Pursuant to section 112(r)(3), EPA has promulgated a list of substances that, in the event of an accidental release, are known to cause or may be reasonably expected to cause death, injury, or serious adverse effects to human health and the environment. EPA also has established a threshold quantity for each listed chemical. Stationary sources that have more than a threshold quantity of a regulated substance are subject to the accident prevention regulations promulgated by EPA under CAA section 112(r), including the requirement to develop risk management plans.

EPA in its regulations defines "stationary source" as follows:

Stationary source means any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur. *The term stationary source does not apply to transportation, including storage incident to transportation, of any regulated substance or any other extremely hazardous substance under the provisions of this part.* A stationary source includes transportation containers used for storage not incident to transportation and transportation containers connected to equipment at a stationary source for loading or unloading * * *

40 CFR 68.3. (Emphasis added).

In 1999, EPA clarified its definition of stationary source by stating,

Because a transportation container may at times function as a storage container or a

process at a stationary source, or may function as part of operations at a stationary source, EPA is specifically directed by statute to address these activities (CAA section 112(r)(7)(B)(i)) ("The regulations shall cover storage, as well as operations"). To the extent that DOT is also authorized under Federal Hazmat Law to regulate activities that are at a stationary source, nothing in the CAA prohibits both agencies from exercising concurrent jurisdiction over these activities. As EPA has said in the context of the RMP Rule, compliance with Federal Hazmat Law and HMR requirements may satisfy parallel requirements of part 68. This approach to implementation reflects the coordination between the agencies that is called for under CAA section 112(r)(7)(D). The exercise of concurrent jurisdiction preserves the applicability of the Federal Hazmat Law and HMR and does not supersede or limit DOT's jurisdiction.

(64 FR 28696, at 28698; May 26, 1999).

The proposals in this NPRM would make clear that, from DOT's perspective, the following situations are neither transportation in commerce nor storage incidental to transportation in commerce:

(1) Hazardous materials stored at an offeror's facility prior to a carrier taking possession of the hazardous material for movement in transportation in commerce.

(2) Hazardous materials being unloaded from a transport vehicle or bulk packaging by a person employed by or under contract to the consignee following delivery, including unloading into a manufacturing process.

(3) Hazardous materials stored at a consignee facility after delivery, including hazardous materials stored on track leased from a rail carrier by the consignee.

(4) Hazardous materials stored at a carrier facility where shipping papers indicate the carrier facility as the shipment destination.

(5) Hazardous materials temporarily stored at an intermodal carrier facility for repackaging.

Resource Conservation and Recovery Act (RCRA). RCRA requires EPA to issue regulations to ensure the proper management of hazardous waste from its point of generation to its ultimate disposal—"cradle to grave." The regulations establish a step-by-step approach to monitor and control hazardous wastes at every point in the waste cycle. The regulated community in this system includes those who generate, recycle, transport, treat, store, and dispose of hazardous wastes.

EPA and DOT have joint responsibility for regulating the transportation of hazardous wastes, and the two agencies' regulations in this area are inter-related. EPA has incorporated

DOT's pre-transportation requirements into its regulations—i.e., generators that send hazardous wastes off-site for treatment or disposal must comply with all applicable requirements in the HMR, including those for packaging, marking, and labeling. In addition, generators are required to prepare a uniform hazardous waste manifest to accompany any hazardous waste transported off-site. DOT has incorporated this requirement into its regulations.

Hazardous waste transporters are subject to both the HMR and the EPA regulations governing hazardous waste transportation, storage, and disposal. In the event of a release during transportation, transporters must comply with EPA requirements for hazardous waste spill cleanup.

Hazardous wastes stored incidental to movement in commerce as that term is proposed to be defined in this NPRM—that is, between the time that a carrier takes possession of the hazardous waste until the hazardous waste is delivered to the destination indicated on the hazardous waste manifest—must be stored in accordance with EPA requirements for hazardous waste storage, including time limits on such storage. Similarly, in the event that a carrier discovers a leaking hazardous materials package and the offeror directs the carrier to dispose of the material, the carrier is subject to all applicable EPA and DOT requirements for transporting, storing, and disposing of the material.

Spill Prevention, Control, and Countermeasure (SPCC) Program. The Clean Water Act (33 U.S.C. 1251 *et seq.*) establishes authority for the Spill Prevention, Control, and Countermeasure (SPCC) program for non-transportation-related facilities. The SPCC regulations are designed to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or onto the navigable waters of the United States or adjoining shorelines. A 1971 Memorandum of Understanding (MOU) between EPA and DOT establishes definitions of transportation-related and non-transportation-related facilities for purposes of the FWPCA. Under the MOU, SPCC regulations apply to the following non-transportation-related facilities: (1) Oil storage facilities, including all related equipment and appurtenances and bulk plant storage; (2) terminal oil storage; (3) pumps and drainage systems used in the storage of oil, except for in-line or breakout tanks needed for the continuous operation of a pipeline system; and (4) any terminal facility, unit, or process integrally associated with the transfer of oil in bulk to or from a vessel. Loading racks,

transfer hoses, loading arms, and other equipment that is appurtenant to a non-transportation-related facility or terminal and that is used to transfer oil in bulk to or from highway vehicles or rail cars are also subject to regulation under the SPCC program. The SPCC regulations include several requirements for facility rail tank car and cargo tank motor vehicle loading and unloading racks, such as a secondary containment system and lights or barriers to prevent the vehicle from departing the facility prior to disconnecting transfer lines.

V. Section-by-Section Review

General

In Section 171.8, we propose to define a new term, "movement," to mean "the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel." Accordingly, we propose to replace the term "movement" when it appears in the HMR in a context where the proposed definition would be inappropriate. These changes are proposed for Sections 173.3(c)(2); 173.6(b)(1) and (b)(3); 173.24a(a)(3); 173.62(c) in the table under Packing Instruction 131 each time it appears; 173.166(e)(4)(iii); 173.171 (d); 173.181(a)(2); 173.185(e)(7), (g)(1), and (g)(2); 173.189(b) and (d)(4)(i); 173.219(b)(3); 173.308(a)(4); 173.335(c); 173.416(f); 174.110; 174.112(b) and (c)(3); 174.115(a) and (b)(3); 175.81(a); 176.69(d); 176.76(a)(2) each time it appears; 176.78(f)(8); 176.93(a)(1); 176.116(d); 176.132(c); 176.168(g); 176.200(b) and (c) each time it appears; 177.834(a); 177.840(b)(3); 177.870(e); 178.601(g)(1)(i)(D), (g)(1)(ii), and (g)(4)(v); and 178.704(d)(3).

Part 171

Section 171.1. In this NPRM, we propose to retitle this section "Applicability of HMR to persons and functions." We further propose to add introductory text to this section to explain the authority provided to the Secretary of Transportation under federal hazmat law to establish regulations for the safe transportation of hazardous materials in commerce, the Secretary's delegation of this authority to RSPA, and the applicability of this section to packagings represented as qualified for use in the transportation of hazardous materials in commerce and to pre-transportation and transportation functions.

In paragraph (a) of this section, we propose to specify that the HMR apply to each person who manufactures, fabricates, marks, maintains,

reconditions, repairs, or tests a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce, including each person who performs these activities under contract to an agency or branch of the federal government. Proposed paragraph (a) restates requirements in current paragraphs (a)(3) and (b) of Section 171.1.

Proposed paragraph (b) of this section specifies that the HMR apply to pre-transportation functions performed by persons who offer hazardous materials for transportation in commerce or cause hazardous materials to be transported in commerce, including persons who perform pre-transportation functions under contract to an agency or branch of the federal government. Proposed paragraph (b) includes a non-exhaustive list of pre-transportation functions to which the HMR apply.

Proposed paragraph (c) of this section states that the HMR apply to transportation of hazardous materials in commerce and to persons who transport hazardous materials in commerce, including persons who transport hazardous materials in commerce under contract to an agency or branch of the federal government. Proposed paragraph (c) also defines the points at which transportation in commerce begins and ends and lists transportation functions included in "transportation in commerce"—movement of a hazardous material in commerce, loading incidental to movement of a hazardous material in commerce, unloading incidental to movement of a hazardous material in commerce, and storage incidental to movement of a hazardous material in commerce.

Proposed paragraph (d) of this NPRM lists specific functions that are not subject to the HMR.

Proposed paragraph (e) states that facilities at which functions are performed in accordance with the HMR may also be subject to applicable standards and regulations of other federal agencies.

Proposed paragraph (f) states that facilities at which functions are performed in accordance with the HMR may also be subject to applicable laws and regulations of state and local governments, except to the extent that such laws and regulations are preempted by federal hazmat law. Proposed paragraph (f) also sets forth the criteria established in federal hazmat law for making preemption determinations.

Proposed paragraph (g) restates the penalties for noncompliance with the

HMR that are currently in paragraph (c) of Section 171.1. The maximum criminal fines under Title 18 of the United States Code are \$250,000 for an individual and \$500,000 for a corporation.

Section 171.2. We propose to revise this section to clarify those persons and activities that are subject to the requirements of the HMR. Generally, we propose to revise this section to state more clearly the current requirements and prohibitions.

Proposed paragraph (a) states that a person who performs a function that is required by the HMR must perform the function in accordance with the HMR.

Proposed paragraph (b) requires a person who offers hazardous materials for transportation in commerce to comply with the HMR or with an exemption, approval, or registration issued in accordance with the HMR.

Proposed paragraph (c) requires each person who performs a function covered by or having an effect on the packaging specifications in parts 178, 179, or 180 of the HMR or an exemption or approval to perform the function in accordance with the specification, exemption, or approval.

Proposed paragraph (d) prohibits any person subject to the registration requirements in subpart G of Part 107 from offering or accepting a hazardous material for transportation in commerce or from transporting a hazardous material in commerce unless that person is registered.

Proposed paragraph (e) prohibits any person from offering or accepting a hazardous material for transportation in commerce unless the hazardous material is prepared for shipment as required by the HMR or an applicable exemption, approval, or registration.

Proposed paragraph (f) prohibits any person from transporting a hazardous material in commerce except in conformance with the HMR or an applicable exemption, approval, or registration.

Proposed paragraph (g) restates requirements in current paragraph (c) of Section 171.2. Proposed paragraph (g) prohibits any person from representing, marking, certifying, selling, or offering a packaging as meeting the requirements of the HMR unless the packaging is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable HMR requirements. Proposed paragraph (g) applies the same prohibition to any person who performs these functions under the terms of an exemption, approval, or registration. This paragraph also would require a packaging marked as meeting a DOT

specification or UN standard to conform to the specification or standard at all times that the marking is visible. The requirements of proposed paragraph (g), like the current requirements in Section 171.2(a), would apply whether or not the packaging is used for the transportation in commerce of a hazardous material.

Proposed paragraph (h) restates the requirements in current paragraph (d) of Section 171.2. This paragraph lists the representations, markings, and certifications subject to the prohibitions of proposed paragraph (g) of this section.

Proposed paragraph (i) prohibits any person from certifying that a hazardous material is offered for transportation in commerce in accordance with the HMR unless the hazardous material has been prepared for shipment as required or authorized by the HMR or an exemption, approval, or registration. This proposed paragraph requires persons who offer a hazardous materials package for transportation under the HMR to assure that the package remains in condition for shipment until it is in the possession of the transporting carrier.

Proposed paragraph (j) prohibits any person from marking or representing that a package for transporting a hazardous material in commerce is safe, certified, or in compliance with the HMR unless it meets all applicable regulatory requirements issued under federal hazmat law. This proposed paragraph restates a prohibition in current paragraph (f)(1) of Section 171.2.

Proposed paragraph (k) prohibits any person from marking or representing that a hazardous material is present in a package or transportation conveyance if the hazardous material is not, in fact, present. This proposed paragraph restates a prohibition in current paragraph (f)(2) of Section 171.2.

Proposed paragraph (l) prohibits any person from unlawfully tampering with any marking, label, placard, or description on a document that is required by federal hazmat law or a regulation issued under federal hazmat law. This proposed paragraph also prohibits any person from unlawfully tampering with a package or transportation conveyance used to transport hazardous materials. This proposed paragraph restates a prohibition in current paragraphs (g)(1) and (g)(2) of Section 171.2.

Proposed paragraph (m) prohibits any person from falsifying or altering an exemption, approval, registration, or other grant of authority relevant to the transportation of hazardous materials issued by RSPA. This proposed

paragraph further prohibits any person from offering a hazardous material for transportation under an exemption, approval, registration, or other grant of authority that has been altered without the consent of RSPA. Finally, this proposed paragraph prohibits any person from representing, marking, certifying, or selling a packaging under an exemption, approval, registration, or other grant of authority that has been altered without the consent of RSPA.

Section 171.8. We propose to add or revise definitions for the following terms: *Administrator, Associate Administrator, carrier, commerce, consignee, hazmat, HMR, loading incidental to movement, movement, offer a hazardous material, person, pre-transportation function, Secretary, sheathing, storage incidental to movement, transportation or transport, transportation facility, and unloading incidental to movement.*

Part 173

Section 173.1. We propose to remove paragraph (c) and redesignate current paragraph (d) as paragraph (c). Current paragraph (c) is redundant with the proposed revisions to Sections 171.1 and 171.2.

Section 173.10. We propose to remove this section. It contains outdated and obsolete requirements.

Section 173.30. We propose to remove this section because it conflicts with the new definitions of "loading incidental to movement" and "unloading incidental to movement" proposed in Sections 171.1 and 171.8

Section 173.31. We propose to add new paragraph (g) to consolidate requirements related to the protection of train and engine crews during rail tank car loading and unloading operations.

Part 174

We propose to delete Section 174.67. Consignee unloading of tank cars is not unloading incidental to movement as that term is defined in this NPRM for purposes of HMR applicability; thus, tank car unloading would not be subject to requirements in the HMR.

VI. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of significant public interest. A preliminary regulatory evaluation is available for review in the public docket for this rulemaking.

For the most part, the proposals in this NPRM maintain the status quo for applicability of the HMR and, thus, neither increase nor decrease the costs of compliance with the HMR for persons who offer hazardous materials for transportation or transport hazardous materials in commerce. The only change from the status quo concerning rail tank car unloading operations and storage of rail tank cars on leased track. This NPRM proposes to exclude consignee unloading of rail cars and rail car storage on leased track from regulation under the HMR, thereby reducing the costs of compliance with the HMR for rail tank car unloading facilities and consignees that store hazardous materials in rail cars on leased track. In addition, this NPRM proposes to expand application of current requirements for placing warning signs, setting brakes, and blocking wheels during rail tank car unloading operations to loading operations, as well. FRA believes that rail facilities currently utilize these protective measures as part of their standard safe operating procedures and, thus, should incur minimal increased costs as a result of this proposal.

We invite all commenters to address the issues discussed in the preliminary regulatory evaluation. In particular, we invite comments on our general conclusion that the proposals in this NPRM (other than cost reductions pertaining to the unloading and storage of tank cars) maintain the status quo for applicability of the HMR and, thus, neither increase nor decrease the costs of compliance with the HMR for persons who offer hazardous materials for transportation or transport hazardous materials in commerce. Do you agree that these proposals generally represent a restatement of the current status quo for applicability of the HMR? If not, how would these proposals change your current business practices? Which requirements in the proposal represent potential increases or decreases in the cost of compliance with the HMR? For persons required to comply with the HMR, can you quantify any increased costs? For emergency responders, members of local emergency planning committees, and other interested persons, what benefits would result if the proposals in this NPRM are implemented? Can you quantify any benefits that may result?

B. Executive Order 13132

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This proposed rule would preempt state law and would have substantial direct effects on

the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the consultation requirements of Executive Order 13132 apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
- (4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or
- (5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This proposed rule addresses covered subject item(s) 1–5 above and would preempt state, local, and Indian tribe requirements not meeting the “substantively the same” standard. This proposed rule is necessary because there appears to be confusion in the regulated community and among federal, state, and local agencies with hazardous materials safety responsibilities concerning whether and to what extent the HMR apply to particular operations and activities related to the transportation of hazardous materials in commerce. The most obvious area of confusion was identified in the 1996 and 1999 ANPRMs issued for this docket—which loading, unloading, and storage activities are incidental to the movement of hazardous materials in commerce and therefore subject to the HMR. In addition, there is uncertainty concerning the extent to which other federal, state, and local agencies may regulate hazardous materials safety, particularly at fixed facilities where the lines between pre-transportation, transportation, and non-transportation operations are not clearly articulated.

Federal hazardous materials transportation law provides at Section 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine

and publish in the **Federal Register** the effective date of federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. We propose that the effective date of federal preemption will be 90 days from publication of a final rule in this matter in the **Federal Register**.

As required under Executive Order 13132, we consulted with state and local officials early in the process of developing a proposed regulation in this matter. Through letters dated November 2, 1999, we invited the following organizations to participate in a meeting to discuss the HM–223 rulemaking: National Governors’ Association; Council of State Governments; National Conference of State Legislatures; U.S. Conference of Mayors; the National Association of Counties; the National Association of Towns and Townships; and the National League of Cities. We met with representatives of the National Governors’ Association, the Council of State Governments, and the National Conference of State Legislatures on January 20, 2000. During the meeting, we provided a brief summary of the status of the rulemaking. In addition, we explained the preemption provisions of federal hazmat law and how this rulemaking could affect state and local government programs governing hazardous materials safety. The state and local government representatives asked several questions about time frames and procedures for the rulemaking and expressed general support for the rulemaking goals as expressed in the two ANPRMs. The state and local government representatives did not comment on the issues and options discussed in the two ANPRMs and expressed a preference to wait to submit comments until we publish a specific proposal in an NPRM. We encouraged the state and local representatives to submit written comments in advance of publication of the NPRM to assure that the rulemaking addresses their concerns. After the meeting, we sent letters to all of the invited organizations, summarizing the meeting and again encouraging them to submit written comments to the HM–223 docket in advance of publication of the NPRM. None chose to do so.

RSPA made all written communications submitted in this proceeding by state and local officials available to the Director of the Office of Information and Regulatory Affairs, Office of Management and Budget.

C. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this proposed rule does not have tribal implications, does not impose substantial direct compliance costs, and is required by statute, the funding and consultation requirements of Executive Order 13175 do not apply. Nevertheless, through a letter dated November 2, 1999, we invited the National Congress of American Indians (NCAI) to participate in a meeting to discuss this rulemaking. The NCAI did not attend the meeting, which occurred on January 20, 2000. After the meeting, we sent a letter to the NCAI, summarizing the meeting and encouraging the organization to submit written comments to the docket in advance of publication of this NPRM. The NCAI chose not to do so.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. Based on the assessment in the preliminary regulatory evaluation, I hereby certify that the proposed rule would not have a significant economic impact on a substantial number of small businesses.

Need for the proposed rule. There is confusion in the regulated community and among government agencies with hazardous materials safety responsibilities concerning whether and to what extent the HMR apply to particular operations and activities related to the transportation of hazardous materials in commerce. This NPRM proposes to clarify specific functions to which the HMR apply. Providing a definitive line for determining the applicability of the HMR will reduce confusion on the part of the regulated public concerning where the transportation requirements apply and should have the beneficial effect of clarifying EPA and OSHA requirements for hazardous materials at fixed facilities. This should result in improved compliance with the separate regulatory requirements of DOT, EPA, and OSHA and, thus, enhance hazardous materials transportation safety, reduce risks to the environment from hazardous materials, and promote workplace safety at facilities that

manufacture or handle hazardous materials.

Identification of potentially affected small entities. For the most part, the selected alternative maintains the status quo in terms of applicability of the HMR, thus imposing no new compliance costs on the regulated industry. For rail tank car unloading facilities, the selected alternative reduces the costs of compliance with the HMR by eliminating the current requirement that rail tank car consignees comply with the unloading requirements in section 174.67.

Unless alternative definitions have been established by the agency in consultation with the Small Business Administration (SBA), the definition of "small business" has the same meaning as under the Small Business Act. Therefore, since no such special definition has been established, RSPA employs the thresholds published by SBA for industries subject to the HMR. (A complete listing of industries and their SBA thresholds is included as Appendix A to the Preliminary Regulatory Evaluation that has been placed in the public docket for this rulemaking.) Based on data for 1997 compiled by the U.S. Census Bureau, it appears that upwards of 95 percent of these firms are small businesses. These entities will incur no new costs to comply with the HMR if the proposals in this NPRM are implemented.

The Federal Railroad Administration estimates that there are 2,500 rail tank car loading and unloading facilities operated by manufacturers of chemicals and allied products. Since no special definition has been established, we employ the threshold of 500–1,000 employees published by SBA for manufacturers of chemicals and allied products (NAICS Subsector 325). Based on data for 1997 compiled by the U.S. Census Bureau, it appears that 93 percent of these firms are small businesses. The proposals in this NPRM will minimally increase the costs of complying with HMR requirements related to preventing access to rail tank cars during loading operations and will reduce the cost of complying with the HMR unloading requirements.

Related federal rules and regulations. OSHA issues regulations related to safe handling, including containment and transfer operations, of hazardous materials in the workplace. These regulations are codified at 29 CFR part 1910 and include requirements for process safety management of highly hazardous chemicals and for handling and storage of specific hazardous materials, such as compressed gases, flammable and combustible liquids,

explosives and blasting agents, liquefied petroleum gases, and anhydrous ammonia. OSHA regulations also address hazard communication requirements at fixed facilities, including container labeling and other forms of warning, material safety data sheets, and employee training.

EPA issues regulations, codified at 40 CFR part 68, designed to prevent accidental releases into the environment of hazardous materials at fixed facilities. These regulations include requirements for risk management plans that must include a hazard assessment, a program for preventing accidental releases, and an emergency response program to mitigate the consequences of accidental releases. In addition, EPA regulations applicable to hazardous materials handling at fixed facilities address community right-to-know requirements; hazardous waste generation, transportation, storage, disposal, and treatment; and requirements to prevent the discharge of oil into or onto the navigable waters of the United States or adjoining shorelines.

Conclusion. We have determined that this NPRM will impose no new costs for compliance with the HMR. The NPRM will reduce the costs to comply with the HMR for companies that operate rail tank car loading and unloading facilities.

E. Paperwork Reduction Act

This NPRM does not impose any new information collection requirements.

F. Regulation Identifier Number (RIN)

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

G. Unfunded Mandates Reform Act

This NPRM imposes no mandates and thus does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995.

H. Environmental Assessment

We find that there are no significant environmental impacts associated with this proposed rule. An environmental assessment has been placed in the public docket for this rulemaking.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste,

Imports, Reporting and recordkeeping requirements.

49 CFR Part 173

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

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, Railroad safety.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 178

Hazardous materials transportation, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, we propose to amend 49 CFR Parts 171, 173, 174, 175, 176, 177, and 178 as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for Part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

2. Sections 171.1 is revised to read as follows:

§ 171.1 Applicability of Hazardous Material Regulations (HMR) to persons and functions.

Federal hazardous material transportation law (49 U.S.C. 5101 *et seq.*) directs the Secretary of Transportation to establish regulations for the safe transportation of hazardous materials in commerce. The Secretary is authorized to apply these regulations to persons who transport hazardous materials in commerce. In addition, the law authorizes the Secretary to apply these regulations to persons who perform pre-transportation functions that relate to assuring the safe transportation of hazardous materials in commerce, specifically persons who offer for transportation or otherwise

cause hazardous materials to be transported in commerce. The law also authorizes the Secretary to apply these regulations to persons who manufacture or maintain packagings or components of packagings that are represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce. Federal hazardous material transportation law also applies to: anyone who indicates by marking or other means that a hazardous material is present in a package or transport conveyance when it is not, and to anyone who tampers with a package or transport conveyance used to transport hazardous materials or a required marking, label, placard, or shipping description. In 49 CFR 1.53, the Secretary delegated authority to issue regulations to the Research and Special Programs Administrator. The Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through 180) are issued by the Administrator under that delegated authority. This section addresses the applicability of the HMR to packagings represented as qualified for use in the transportation of hazardous materials in commerce and to pre-transportation and transportation functions.

(a) *Packagings.* Requirements in the HMR apply to each person who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce, including each person under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the federal government who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce.

(b) *Pre-transportation functions.* Requirements in the HMR apply to pre-transportation functions performed by each person who offers a hazardous material for transportation in commerce or causes a hazardous material to be transported in commerce, including each person performing pre-transportation functions under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the federal government. Pre-transportation functions include the following:

(1) Determining the hazard class of a hazardous material.

(2) Selecting a hazardous materials packaging.

(3) Filling a hazardous materials packaging.

(4) Securing a closure on a filled hazardous materials package or container or on a package or container containing a residue of a hazardous material.

(5) Marking a package to indicate that it contains a hazardous material.

(6) Labeling a package to indicate that it contains a hazardous material.

(7) Preparing a shipping paper.

(8) Providing and maintaining emergency response information.

(9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.

(10) For each person importing a hazardous material into the United States, providing the shipper and the forwarding agent at the place of entry into the United States with timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States.

(11) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

(12) Blocking and bracing a hazardous materials package in a freight container or transport vehicle.

(13) Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo.

(14) Selecting, providing, or affixing placards for a transport vehicle to indicate that it contains a hazardous material.

(c) *Transportation functions.* Requirements in the HMR apply to transportation of a hazardous material in commerce and to each person who transports a hazardous material in commerce, including each person under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the federal government who transports a hazardous material in commerce. Transportation in commerce begins when a carrier takes possession of a hazardous material for the purpose of transporting it and continues until the package containing the hazardous material arrives at the destination indicated on a shipping document, package marking, or other medium. For a private motor carrier, transportation in commerce begins when a motor vehicle driver takes possession of a hazardous material for the purpose of transporting it and continues until the driver relinquishes possession of the package containing the hazardous material at its

destination and is no longer responsible for performing functions subject to the HMR. Transportation in commerce includes the following:

(1) *Movement.* Movement of a hazardous material by rail car, aircraft, motor vehicle, or vessel (except as delegated at section 1.46(t) of this title).

(2) *Loading incidental to movement of a hazardous material.* Loading of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel or loading of a hazardous material into a bulk packaging for the purpose of transporting it, when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle into which the hazardous material is being loaded immediately prior to movement of the hazardous material (except as delegated at section 1.46(t) of this title).

(3) *Unloading incidental to movement of a hazardous material.* Unloading of a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel or unloading of a hazardous material from a bulk packaging when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed (except as delegated at § 1.46(t) of this title).

(4) *Storage incidental to movement of a hazardous material.* Storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a private motor carrier, between the time that a motor vehicle driver takes physical possession of the hazardous material for the purpose of transporting it until the driver relinquishes possession of the package containing the hazardous material at its destination and is no longer responsible for performing functions subject to the HMR.

(d) *Functions not subject to the requirements of the HMR.* Requirements of the HMR do not apply to the following:

(1) Storage of a freight container, transport vehicle, or package containing a hazardous material at an offeror facility prior to a carrier taking possession of the hazardous material for

movement in transportation in commerce or, for a private motor carrier, prior to a motor vehicle driver taking physical possession of the hazardous material for movement in transportation in commerce.

(2) Unloading of a hazardous material from a transport vehicle or a bulk packaging performed by a person employed by or working under contract to the consignee or, in the case of a private motor carrier, following delivery of the hazardous material by the carrier to its destination, unloading by a person other than the driver of the motor vehicle from which the hazardous material is being unloaded.

(3) Storage of a freight container, transport vehicle, or package containing a hazardous material after its delivery by a carrier to the destination indicated on a shipping document, package marking, or other medium.

(4) Rail and motor vehicle movements of a hazardous material within a contiguous facility boundary, other than at a transportation facility, where public access is restricted, except to the extent that the movement is on or crosses a public road or on track that is part of the general railroad system of transportation.

(5) Transportation of a hazardous material in a motor vehicle, aircraft, or vessel operated by a federal, state, or local government employee solely for noncommercial federal, state, or local government purposes.

(6) Transportation of a hazardous material by an individual for non-commercial purposes in a private motor vehicle, including a leased or rented motor vehicle.

(7) Any matter subject to the postal laws and regulations of the United States.

(e) *Requirements of other federal agencies.* Each facility at which functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other federal agencies.

(f) *Requirements of state and local government agencies.* Each facility at which functions are performed in accordance with the HMR may be subject to applicable laws and regulations of state and local governments and Indian tribes, except to the extent that such laws and regulations are preempted under 49 U.S.C. section 5125. Under section 5125, a non-federal law or regulation may be preempted, unless otherwise authorized by another federal statute, if—

(1) Complying with both the non-federal law or regulation and a requirement of federal hazardous

materials transportation law or the HMR is not possible;

(2) The non-federal law or regulation as applied or enforced is an obstacle to accomplishing and carrying out federal hazardous material transportation law or the HMR; or

(3) The non-federal law or regulation is not substantively the same as a provision of federal hazardous materials transportation law or the HMR with respect to—

(i) The designation, description, and classification of hazardous material;

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(iii) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of these documents;

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(g) *Penalties for noncompliance.* Each person who knowingly violates a requirement of federal hazardous material transportation law, an order issued under federal hazardous material transportation law, subchapter A of this chapter, or an exemption or approval issued under subchapter A or C of this chapter is liable for a civil penalty of not more than \$27,500 and not less than \$250 for each violation. When a violation is a continuing one and involves transporting of hazardous materials or causing them to be transported or shipped, each day of the violation constitutes a separate offense. Each person who knowingly violates a requirement in § 171.2(l) of this subchapter or willfully violates a provision of federal hazardous material transportation law or an order issued under federal hazardous material transportation law may be fined under Title 18, United States Code, or imprisoned for not more than 5 years, or both.

3. Section 171.2 is revised to read as follows:

§ 171.2 General requirements.

(a) Each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.

(b) Each person who offers a hazardous material for transportation in

commerce must comply with all applicable requirements of this subchapter or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter.

(c) Each person who performs a function covered by or having an effect on a specification prescribed in part 178, 179, or 180 of this subchapter, an approval issued under the HMR, or an exemption issued under subchapter A of this chapter, must perform the function in accordance with that specification, approval, or exemption, as appropriate.

(d) No person may offer or accept a hazardous material for transportation in commerce or transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable.

(e) No person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter.

(f) No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter.

(g) No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter governing its use in the transportation of a hazardous material in commerce unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of this subchapter. No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of the exemption, approval, or registration issued under this subchapter or subchapter A of this chapter. Except as provided in section 178.2 of this subchapter, a packaging or container marked as meeting a DOT specification or UN standard must

conform to the specification or standard at all times that the marking is visible. The requirements of this paragraph apply whether or not the packaging or container is used or to be used for the transportation of a hazardous material.

(h) The representations, markings, and certifications subject to the prohibitions of paragraph (g) of this section include—

(1) Specification identifications that include the letters "ICC", "DOT", "CTC", "MC", or "UN";

(2) Exemption, approval, and registration numbers that include the letters "DOT", "EX", "M", or "R"; and

(3) Test dates associated with specification, registration, approval, retest, or exemption markings indicating compliance with a test or retest requirement of the HMR, or an exemption, approval, or registration issued under the HMR or under subchapter A of this chapter.

(i) No person may certify that a hazardous material is offered for transportation in commerce in accordance with the requirements of this subchapter unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter. Each person who offers a package containing a hazardous material for transportation in commerce in accordance with the requirements of this subchapter, to include the signing of the shipper's certification, or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter, must assure that the package remains in condition for shipment until it is in the possession of the carrier.

(j) No person may, by marking or otherwise, represent that a container or package for transportation of a hazardous material is safe, certified, or in compliance with the requirements of this chapter unless it meets the requirements of all applicable regulations issued under federal hazardous material transportation law.

(k) No person may, by marking or otherwise, represent that a hazardous material is present in a package, container, motor vehicle, rail car, aircraft, or vessel if the hazardous material is not present.

(l) No person may alter, remove, deface, destroy, or otherwise unlawfully tamper with any marking, label, placard, or description on a document required by federal hazardous material transportation law or the regulations

issued under federal hazardous material transportation law. No person may alter, deface, destroy, or otherwise unlawfully tamper with a package, container, motor vehicle, rail car, aircraft, or vessel used for the transportation of hazardous materials.

(m) No person may falsify or alter an exemption, approval, registration, or other grant of authority issued under this subchapter or subchapter A of this chapter. No person may offer a hazardous material for transportation or transport a hazardous material in commerce under an exemption, approval, registration or other grant of authority issued under this subchapter or subchapter A of this chapter if such grant of authority has been altered without the consent of the issuing authority. No person may represent, mark, certify, or sell a packaging or container under an exemption, approval, registration or other grant of authority issued under this subchapter or subchapter A of this chapter if such grant of authority has been altered without the consent of the issuing authority.

4. In section 171.8, definitions for "carrier," "person," and "sheathing" are revised, and definitions for "Administrator," "Associate Administrator," "commerce," "consignee," "hazmat," "HMR," "loading incidental to movement," "movement," "offer a hazardous material," "pre-transportation function," "Secretary," "storage incidental to movement," "transportation or transport," "transportation facility," and "unloading incidental to movement" are added in alphabetical order, to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Administrator means the Administrator, Research and Special Programs Administration.

* * * * *

Associate Administrator means the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

* * * * *

Carrier means a person who transports passengers or property in commerce by rail car, aircraft, motor vehicle, or vessel.

* * * * *

Commerce means trade or transportation in the jurisdiction of the United States between a place in a state and a place outside of the state; or that affects trade or transportation between a

place in a state and place outside of the state.

* * * * *

Consignee means the person or place shown on a shipping document, package marking, or other media as the location to which a carrier is directed to transport a hazardous material.

* * * * *

Hazmat means a hazardous material.

* * * * *

HMR means the Hazardous Materials Regulations, Parts 171 through 180 of this chapter.

* * * * *

Loading incidental to movement means loading of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel or loading of a hazardous material into a bulk packaging for the purpose of transporting it, when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle into which the hazardous material is being loaded immediately prior to movement of the hazardous material in commerce.

* * * * *

Movement means the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel.

* * * * *

Offer a hazardous material means perform, attempt to perform, or is required to perform a pre-transportation function under the HMR.

* * * * *

Person means an individual, corporation, company, association, firm, partnership, society, joint stock company; or a government, Indian tribe, or authority of a government or tribe offering a hazardous material for transportation in commerce or supporting a hazardous material to support a commercial enterprise. This term does not include the United States Postal Service or, for purposes of 49 U.S.C. 5123 and 5124, a Department, agency, or instrumentality of the government.

* * * * *

Pre-transportation function means tendering a hazardous material to a carrier for transportation in commerce; causing a hazardous material to be transported in commerce; or performing a function specified in the HMR that is required to assure the safe transportation of a hazardous material in commerce, including—

(1) Determining the hazard class of a hazardous material.

(2) Selecting a hazardous materials packaging.

(3) Filling a hazardous materials packaging.

(4) Securing a closure on a filled hazardous materials package or container or on a package or container containing a residue of a hazardous material.

(5) Marking a package to indicate that it contains a hazardous material.

(6) Labeling a package to indicate that it contains a hazardous material.

(7) Preparing a shipping paper.

(8) Providing and maintaining emergency response information.

(9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.

(10) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

(11) Blocking and bracing a hazardous materials package in a freight container or transport vehicle.

(12) Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo.

(13) Selecting, providing, or affixing placards for a transport vehicle to indicate that it contains a hazardous material.

* * * * *

Secretary means the Secretary of Transportation.

* * * * *

Sheathing means a covering consisting of non-sparking, non-metallic material used as a lining over metal, and secured to prevent any motion, to reduce sparking or damage to inner packagings.

* * * * *

Storage incidental to movement means storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a private motor carrier, between the time that a motor vehicle driver takes physical possession of the hazardous material for the purpose of transporting it until the driver relinquishes possession of the hazardous material at its intended destination and is no longer responsible for performing functions subject to the HMR.

* * * * *

Transportation or transport means the movement of property and loading, unloading, or storage incidental to the movement.

Transportation facility means an airport, rail yard or terminal, marine terminal, truck terminal, or intermodal terminal. This term also includes a warehouse or storage location where hazardous materials are stored incidental to transportation.

* * * * *

Unloading incidental to movement means unloading of a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel or unloading of a hazardous material from a bulk packaging when performed by a person employed by or under contract to a for-hire carrier or, in the case of a private motor carrier, when performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement in commerce is completed.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

5. The authority citation for Part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.45 and 1.53.

§ 173.1 [Amended]

6. In § 173.1, paragraph (c) is removed and paragraph (d) is redesignated as new paragraph (c).

§ 173.10 [Removed and Reserved]

7. Section 173.10 is removed and reserved.

§ 173.30 [Removed and Reserved]

8. Section 173.30 is removed and reserved.

9. Section 173.31 is amended by adding new paragraph (g) to read as follows:

§ 173.31 Use of tank cars.

* * * * *

(g) *Tank car loading and unloading.* When placed for loading or unloading and before unsecuring any closure, a tank car must be protected against movement or coupling as follows:

(1) Caution signs must be placed between the rails to give necessary warning to persons approaching the car(s) from the open end of a siding and must be left up until after all closures are secured and the cars are in proper condition for transportation. The signs must be of a durable material, blue in color, rectangular in shape, at least 30.48 cm (12 inches) high by 38.10 cm (15 inches) wide, and bear the word “STOP.” The word “STOP” must appear in white letters at least 10.16 cm (4 inches) high. Additional words, such

as “Tank Car Connected” or “Crew at Work,” may also appear in white letters under the word “STOP.”

(2) At least one wheel on the tank car must be blocked against movement in both directions, and the hand brakes must be set. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent movement in both directions.

§§ 173.3, 173.6, 173.24a, 173.62, 173.166, 173.171, 173.181, 173.185, 173.189, 173.219, 173.308, 173.335 and 173.416 [Amended]

10. In addition to the amendments set forth above, in Part 173 the word “movement” is revised to read

“shifting” in the following places:

- a. Section 173.3(c)(2);
- b. Section 173.6(b)(1) and (b)(3);
- c. Section 173.24a(a)(3);
- d. Section 173.166(e)(4)(iii);
- f. Section 173.171(d);
- g. Section 173.181(a)(2);
- h. Section 173.189(b) and (d)(4)(i);
- i. Section 173.335(c); and
- j. Section 173.416(f).

11. In addition to the amendments set forth above, in Part 173 the words “freedom of movement” are revised to read “free moving” in § 173.62(c) in the table under Packing Instruction 131 each time they appear.

12. In addition to the amendments set forth above, in Part 173 the word “movement” is revised to read “moving” in the following places:

- a. Section 173.185(e)(7), (g)(1), and (g)(2);
- b. Section 173.219(b)(3); and
- c. Section 173.308(a)(4).

PART 174—CARRIAGE BY RAIL

13. The authority citation for Part 174 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 174.67 [Removed and Reserved]

14. Section 174.67 is removed and reserved.

§§ 174.110, 174.112, and 174.115 [Amended]

15. In addition to the amendments set forth above, in Part 174 the word “movement” is revised to read “shifting” in the following places:

- a. Section 174.110;
- b. Section 174.112(b) and (c)(3) each time it appears; and
- c. Section 174.115(a) and (b)(3) each time it appears.

PART 175—CARRIAGE BY AIRCRAFT

16. The authority citation for Part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 175.81 [Amended]

17. In § 175.81(a), the word “movement” is revised to read “shifting”.

PART 176—CARRIAGE BY VESSEL

18. The authority citation for Part 176 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§§ 176.69, 176.76, 176.78, 176.93, 176.116, 176.132, 176.168, and 176.200 [Amended]

19. In Part 176, the word “movement” is revised to read “shifting” in the following places:

- a. Section 176.69(d);
- b. Section 176.76(a)(2) each time it appears;
- c. Section 176.116(d);
- e. Section 176.132(c); and
- f. Section 176.200(b) and (c) each time it appears.

20. In Part 176, the word “movement” is revised to read “motion” in § 176.93(a)(1).

21. In Part 176, the word “movement” is revised to read “moving” in the following places:

- a. Section 176.78(f)(8); and
- b. Section 176.168(g).

PART 177—CARRIAGE BY PUBLIC HIGHWAY

22. The authority citation for Part 177 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§§ 177.834, 177.840, and 177.870 [Amended]

23. In Part 177, the word “movement” is revised to read “shifting” in the following places:

- a. Section 177.834(a);
- b. Section 177.840(b)(3); and
- c. Section 177.870(e).

PART 178—SPECIFICATIONS FOR PACKAGINGS

24. The authority citation for Part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§§ 178.601, 178.704 [Amended]

25. In Part 178, the word “movement” is revised to read “moving” in § 178.601(g)(1)(i)(D), (g)(1)(ii), and (g)(4)(v).

26. In Part 178, the word “movement” is revised to read “motion” in § 178.704(d)(3).

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Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

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