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: Final rule.

SUMMARY: RSPA is clarifying 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 are also listing in the HMR pre-transportation functions to which the HMR apply. Pre-transportation functions are functions performed to prepare hazardous materials for transportation 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 that movement. For purposes of applicability of the HMR, ''transportation in commerce'' 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 or other shipping documentation.

DATES: This final rule is effective October 1, 2004.

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SUPPLEMENTARY INFORMATION:

List of Topics

I. Background

Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) are promulgated under the mandate in section 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*, as amended by section 1711 of the Homeland Security Act of 2002, Pub. L. 107–296) that the Secretary of Transportation ''prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.'' Section 5103(b)(1)(B) provides that the HMR ''shall govern safety aspects, including security, 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 define 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.

On June 14, 2001, the Research and Special Programs Administration (RSPA, we) issued a notice of proposed rulemaking (NPRM; 66 FR 32420) proposing to clarify the applicability of the HMR to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation. The proposals in the NPRM were based on previously issued administrative determinations as to the applicability of the HMR, including informal letters of interpretation, formal interpretations published in the **Federal Register**, inconsistency rulings, and preemption determinations. In the NPRM, we proposed to key the definition of ''transportation in commerce'' to a carrier's possession of a hazardous materials shipment. As we stated in the NPRM, we believe 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.

As we explained in the NPRM, using this approach, the HMR would continue to apply, as they do now, to certain activities performed by offerors to prepare a hazardous material for transportation. We proposed a new term to describe these activities—''pre-transportation functions.'' These are functions that affect the safe movement of hazardous materials during transportation. ''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. We proposed that, 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, we proposed that such storage would be considered storage ''incidental to movement.'' We proposed and requested comment on two alternatives for applying the HMR to rail cars stored on leased track in certain circumstances.

In addition, the NPRM described the statutory authorities and associated regulatory programs of the Department of Labor's Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) and explained their applicability to

operations at fixed facilities involving hazardous materials. The NPRM indicated that facilities at which functions regulated by the HMR occur might also be subject to applicable OSHA and/or EPA regulations. Finally, the NPRM discussed the preemption provisions of Federal hazmat law and indicated that facilities at which functions regulated by the HMR occur may also be subject to laws and regulations of state, local, or tribal governments.

II. Summary of Final Rule

This final rule amends the HMR to incorporate the following new definitions and provisions:

• We are defining a new term—''pre-transportation function''—to mean a function performed by any person that is required to assure the safe transportation of a hazardous material in commerce. When performed by shipper personnel, loading of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel and filling a bulk packaging with hazardous material in the absence of a carrier for the purpose of transporting it is a pre-transportation function as that term is defined in this final rule. Pre-transportation functions must be performed in accordance with requirements in the HMR.

• We are defining ''transportation'' to mean the movement of property and loading, unloading, or storage incidental to the movement. This definition is consistent with the definition of ''transportation'' in Federal hazmat law. Transportation in commerce begins when a carrier takes physical possession of a hazardous material for the purpose of transporting it and continues 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.

• We are defining ''movement'' to mean the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel.

• We are defining ''loading incidental to movement'' to mean the loading by carrier personnel or in the presence of carrier personnel of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel for the purpose of transporting it. For a bulk packaging, ''loading incidental to movement'' means the filling of the packaging with a hazardous material by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. Loading incidental to movement is regulated under the HMR. Note, however, that, as discussed elsewhere in this preamble, OSHA shares jurisdiction for certain aspects of the loading operation.

• We are defining ''unloading incidental to movement'' to mean the removal of a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel or the emptying of a hazardous material from a bulk packaging after a hazardous material has been delivered to a consignee and prior to the delivering carrier's departure from the consignee facility or premises. Unloading incidental to movement is subject to regulation under the HMR. Note, however, that, as discussed elsewhere in this preamble, OSHA shares jurisdiction for certain aspects of the unloading operation. Unloading by a consignee after the delivering carrier has departed the facility is not unloading incidental to movement and not regulated under the HMR.

• We are defining ''storage incidental to movement'' to mean storage by any person 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. However, in the case of railroad shipments, even if a shipment has been delivered to the destination shown on the shipping document, if the track is under the control of a railroad carrier or track is used for purposes other than moving cars shipped to or from the lessee, storage on the track is storage incidental to movement. We have revised the definition of ''private track or private siding'' to make this clear. Storage at a shipper facility prior to a carrier exercising control over or taking possession of the hazardous material or storage at a consignee facility after a carrier has delivered the hazardous material is not storage incidental to movement and is not regulated under the HMR.

• We are amending § 171.1 of the HMR to list regulated and non-regulated functions. Regulated functions include: (1) Activities related to the design, manufacture, and qualification of packaging represented as qualified for use in the transportation of hazardous materials; (2) pre-transportation functions; and (3) transportation functions (movement of a hazardous material and loading, unloading, and storage incidental to the movement). Non-regulated functions include: (1) Rail and motor vehicle movements of a hazardous material solely within a contiguous facility where public access is restricted; (2) transportation of a hazardous material in a transport vehicle or conveyance operated by a Federal, state, or local government employee solely for government purposes; (3) transportation of a hazardous material by an individual for non-commercial purposes in a private motor vehicle; and (4) any matter subject to U.S. postal laws and regulations.

• We are amending § 171.1 of the HMR to indicate that facilities at which functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other Federal agencies or to applicable state or local government laws and regulations (except to the extent that such non-Federal requirements may be preempted under Federal hazmat law). Federal hazmat law does not preempt other Federal statutes nor does it preempt regulations issued by other Federal agencies to implement statutorily authorized programs. This final rule is intended 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 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 may also have to 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 may be subject to EPA's risk management; community right-to-know; hazardous waste tracking and disposal; and spill prevention, control and countermeasure requirements, and OSHA's process safety management and emergency preparedness requirements. Similarly, facilities at which pre-transportation functions are performed may also be subject to regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) concerning the handling of explosives. Questions as to the applicability of EPA, OSHA, or ATF regulations to particular facilities or

operations should be directed to the appropriate EPA, OSHA, or ATF office.

The provisions of this final rule are explained in more detail in the following preamble discussion.

III. Analysis of Comments

We received more than 120 comments on the NPRM. Commenters included representatives of individual shippers and carriers, industry trade associations, state and local governments, and the National Transportation Safety Board (NTSB). Most commenters express support for the goals of this rulemaking, but oppose many of the specific proposals in the NPRM. Generally, industry commenters express concern that the NPRM appears to contradict one of the major goals of Federal hazmat law—establishment of uniform national regulations for the safe transportation in commerce of hazardous materials. On the other hand, commenters representing state and local governments generally support the NPRM proposals. The comments are discussed in detail below.

Several commenters submitted comments that are outside of the scope of this rulemaking. For example, one commenter wants us to eliminate any regulation that allows shippers to prepare and load any hazardous material into a non-bulk fiber drum. This commenter also suggests that we develop a uniform hazardous materials shipping paper or bill of lading. Several other commenters recommend revisions to the current training requirements in Subpart H of Part 172. Other commenters suggest that we should provide special handling provisions applicable to the transportation and recycling of lead batteries. Because these comments are beyond the scope of this rulemaking, they are not addressed in this final rule.

A. Packaging Specifications

The NPRM proposed that Federal hazmat law and the HMR would 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. The NPRM noted 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.

Commenters generally support this aspect of the NPRM. Commenters agree that the packaging requirements ''directly affect packaging integrity and are specifically delineated in the enabling statute.'' (American Chemistry Council)

Three commenters express concern that the requirement to maintain a certified packaging in accordance with applicable specification requirements whether or not it is in transportation will impose a significant compliance burden. The commenters ''purchase many containers, such as steel drums, which arrive with DOT or UN specification markings, but are used for purposes other than the transport of hazardous materials. Since DOT or UN specification markings are permanently affixed to such containers, and cannot be easily removed or covered, this requirement would require considerable effort to establish a separate supply chain * * *'' (Detroit Edison) Another commenter states, ''Containers are used in facilities for a number of things from interim storage to waste receptacles. A facility should not be required to maintain the certification for a package if it is in any other use than for transportation.'' (Nuclear Energy Institute)

The specification markings on DOT or UN specification packagings certify that the packaging has been designed, tested, and maintained in conformance with all applicable HMR requirements. The NPRM proposed no change in the current applicability of the HMR to packagings that are represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce. We recognize that many entities use DOT or UN specification packagings for temporary or permanent storage of hazardous materials. However, because a packaging that is used for storage one day may be used for transportation the next, it is critical to transportation safety that packagings represented as meeting DOT or UN specification requirements in fact do so.

A DOT or UN specification packaging that does not conform to the marked standard must be clearly identified by the manufacturer or distributor as not conforming to the marked standard. Under the notification provisions of § 178.2(c) of the HMR, the manufacturer and each subsequent distributor of a non-conforming packaging must inform customers of all regulatory requirements not met at the time of transfer. For example, the manufacturer of a drum for which both conforming and non-conforming covers are offered may indicate as part of the notification requirement that, when fitted with the non-conforming cover, the drum does not conform to the marked standard. Covers must be marked or there must be a sufficient description in the notification for the user to readily distinguish between the conforming and non-conforming cover. In such cases, non-applicable standard markings should be covered, removed, or obliterated. We realize that this may not be practical, particularly for packagings with embossed markings. Provided sufficient information is provided to enable the user to identify packagings that do not meet all applicable regulatory requirements, the appearance of standard markings is not prohibited.

Persons who offer hazardous materials for transportation must assure that the packaging used for such transportation conforms to all applicable regulatory requirements. In the case of specification packagings, persons who offer hazardous materials for transportation must assure that the packaging conforms to the applicable specification in all respects and that it has been properly maintained and repaired. If a packaging shows evidence of damage such that its effectiveness as a container may be substantially reduced or if the packaging has been subjected to conditions or operating practices that could reduce its effectiveness, it must be inspected and repaired, in accordance with applicable requirements, before it can be filled with a hazardous material and offered for transportation.

In this final rule, we are reiterating that the HMR 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.

B. Pre-Transportation Functions

In the NPRM, we proposed a new term—''pre-transportation function''—for activities performed prior to the transportation of a hazardous material and to which the HMR apply. As defined in the NPRM, a pre-

transportation function is performed to prepare a hazardous material and its accompanying shipping documentation for transportation and is required to assure its safe transportation in commerce. Thus, pre-transportation functions include activities such as determining a material's hazard class, selecting a packaging, marking and labeling a package, preparing shipping papers and emergency response information, and selecting and affixing placards. Preparation of a hazardous material for transportation also includes filling and closing the packaging. As defined in the NPRM, 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 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 usually occur before transportation in commerce begins—that is, before a carrier takes possession of the hazardous material. However, most commenters agree that pre-transportation functions have a direct bearing on the safety of a hazardous materials shipment in commerce and, thus, should be subject to the HMR. Further, commenters agree that 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. As we explained in the NPRM, Congress recognized the importance of national uniformity in these areas by creating a specific preemption provision in section 5125(b) of Federal hazmat law 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.

Certain functions may be considered both pre-transportation and transportation functions, particularly those that involve loading of hazardous materials into packagings or onto transport vehicles. In the NPRM, we identified loading functions as pre-transportation functions, including: (1) Filling of a packaging (both bulk and non-bulk); (2) securing closures on a filled hazardous materials package (both bulk and non-bulk) or on one containing a residue of a hazardous material; (3) blocking and bracing hazardous materials in a freight container or transport vehicle; or (4) segregating hazardous materials packages in a freight container or transport vehicle from incompatible cargo. The NPRM also identified loading of packaged or containerized material onto a transport vehicle or loading of hazardous materials into a bulk packaging as loading incidental to movement. Commenters expressed confusion about this aspect of the NPRM.

It was our intention in the NPRM to clarify that loading functions, as listed above, are regulated under the HMR when performed by any person, whether shipper or carrier. If a shipper performs a loading function prior to the carrier's arrival at the shipper facility, that function is a pre-transportation function and is subject to all applicable regulatory requirements. Because carrier possession of a hazardous material is key to our definition of ''transportation'' for purposes of the HMR, loading functions that are performed by carrier personnel or by shipper personnel in the presence of the carrier are considered loading incidental to movement and are, thus, transportation functions. Irrespective of the person performing the function or the designation as a pre-transportation or transportation function, loading is regulated under the HMR.

For consistency with our treatment of non-bulk packagings, in the NPRM and this final rule we include filling and closing of a bulk packaging as a pre-transportation function in the same way that filling and closing a non-bulk packaging is a pre-transportation function. Filling and closing a hazardous materials packaging, whether bulk or non-bulk, is part of the process of preparing the hazardous material for transportation. As stated above, any person who performs a pre-transportation function must perform that function in accordance with the HMR. Thus, any person who fills and closes a bulk or non-bulk packaging must assure that the packaging is filled and closures are secured in accordance with all applicable regulatory requirements. Such person may be a shipper or a carrier. If a shipper performs the function, it is a pre-transportation function. If a carrier performs the function or if the function is performed in the presence of the carrier, then it is a transportation function.

Similarly, blocking and bracing and segregation of packages in a transport vehicle are functions frequently performed by carrier personnel. However, shipper personnel may also perform such functions, particularly when loading hazardous materials packages into freight containers. These are regulated functions under the HMR, whether performed by shipper or carrier personnel.

In this final rule, we modified the definitions of ''pre-transportation function'' and ''loading incidental to movement'' to reflect commenters'' suggestions and concerns. ''Pre-transportation function'' is defined in this final rule as a function specified in the HMR that is performed prior to the movement of hazardous materials in commerce and is required to assure the safe transportation of a hazardous material in commerce. The list of examples of pre-transportation functions includes filling a hazardous materials packaging, including a bulk packaging; blocking and bracing a hazardous materials package in a freight container or transport vehicle; and segregating a hazardous materials package in a freight container or

transport vehicle from incompatible cargo.

''Loading incidental to movement'' is defined in this final rule to mean loading of packaged or containerized hazardous material by carrier personnel or in the presence of carrier personnel onto a transport vehicle, aircraft, or vessel for the purpose of transporting it, including blocking and bracing a hazardous materials package in a freight container or transport vehicle, and segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo. For a bulk packaging, ''loading incidental to movement'' means filling of a bulk packaging by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. A shipper who loads hazardous materials into a cargo tank or rail tank car is subject to HMR requirements applicable to such loading in the same way that a carrier performing the same function is subject to applicable HMR requirements. When a shipper performs such loading functions in the absence of the carrier, they are pre-transportation functions. When a carrier performs such loading functions or the shipper performs the functions with the carrier present, the functions meet the definition for ''loading incidental to movement.'' We also modified the description of pre-transportation functions in § 171.1(b) to indicate that such functions may be performed by shipper or carrier personnel. It is important to note in this context that, even where the HMR specify requirements for loading a packaging or container, OSHA requirements may also apply. As discussed elsewhere in this preamble, OSHA regulations may specify operational procedures for hazardous materials loading operations. Persons who perform loading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to loading operations—such as requirements for secondary containment or vapor recovery—may also apply.

One commenter suggests that the ''discussion of 'pre-transportation functions' in [the NPRM], which concludes that such activities are not 'incidental' to the movement of hazardous materials, is statutorily nonsensical and unsupported by the words of the statute. * * * The statute contains no authorization for ''pre-transportation functions.'' It only contains authorization for the agency to regulate the 'movement' of goods; or loading, unloading or storage 'incidental' to movement; or (in Section 5103(b)(iii)) a few named activities connected with the manufacture and repair of packaging or containers (not at issue here). * * * If DOT insists that the named 'pre-transportation' functions do not fall into the statutory category of 'movement' (because the carrier has not taken possession of the material * * *), then they must fall into the statutory category of loading, unloading, or storage 'incidental' to the movement of such goods.'' (National Industrial Transportation League) The commenter appears to have misread Federal hazmat law. Federal hazmat law authorizes the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in 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); emphasis added. In addition, the Secretary is authorized to regulate any aspect of hazardous materials transportation that the Secretary considers appropriate. 49 U.S.C. 5103(b)(1)(B); emphasis added. Federal hazmat law thus clearly recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce. Such activities need not be considered ''loading, unloading, or storage incidental to movement'' to be subject to regulations promulgated under the authority of Federal hazmat law.

One commenter recommends that the definition of the term ''pre-transportation function'' should be ''explicit, complete, and self-contained. Although the proposed definition includes descriptions of specific functions, the enumerated functions are not exclusive. * * * A definitive list would go a significant way to provide clarity and certainty in this gray area of federal jurisdiction.'' (Utility Solid Waste Activities Group) We disagree that a definitive list is necessary. As adopted in this final rule, the term ''pre-transportation function'' is defined to mean a function that is required to assure the safe transportation of a hazardous material in commerce. The list of examples provided in the definition includes functions currently regulated under the HMR. An all-inclusive listing of pre-transportation functions would limit our flexibility should we determine that additional pre-transportation functions should be regulated or discover that we inadvertently omitted functions or activities from the definition.

A number of commenters address the specific functions we proposed to include in the definition for ''pre-transportation function.'' Several commenters state that blocking and bracing of packages in a transport vehicle, segregation of materials in a transport vehicle, and providing and affixing placards to a transport vehicle should not be considered pre-transportation functions because ''the carrier, not the shipper, typically performs these functions.'' (FedEx Ground Package Systems, Inc.) We do not agree that carrier personnel usually perform these functions. In fact, both shippers and carriers may perform these functions. Shippers frequently use their own personnel to load trailers or freight containers. Further, it is usually the shipper who provides placards to the carrier when placarding is required by the HMR. However, the commenters are correct that carriers may perform some or all of these functions, as well. Commenters are also correct that the definition of ''pre-transportation function'' should not be dependent on the person performing the function. The definition is intended to delineate functions and activities that are regulated under the HMR because, while they generally occur before transportation in commerce begins, they directly affect transportation safety.

As one commenter points out, ''In reality, after taking possession of a hazardous material, carriers also perform activities that RSPA classifies in the Proposed Rule as 'pre-transportation functions.' In any final rule, RSPA should clarify that 'pre-transportation functions' are not solely performed prior to a carrier's possession of a hazardous material, and that carriers may perform 'pre-transportation' functions *after* taking possession of a hazardous material.'' (United Parcel Service, Inc.) We agree. As we stated in the preamble to the NPRM, any person who performs a pre-transportation function must perform that function in accordance with HMR requirements. Such persons may include shippers, carriers, freight forwarders, non-vessel operating common carriers, freight brokers, and other entities. In this final rule, we modified the definition of ''pre-transportation function'' to clarify that the HMR requirements apply to any person who performs or is responsible

for performing a pre-transportation function.

Several commenters address the statement in the preamble to the NPRM, reiterated above, that any person who performs a pre-transportation function must perform that function in accordance with HMR requirements. In this context, the NPRM noted that the HMR apply to persons who offer hazardous materials for transportation in commerce or cause hazardous materials to be transported in commerce. As examples of persons who cause hazardous materials to be transported in commerce, the NPRM listed freight forwarders, non-vessel operating common carriers, freight brokers, and other entities that perform pre-transportation functions. One commenter states, ''Since in more than 70% of 'third party shipments' the third party has no physical involvement with the shipments, making them liable on these shipments for compliance with hazmat regulations, makes them a guarantor of compliance, when they have no ability to effectuate compliance.'' (Gallagher and Howarth, P.C.) This commenter is concerned that this detail in the NPRM creates an uninsurable liability for third parties who ''simply arranged the transportation of the shipment.''

Another commenter ''believes that the proposed regulation of 'pre-transportation functions' as drafted would be unfair, and possibly unenforceable as well. * * * [B]rokers, freight forwarders and [non-vessel operating common carriers] seldom deal with the freight physically at the dock, and they must rely heavily on information received from shippers as to the contents. Intermediaries have the responsibility to select the carrier, and they may issue a house bill of lading or freight receipt to the shipper, but they do not ordinarily take responsibility for preparing the underlying carrier's shipment documentation, or for making the physical arrangements to classify, placard, brace and pack the cargo. As long as either the shipper or the underlying carrier is performing those functions, it would be unfair and unworkable for DOT to hold the intermediary liable for any errors made by parties over which they have no operational control.'' (Transportation Intermediaries Association)

We agree. We did not mean to suggest that third-party intermediaries would be held responsible for errors made by the shippers and carriers with whom they work unless the third-party knew or should have known about the error. A third-party intermediary who prepares a shipping paper for a hazardous materials shipment and signs the shipper certification is, in effect, assuming responsibility for compliance with the regulations for all aspects of that shipment about which he knew or should have known. For example, if a freight forwarder or consolidator prepares a new shipping paper for a consolidated load that includes hazardous materials, the shipping paper must conform to all applicable HMR requirements. We realize that the shipping paper will be based on information provided by the original shipper. A third-party intermediary would not be held responsible for errors made by the shipper in its initial shipping documentation, such as incorrect classification of a material. However, using the information available, a third-party intermediary is responsible for completing a shipping paper in accordance with HMR requirements. As another example, a third-party intermediary may handle a package that contains a hazardous material. If the shipping documentation prepared by the original shipper indicates that the material is a flammable liquid, but the package label indicates a CORROSIVE hazard, the third-party intermediary must resolve the discrepancy before the package may be transported. In such a situation, the third-party intermediary knew or should have known that the shipment he was handling did not conform to applicable regulatory requirements. Further, as is currently the case, a third-party intermediary who performs a pre-transportation function must perform that function in conformance with the HMR. For example, if a third-party intermediary consolidates a number of packages into a freight container, he must assure that the packages are loaded into the freight container as required by applicable regulations, including those related to blocking and bracing of cargo or segregation of incompatible materials.

In the NPRM, we proposed to define ''offer a hazardous material'' to mean the performance of a pre-transportation function under the HMR. In this way, we intended 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. In addition, we proposed to define ''pre-transportation function'' to mean tendering a hazardous material to a carrier for transportation in commerce, causing a hazardous material to be transported in commerce, or performing a function in the HMR that is required to assure the safe transportation of a hazardous material in commerce. Further, in § 171.2, we proposed that no person may offer or accept a hazardous material for transportation unless the hazardous material is properly classed, described, packaged, marked labeled, and in condition for shipment as required under the HMR.

Several commenters note that under our proposed definitions, a shipper would *offer* a hazardous material when performing pre-transportation functions that § 171.2 requires the shipper to perform *prior to offering* a hazardous material for transportation. ''RSPA could not have intended such an anomalous and circular result, and accordingly should either revise or withdraw its proposed definition of 'Offer a hazardous material.' '' (United Parcel Service, Inc.) Commenters are correct. We did not intend such an anomalous and circular result. In this final rule, we revised the definition of ''pre-transportation function'' to mean a function specified in the HMR that is required to ensure the safe transportation of a hazardous material in commerce. We agree with commenters that the proposed definition for ''offer a hazardous material'' is confusing and difficult to apply. Therefore, in this final rule we do not include a definition for ''offer a hazardous material.''

Several commenters express confusion as to precisely when a person performing pre-transportation functions is responsible for demonstrating compliance with the HMR's pre-transportation requirements. ''Most [facilities at which hazardous materials are tendered for shipment] have multilevel check systems designed to ensure that the freight conforms to applicable HMR requirements. The [facility's hazmat employees] can make final changes to documentation, labels, etc., up until the time that the product is loaded and shipping documents are signed.'' (International Warehouse Logistics Association) We agree with commenters that this point needs clarification. However, the point at which non-compliance with a pre-transportation function becomes enforceable will depend on the facts applicable to a specific instance. As a general rule, we would expect an offeror to be able to demonstrate compliance with all applicable pre-transportation requirements at the time the hazardous material is staged for loading and the consignor or his agent signs the shipping paper. The offeror's signature (or that of his agent as permitted by § 172.205(d)(1)) on the shipping paper is its certification that the hazardous

material is prepared for transportation in accordance with HMR requirements.

Even in the absence of a signed shipping paper, a shipper may be responsible for assuring compliance with specific pre-transportation requirements if other factors indicate that a particular pre-transportation activity has been completed. For example, if a shipper has loaded a trailer with improperly packaged hazardous materials and requested that a carrier pick it up for transport, it is fairly clear that the shipper does not intend to make further changes to the packages, even if a shipping paper has not yet been executed.

We will continue to exercise our statutory authority to inspect for compliance with the HMR requirements applicable to pre-transportation functions. We will 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 § 5103 of Federal hazmat law to regulate activities that affect the safe and secure 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.

Several commenters note that the NPRM included two inconsistent descriptions of pre-transportation functions. In proposed § 171.2, we listed 14 activities; in proposed § 171.8, we inadvertently omitted one listed activity. In this final rule, we corrected the regulatory text to make the two sections consistent.

The NPRM proposed to include as a ''pre-transportation function'' the providing of timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States to the shipper and the forwarding agent at the place of entry into the United States. Two commenters suggest a revision to remove the phrase ''and the forwarding agent at the place of entry into the United States'' for consistency with applicable Customs requirements. ''The shipper, to be in compliance with applicable international and United States regulations, is required to provide the requisite hazmat information to the carrier and/or forwarding agents prior to the introduction of the material into international transportation and commerce. Classification, product description (selection of shipping name), package selection, testing, marking, labeling and creation of applicable shipping papers should all occur before the material reaches the 'place of entry into the United States.' Further, communications with the involved freight forwarder may or may not involve the importer. The party responsible for obtaining the transportation generally has this relationship. Removal of this phrase from the regulation will continue to meet the safety and communications requirements intended while providing the flexibility of clearance now permitted under Customs rules.'' (E.I. DuPont de Nemours and Company) We agree and have made the suggested revision in this final rule.

In this final rule, we are adopting the definition for ''pre-transportation function'' as proposed in the NPRM, with the revisions suggested by commenters and discussed above.

C. Transportation That Is ''in Commerce''

In the NPRM, we proposed 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 and secure 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.

The NPRM proposed to include in the HMR a section specifically stating that noncommercial transportation of hazardous materials is not subject to the HMR. Consistent with numerous letters of interpretation issued over the past several decades (see NPRM discussion at 66 FR 32431–32432), the NPRM proposal included a list of activities that are not part of transportation of a hazardous material in commerce and, therefore, not subject to regulation under the HMR. The list included: (1) Transportation by private individuals in private motor vehicles for personal use; (2) transportation by government employees for government purposes; and (3) rail and motor vehicle movements of hazardous material occurring solely within a contiguous facility boundary where public access is restricted.

Commenters generally agree that transportation of hazardous materials by private individuals in private motor vehicles for personal use is not transportation in commerce and is thus outside the scope of authority delineated in Federal hazmat law. Similarly, most commenters agree that government entities transporting hazardous materials for non-commercial purposes are not ''persons'' subject to Federal hazmat law. (See 49 U.S.C. 5102(9).)

One commenter disagrees that transportation of hazardous materials by government entities for government purposes should be excluded from regulation under the HMR. ''[We do] not see why hazardous materials being moved '* * * in motor vehicles, aircraft or vessels operated by federal, state or local government employees * * *' pose any less of a threat to the people of the United States than those of private operators.'' (E.I. DuPont de Nemours and Company) Our authority to regulate the transportation of hazardous materials is restricted by Federal hazmat law. As stated above, Federal hazmat law specifically excludes government entities from regulation when moving hazardous materials for a non-commercial purpose. Thus, application of the HMR to such movements is outside the scope of the Secretary's regulatory authority under the law.

One commenter expresses confusion about movements of hazardous materials that occur entirely within a contiguous facility boundary where public access is restricted. The commenter formulates the following scenario: ''Once the shipper personnel have loaded the hazardous material into the cargo tank, it is then returned to the central staging area [within the contiguous facility boundary]. If the carrier moves the loaded cargo tank from the loading point back to the central staging area then the HMRs would apply; however, if [company] personnel move the loaded cargo tank from the loading area back to the central staging area then the HMR would not apply.'' (Dow) The commenter is not correct. As described in the NPRM (66 FR 32431) and adopted in this final rule, movement of hazardous materials that occurs entirely within a contiguous facility boundary where public access is restricted is not commercial transportation and therefore is not

subject to HMR requirements, even if the movement is conducted by a common or contract carrier. Thus, for example, movement of hazardous materials between Warehouse A and Warehouse B that occurs solely within the contiguous boundaries of a facility is not movement in commerce; shipping paper, UN specification packaging, labeling, marking, and other HMR requirements do not apply to these types of movements.

As we discussed in the preamble to the NPRM (66 FR 32432), we have indicated in letters of interpretation 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. Movements of hazardous materials in such circumstances are not subject to the HMR. The same conditions apply to rail transportation of hazardous materials that utilizes private railroad tracks that cross a public highway. In a letter of interpretation, we have said that the HMR apply to transportation on private tracks that are not part of the general system of rail transportation if the private tracks cross a public highway and access to the tracks is not controlled or restricted (May 4, 1998 RSPA letter to Amoco Chemicals). However, if warning lights or a gate restricts access to the tracks during the hazardous materials movement, then the HMR do not apply.

Another commenter requests clarification of the status under the HMR of emergency vehicles, such as aircraft rescue and firefighting vehicles, that are owned by a private company and respond to emergencies on company property. The commenter notes that, although these emergency vehicles generally operate on company property, they also have official county identification numbers as emergency vehicles and may be dispatched to respond to incidents in the community in the same way that a public agency would respond.

Emergency vehicles owned by a company are not regulated under the HMR when they operate solely within the contiguous boundaries of a facility to respond to emergencies at the facility. Further, such emergency vehicles are not subject to HMR requirements when they leave company property to respond to emergencies because they are acting under the authority of the local government, which treats them as a government-operated vehicle for community emergency response. Similarly, because such vehicles operate under local government authority, they are not subject to HMR requirements when they leave company property for maintenance, offsite training, or other purposes.

The NPRM included transportation activities of state-chartered and -funded universities as noncommercial transportation, unless the university transports hazardous materials in furtherance of a commercial enterprise. One commenter suggests that ''[t]he definition of ''in commerce'' should be expanded to include state entities which are engaged in private enterprises of any percentage. If a state entity chooses to allow private enterprises to use its facilities and to co-mingle their hazardous [materials] with that of the state entity, the state entity has taken itself out of the 'in commerce' exception.'' (The Frickey Law Firm) We disagree. A state entity need not treat all transportation activities as commercial transportation merely because some of its transportation of hazardous materials is in furtherance of a commercial enterprise.

This commenter also asks for clarification concerning whether the use of contractor personnel by a state-chartered and -funded university to perform functions regulated under the HMR triggers coverage by the HMR. ''[T]he use of outside contractors by a state entity * * * should be clearly defined as falling within the HMR.'' (The Frickey Law Firm) We agree. The NPRM (66 FR 32431) and this final rule specifically state that the HMR apply to contractor personnel who perform regulated activities related to: (1) Packaging manufacturing, maintenance, and requalification; (2) pre-transportation functions; and (3) transportation functions (see § 171.1(a), (b), and (c)).

One commenter requests clarification of the statements in the NRPM on the applicability of the HMR to movements of hazardous materials within an airport facility. ''Proposed § 171.1(d)(4) appears to imply that movement [of hazardous materials] by or aboard ramp vehicles [at an airport]—either containerized cargo on dollies or uncontainerized packages on carts, or ramp vehicles making ramp transfers of packages—could require the issuance of shipping papers to those on-airport drivers. At the time that hazardous materials are staged for flight, they are fully prepared for pickup prior to air transportation and delivery subsequent to air transportation. All hazard communications and notifications are in place for ground handlers and flight crew. Any requirement for additional shipping papers for the on-airport drivers of these incidental ramp vehicles would impose an unjustified cost and obstructive delay of airport operations.'' (Air Transport Association) This commenter suggests that the NPRM proposed to ''abandon'' our past policy of excluding intra-facility movements of hazardous materials from regulation under the HMR because the language of § 171.1(d)(4) included the phrase ''other than at a transportation facility'' when describing movements of hazardous materials within a contiguous facility boundary.

The NPRM (66 FR 32431) cited letters of interpretation that clarified that the HMR do not apply to intra-facility movements of hazardous materials that take place entirely on private property or where public access is denied or restricted. Such movements are not ''in commerce'' and, therefore, are not subject to regulation under the HMR. At an airport, such movements include transfers of hazardous materials used for aircraft maintenance and refueling operations from one location to another within the airport's boundaries.

As the NPRM noted, baggage or packages offered to airlines for transportation are subject to HMR requirements during that portion of transportation that takes place in the airport and thereafter. Thus, for example, the prohibitions in the HMR applicable to hazardous materials that may not be carried in baggage on board an aircraft apply to baggage that is brought to an airport and transported through the airport to an airplane. Similarly, requirements for hazardous materials offered as cargo to an airline apply when the airline accepts the package for transportation and during its movement at the airport prior to loading onto an airplane. This statement should not be interpreted to mean that an airline must complete a separate shipping paper each time cargo is transferred through the airport to or from an airplane. Rather, our intention is to make clear that requirements for appropriate packaging, marking, labeling, emergency response information, shipping documentation, and the like continue to apply while the cargo is moving on airport property. The NPRM did not propose an abandonment of our long-standing interpretation of the meaning of ''transportation that is in commerce,'' Rather, the NPRM, and this final rule, reiterate this long-standing interpretation and make it explicit in the HMR. We agree that the phrase ''other than at a transportation facility'' as used in the NPRM is misleading and have removed it in this final rule.

Note that for rail transportation, certain intra-facility movements may be

subject to HMR requirements. For example, movements within railyards to assemble rail cars containing hazardous materials into trains are subject to applicable HMR requirements. In addition, facilities at which rail cars containing hazardous materials are received, stored, or handled during transportation must maintain emergency response information applicable to the hazardous materials in accordance with § 172.602 of the HMR.

The NPRM proposed to except from coverage under the HMR ''any matter subject to the postal laws and regulations.'' One commener opposes this exception. ''RSPA does not provide a reason for this exemption or indicate what precautions are in place or are being implemented to justify this position. The fact that all items transported by the U.S. Postal Service (USPS) will enter the transportation system at some point and will be transported by commercial carriers should be of utmost interest and concern to RSPA.'' (National Transportation Safety Board) The exception for matter covered by postal laws and regulations is based on Federal hazmat law, which explicitly excludes the U.S. Postal Service from the definition of ''persons'' to whom Federal hazmat law and the regulations issued thereunder apply. 49 U.S.C. 5102. The statute also explicitly excludes from its application ''any matter that is subject to the postal laws and regulations of the United States under this chapter or title 18 or 39.'' 49 U.S.C. 5126.

In the NPRM, we proposed to define ''commerce'' to mean 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. Several commenters disagree with this proposed definition, noting that it appears to exclude intrastate commerce. ''Congressional instructions to the Secretary * * * indicate that the Secretary '* * * shall issue regulations for the safe transport of hazardous materials in intrastate, interstate, and foreign commerce.' [49 U.S.C. 5103(b)(1)] The definition of the term 'commerce' * * * should reflect this instruction and be enlarged to include hazardous materials movements within a state as well as those in interstate commerce. Such a change would reflect current practice and is * * * consistent with current understanding * * *'' (E.I. Dupont de Nemours and Company) We agree. The definition proposed in the NPRM is consistent with the definition of ''commerce'' in §§ 5102 and 5103 of Federal hazmat law. However, the language in § 5103(b) is more explicit concerning the Secretary's authority to regulate intrastate commerce. In this final rule, we revised the definition of ''commerce'' as suggested by commenters to clearly include intrastate transportation as specified in § 5103 of Federal hazmat law.

D. Transportation Functions Subject to the HMR

The NPRM proposed 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 the destination indicated on the shipping documentation under which the hazardous material is moving. This proposal was based on our conclusion that the key word in the definition of ''transportation'' in Federal hazmat law is ''movement.'' We proposed 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.'' Because a carrier ''moves'' a hazardous material, transportation in commerce necessarily involves activities performed by a carrier in connection with the movement of a hazardous material. Thus, under the NPRM proposal, 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 HMR.

A number of commenters support this demarcation of the beginning and end points of transportation in commerce. ''We believe that the definition of 'in transportation' must be a simple one which is applied uniformly to all types of containers under all types of circumstances. Transportation in commerce should begin 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.'' (Monsanto Company; see also Arkansas Department of Environmental Quality, Contra Costa Health Services, Environmental Technology Council, International Brotherhood of Teamsters, International Warehouse Logistics Association, County of Los Angeles Fire Department, and National Propane Gas Association) However, many commenters disagree with the NPRM approach. Most of these commenters state that a definition of ''transportation in commerce'' should include all loading and unloading operations involving hazardous materials and suggest broadening the proposed definition accordingly.

In making the case for a broader definition for ''transportation in commerce,'' several commenters suggest that we have misread Federal hazmat law. ''[Federal hazmat law] defines transportation as the 'movement of property and loading, unloading, or storage incidental to the movement.' 49 U.S.C. 5102(12). The grammatical construction of the definition makes clear that the term 'storage' is modified by the phrase 'incidental to the movement,' while the terms 'loading' and 'unloading' stand by themselves. As such, RSPA has jurisdiction over all loading and unloading of hazardous materials that are transported, while RSPA's jurisdiction over storage activities is limited to those storage activities that are incidental to the movement/transportation of the materials.'' (American Trucking Associations) We disagree. If Congress had intended DOT's statutory authority to include all loading and unloading of hazardous materials that are transported, Federal hazmat law would have defined ''transportation'' to mean ''the movement, loading, and unloading of property, and storage incidental to the movement.'' There is no legislative history on this point. However, it is clear that Congress intended the phrase ''incidental to the movement'' to modify the terms ''loading,'' ''unloading,'' and ''storage.'' This language and our interpretation of it are longstanding, dating back to the Hazardous Materials Transportation Act of 1975. Congress has had a number of opportunities to change the language and our interpretation in subsequent authorization legislation, but has not elected to do so. The fact that Congress continued to incorporate the language at issue in the Hazardous Materials Uniform Safety Act of 1990 and the recodification of Federal hazmat law in 1994 indicates that our position regarding this language is correct.

Many commenters suggest a broader definition for ''transportation in commerce.'' These commenters say that '' '[t]ransportation in commerce' should begin when a hazardous material first begins to flow into a bulk package or when a non-bulk package is loaded onto a transport conveyance (truck trailer, railcar, ocean or intermodal container) and continue until that material is removed from the bulk package or the non-bulk packages are removed from the transportation conveyance. * * * [B]ulk packages should remain in 'transportation in commerce' and subject to the HMR so long as any

residue of hazardous material remains.'' (American Chemistry Council) Other commenters suggest that DOT or UN specification bulk packagings should be regarded as ''instruments of commerce'' and should be ''under DOT's jurisdiction at all times and in all places.'' (Dangerous Goods Advisory Council)

We disagree. As we stated in the NPRM, in clarifying the applicability of the HMR, we must consider how such clarification will affect other Federal and non-Federal programs that govern hazardous materials operations at fixed facilities. We must, therefore, look 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 Occupational Safety and Health Act (OSH Act), which provides the statutory authority for regulatory programs administered by OSHA, the authorizing statutes for the regulatory programs administered by EPA, and the Organized Crime Control Act of 1970, which provides the statutory basis for ATF programs applicable to the safety and security of explosives, express different statutory purposes. We must interpret and implement Federal hazmat law in a way that fulfils its statutory purpose and is consistent with the statutory purposes of the OSH Act, the Organized Crime Control Act, and EPA's statutes.

A broad definition of ''transportation in commerce'' that encompasses all activities that occur beginning when a bulk packaging is filled and continuing until no residue of hazardous material remains or that considers DOT or UN specification bulk packagings to be ''instruments of commerce'' would result in DOT regulation of long-term storage operations at both shipper and consignee facilities. This would have the effect of limiting and, perhaps, precluding regulation of hazardous materials stored at fixed facilities by other Federal and non-Federal government agencies. Federal and non-Federal programs for worker and environmental protection and the safety and security of explosives, established under the OSH Act, EPA's authorizing statutes, and the Organized Crime Control Act, could be adversely affected. Such an outcome clearly would be contrary to the intent of Congress as expressed in these laws and Federal hazmat law.

Commenters also suggest that broadening the proposed definition of ''transportation in commerce'' in the NPRM supports one of the primary purposes of Federal hazmat law—to promote nationally uniform regulations applicable to hazardous materials transportation. ''It has long been recognized that safety is enhanced dramatically when there are national, uniform standards governing the conduct at issue. Management efforts to track, implement, and report on different local, state, and Federal regulations only bring confusion and therefore, decrease the level of safety to our society and the environment.'' (National Paint and Paint Coatings Association, Inc.) Many commenters suggest that the proposed definition in the NPRM, which keys transportation in commerce to carrier control and possession of a hazardous material, will make it ''unmanageable to comply with the separate requirements of various Federal, state, and local authorities. This will invite state and local government to create different and perhaps conflicting rules regarding the loading and unloading of hazardous materials destined for or emerging from transportation and performed by persons other than the carrier's driver. Furthermore, this proposal would provide for local and state jurisdictions to set forth hazardous materials regulations without guidance or oversight by DOT.'' (American Chemistry Council) Another commenter suggests that ''if [a company] has multiple facilities within the United States then arguably each facility may be subject to differing state and local laws and regulations, thus precluding [the company] from implementing a consistent, best practices safety program. Uniformity is essential in the handling and transport of hazardous materials.'' (Dow)

Commenters misunderstand the reason for nationally uniform regulations applicable to the transportation of hazardous materials. As commenters note, nationally uniform regulations facilitate transportation by eliminating the necessity to comply with conflicting sets of regulations as hazardous materials move across jurisdictional boundaries. Further, as commenters also agree, nationally uniform regulations enhance transportation safety by reducing confusion and simplifying the task of compliance. ''Uniformity, clarity and consistency are essential when addressing the movement, loading, unloading, and storage of hazardous materials in intrastate and interstate commerce.'' (Dow) We agree. However, there is no transportation safety rationale for nationally uniform regulations applicable to fixed facility operations other than activities defined in this final rule as pre-transportation or transportation functions. The employees at a fixed facility do not cross jurisdictional lines and so are not faced with the possibility of complying with different sets of possibly conflicting regulatory requirements. Further, Congress recognized that non-transportation operations involving hazardous materials at fixed facilities need not be governed by one set of nationally uniform regulations in both the OSH Act and the various statutes that authorize EPA's programs by explicitly permitting non-Federal entities to impose requirements for worker or environmental protection at fixed facilities that are *more stringent* than Federal requirements. As we stated in the NPRM, Congress expressly recognized that state and local governments have a legitimate role in the regulation of hazardous materials at fixed facilities, and this role should be accommodated to the extent possible within the context of a nationally uniform hazardous materials transportation safety regulatory program. Our definitions for pre-transportation and transportation functions, as proposed in the NPRM and adopted with modifications in this final rule, provide a set of nationally uniform regulations governing functions that affect the safe transportation of hazardous materials in commerce and governing the actual transportation in commerce of hazardous materials. At the same time, the definitions adopted in this final rule permit other Federal agencies, states, and local governments to exercise their legitimate regulatory roles at fixed facilities.

A number of commenters assert that, in the NPRM, RSPA proposed to ''withdraw'' from the regulation of loading, unloading, and storage incidental to movement in a way that is inconsistent with our Congressional mandate. ''* * * Congress has directed DOT to take a broad approach to the regulation of hazardous materials transportation. RSPA's proposal to adopt a narrow definition of 'transportation in commerce' and withdraw from its regulation of loading, unloading, and, to a significant extent, incidental storage is inconsistent with its Congressional mandate.'' (Association of American Railroads) A careful reading of the NPRM indicates that this is not, in fact, the case.

As we stated in the NPRM, the regulatory clarifications we proposed are based on long-standing administrative decisions and regulatory interpretations, which were cited in the NPRM (66 FR 32432–32436) and

included in the docket. Under the NPRM and this final rule, the HMR apply to the loading of packaged or containerized hazardous materials into transport vehicles or freight containers and the filling of bulk packagings, such as cargo tanks and rail tank cars, in the same manner that the HMR currently apply to such operations. Similarly, under the NPRM and this final rule, the HMR apply to incidental storage of hazardous materials in the same manner as currently. The only changes proposed in the NPRM to the current applicability of the HMR involve certain rail storage and unloading operations. Rail issues are discussed in more detail below.

Loading incidental to movement. The NPRM proposed that, for purposes of applicability of the HMR, loading incidental to movement is loading *associated* with such movement. Thus, the NPRM proposed 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. For private carriers, the NPRM proposed 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 the driver of the motor vehicle into which the hazardous material is being loaded immediately prior to movement in commerce of the hazardous material.

Many commenters express concern about the proposed definition for ''loading incidental to movement.'' Much of this concern relates to the way that the NPRM attempted to divide loading activities into pre-transportation and transportation activities. Thus, one commenter suggests that ''[n]o other federal agency has similar rules governing the mechanics of loading * * * hazardous materials * * * For example, DOT regulates the blocking and bracing of packages in vehicles. If DOT walks away from the function of loading * * * by non-carrier personnel, no other federal agency has rules to fill the void on a safety concern so fundamental as blocking and bracing freight.'' (Institute of Makers of Explosives) As discussed under ''Pre-Transportation Functions'' above, blocking and bracing and segregation of hazardous materials in a transport vehicle or freight container are and will continue to be regulated functions under the HMR, irrespective of the entity that performs the function. This final rule modifies the proposed definitions for ''pre-transportation functions'' and ''loading incidental to movement'' to clarify this point.

Commenters are also concerned that, under the NPRM proposal for defining ''loading incidental to movement,'' it appeared that the HMR would not apply to the loading of bulk packagings for transportation in commerce. Commenters appear to have misunderstood this aspect of the NPRM. Loading or, more accurately, filling of a bulk packaging, such as a cargo tank or rail tank car, for purposes of transporting it is now and will continue to be a regulated function under the HMR whether the function is performed by shipper or carrier personnel. To eliminate confusion on this point, this final rule clarifies that filling of a bulk packaging and securing its closures is a pre-transportation function subject to HMR requirements. The final rule also clarifies that for a bulk packaging, ''loading incidental to movement'' means filling of and securing the closures on a bulk packaging by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. Thus, filling, or loading, of a bulk packaging for the purpose of transporting it is regulated under the HMR as a pre-transportation function if a shipper performs such filling or as a transportation function if a carrier performs such filling. Irrespective of the entity performing the function, filling, or loading, of a bulk packaging is regulated under the HMR.

It is important to note, however, that, even where the HMR specify requirements for loading a packaging or container, OSHA requirements may also apply. For example, the HMR specify filling limits for most hazmat packagings, including bulk packagings. Further, the HMR specify valving, piping, hose, and similar requirements as part of the specification packaging requirements for authorized transportation of hazardous materials. OSHA regulations cover operational procedures for loading operations with which a facility must comply and include requirements for facility equipment used for such loading operations. Persons who perform loading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to loading operations—such as requirements for secondary containment or vapor recovery—may also apply.

Unloading incidental to movement. The NPRM proposed that, for purposes of applicability of the HMR, unloading incidental to movement is unloading *associated* with such movement. Thus, the NPRM proposed 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. For private carriers, the NPRM proposed to define ''unloading incidental to movement'' to mean unloading performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement in commerce is completed. Under the proposed definition, hazardous materials unloading operations performed by consignees would not be subject to HMR requirements because they occur after movement of the hazardous materials in commerce is completed.

The preamble to the NPRM noted that, for the most part, our proposed definition of unloading incidental to movement is consistent with current HMR requirements, letters of interpretation, and administrative decisions we have issued to clarify the applicability of the HMR to unloading operations (66 FR 32433). As the preamble discussed, the proposals in the NPRM applicable to rail tank car unloading operations represent a change from current practice and interpretation. Currently, the tank car unloading requirements in Part 174 of the HMR apply to all unloading operations. However, we suggested in the preamble to the NPRM that rail tank car unloading operations performed by consignee personnel generally should be considered part of a manufacturing process rather than part of transportation.

Most commenters disagree with our proposed definition. ''This is a significant change from current policy. No other federal agency has similar rules covering this issue and cannot fill this void.'' (National Association of Chemical Distributors) Other commenters assert that the NPRM represents an effort by RSPA to relinquish its regulatory authority. ''The Department of Transportation's proposal to relinquish its regulatory authority over 'post-transportation' functions such as storage during movement and unloading yet retaining its regulatory authority over 'pre-transportation' functions and 'transportation in commerce' functions will jeopardize transportation safety as well as adversely impact the cost of hazardous materials transportation.'' (Air Products and Chemicals, Inc.) Other commenters express concern about the ''transfer'' of regulatory authority from DOT to OSHA or EPA. ''This proposed rule (HM–223)

transfers some of the oversight responsibilities concerning the * * * unloading * * * of hazardous materials from the U.S. Department of Transportation * * * to other federal agencies, such as the Environmental Protection Agency * * * and the Occupational Safety and Health Administration * * *. [We] are concerned that this transfer of authority and jurisdiction * * * could result in regulatory gaps and confusion about which agency is responsible for enforcing these regulations. Also in question is the ability of other federal agencies to assume additional oversight responsibilities and whether these agencies would have the personnel, resources, or expertise to effectively monitor compliance with regulations * * *'' (American Road and Transportation Builders Association) Similarly, ''[We are] specifically concerned about the lack of expertise that personnel from [other Federal agencies] have in rail tank car design, cargo tank design, and the operational parameters associated with bulk container * * * unloading. [We are] not convinced that, if RSPA relinquishes its regulatory authority over hazardous materials * * * unloading operations, other federal and state agencies will be able to effectively exercise the necessary safety oversight of these very specific areas of transportation.'' (National Transportation Safety Board)

The NPRM proposals concerning the definition of ''unloading incidental to movement'' do not represent an effort on our part to relinquish or abdicate our authority or transfer our authority to other Federal agencies. As we stated in the NPRM, generally our proposals concerning unloading incidental to movement are consistent with current HMR requirements, 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 rail tank cars. Further, except for rail tank car unloading, we have never promulgated regulations applicable to ''post transportation functions'' at consignee facilities. The HMR are promulgated under the mandate in 49 U.S.C. 5103(b) that the Secretary ''prescribe regulations for the safe *transportation* of hazardous material in intrastate, interstate, and foreign commerce.'' (Emphasis added.) Section 5103(b)(1)(B) provides that the HMR ''shall govern safety aspects of the *transportation* of hazardous material the Secretary considers appropriate.'' (Emphasis added.)

Congress recognized that post-transportation activities should be regulated by Federal agencies, such as OSHA, EPA, and ATF, that generally have authority to regulate non-transportation activities at fixed facilities. For example, Congress directed that OSHA, and not DOT, issue regulations to require labels and placards affixed to hazardous materials packages in accordance with the HMR to remain on the packages after delivery until they are emptied. (See section 29, Public law 101–615, 1990.)

Commenters are correct that the NPRM proposals applicable to unloading of rail tank cars are a change from current practice and interpretation. As stated in the NPRM, the proposals applicable to rail tank car unloading operations stem from changes in the way rail tank cars are used in manufacturing processes and are consistent with RSPA's current regulation of cargo tank unloading operations.

Despite commenters' opposition, we continue to believe that the unloading of a rail tank car directly into a manufacturing process is more properly considered part of a manufacturing operation, not a transportation operation. The rail tank car has been delivered to the consignee by the rail carrier; in many cases, the rail tank car sits for several days, weeks, or even months prior to commencement of the unloading operation. Commenters assert that, because the vessel being unloaded is a DOT or UN specification packaging, all operations related to that vessel should be subject to regulation under the HMR. This position is difficult to support. DOT or UN specification packagings are used for many purposes besides transportation. For example, firefighters' equipment includes DOT specification cylinders as part of self-contained breathing apparatus. The DOT cylinder itself remains subject to DOT requirements for repair and maintenance. However, no one would assert that DOT should develop regulations for firefighters' use of self-contained breathing apparatus merely because that apparatus incorporates a DOT specification packaging. Similarly, it is difficult to argue that manufacturing operations should be subject to regulation under the HMR merely because such operations may incorporate a DOT or UN specification packaging as part of the process. OSHA is the Federal agency charged by the Congress with workplace safety oversight. OSHA has detailed requirements for process safety management that apply to all aspects of the manufacturing process, including rail tank car unloading into a process. The OSHA process safety management standard is considerably more comprehensive than the current regulations in § 174.67 of the HMR that apply to rail tank car unloading operations. Overlaying the requirements in § 174.67 with the OSHA process safety management standard creates a duplicative and redundant regulatory regime that is confusing, potentially costly, and unnecessary.

Other commenters assert that the applicability of the HMR should be determined based on the function, not on the status of the person performing the function. ''[A]n individual's employment or occupation should [not] dictate whether the HMR is applicable to the functions being performed. Each entity performing these functions should be subject to the same operational requirements, including training. Thus, the HMR should be applicable to these functions regardless of the status of the person who is performing the action.'' (American Chemistry Council) Similarly, a commenter suggests that limiting the applicability of the HMR to loading and unloading activities performed by a carrier ''has no rational basis in fact. From a safety perspective, there is no difference between an unloading activity performed by a carrier and that same activity performed by the consignee's employee. * * * If RSPA is concerned about unloading that occurs long after the hazardous materials have been delivered to the consignee, then RSPA should address that narrow issue, rather than create an artificial jurisdiction test that is dependent upon the identity of whom is conducting the regulated activity.'' (American Trucking Associations)

We agree with commenters who suggest that the function being performed should dictate whether the HMR should apply to that function. As should be apparent by the discussion of this issue in the NPRM and this final rule, our determination as to whether the HMR should apply to the unloading of rail tank cars into manufacturing processes is based on our analysis of the function being performed. Unloading of a bulk packaging directly into a manufacturing process is not a transportation function; such unloading is a manufacturing function and should be treated as such for purposes of applicability of the HMR. Indeed, unloading of a bulk packaging after a carrier has delivered it to a consignee, detached its motive power, and departed the consignee's premises should not be regulated differently from unloading of a non-bulk packaging after a carrier has delivered it to a consignee and departed the consignee's premises.

No commenter suggests that the act of emptying a non-bulk packaging when performed by a consignee after delivery should be regulated under the HMR. Such action clearly occurs after transportation is completed. The same is true of the act of emptying a bulk packaging after a carrier has delivered it to the consignee and departed the consignee's premises.

Commenters suggest that the proposed definition for ''unloading incidental to movement'' could result in confusion and ambiguity. ''In simple situations where only one person is involved, the 'who is unloading' test may work quite well. Unfortunately, the reality of handling hazardous liquids is that both the consignee and the carrier are involved in the unloading because both parties have a strong interest in the safe handling of the materials. Even where the carrier is physically initiating and monitoring the unloading, the consignee is likely to be inspecting the receiving tanks, assuring scrubbers are functioning properly, monitoring pressures, checking for leaks and the like. * * * With this sharing of responsibilities, who is performing the unloading for the purposes of the Proposed Rule? Even if the carrier is primarily responsible for the unloading, the consignee arguably is performing unloading activities as well. This creates an ambiguity with respect to whether a particular unloading scenario is or is not transportation in commerce.'' (Unimin Corporation) Another commenter has a similar concern. ''If more than one person is involved in the loading or unloading of hazardous materials, a determination by U.S. DOT should be made about who is *primarily* responsible for the loading or unloading, which would, therefore, determine whether that particular situation is or is not transportation in commerce as defined by the proposed rule. HM–223 also does not address which standard applies to loading or unloading operations that are done jointly by carrier and facility personnel. Multiple agencies enforcing different aspects of the loading, unloading and storage of hazardous materials could result in many differing interpretations of the same situation.'' (American Road and Transportation Builders Association)

We agree that the proposed definition could create some confusion when both carrier and consignee personnel are present and participating in an unloading operation. In this final rule, therefore, we are modifying the definition for ''unloading incidental to movement'' to specify that if carrier personnel are present during the unloading of packaged hazardous materials from a transport vehicle or the unloading of a bulk package, such as a cargo tank or a rail tank car, into a storage tank or manufacturing process, then the unloading operation is considered to be incidental to the movement of the hazardous material and is subject to regulation under the HMR. This approach is consistent with our long-standing policy concerning hazardous materials incident reporting. Under §§ 171.15 and 171.16 of the HMR, carriers are required to report incidents that occur during the course of transportation. A carrier must report a loading or unloading incident in conformance with §§ 171.15 and 171.16 if carrier personnel are present at the time the incident occurs, even if carrier personnel are not participating in the loading or unloading operation. This is also consistent with current HMR requirements concerning unloading of cargo tanks in § 177.834(i)(2).

Note that, as with loading operations, even where the HMR specify requirements for unloading a packaging or container, OSHA requirements may also apply. For example, the HMR specify valving, piping, hose, and similar requirements as part of the specification packaging requirements for authorized transportation of hazardous materials and include periodic testing and maintenance requirements. In addition, for unloading operations involving liquefied compressed gases in cargo tanks, the HMR require an operator to develop and maintain operating procedures for emergency discharge control equipment and emergency shutdown of the unloading operation. OSHA regulations cover operational procedures for unloading operations with which a facility must comply and include requirements for facility equipment used for such unloading operations. Persons who perform unloading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to unloading operations—such as requirements for secondary containment or vapor recovery—may also apply.

A commenter suggests that if the HMR are not applicable ''to the unloading of tank cars at a consignee facility, * * * other agencies are going to get involved in the construction, test, inspection, marking, labeling, securement rules and regulations. How does RSPA plan to enforce the HMR in part, if not in whole, on an operation that is not subject to the HMR?'' (Farmland) This commenter appears to misunderstand the implications of the NPRM proposal concerning rail tank car unloading. The NPRM proposed to exclude from regulation under the HMR rail tank car unloading operations performed by consignee personnel after delivery of the rail tank car to the consignee's premises and departure of the rail carrier. However, other aspects of the HMR continue to apply to a rail tank car. For example, HMR requirements applicable to rail tank car construction, inspection, and maintenance continue to apply to a rail tank car even if the unloading operation involving such tank car is not subject to the HMR and, indeed, even if the rail tank car does not contain a hazardous material. Similarly, HMR requirements concerning rail tank car marking continue to apply to a rail tank car.

In addition, as proposed in the NPRM, requirements related to the protection of train and engine crews operating within a shipper or consignee facility, such as posting warning signs, setting hand brakes, and blocking the wheels of hazardous materials tank cars placed for unloading would continue to apply, not because the tank car is being unloaded incidental to movement but because unloading of a tank car has the potential to affect the safety of rail carrier personnel. These requirements apply whether or not the carrier is present during the unloading operation.

In summary, the fact that a non-transportation function involving a rail tank car is not regulated under the HMR does not negate the design, construction, and maintenance standards for the rail tank car, nor does it negate HMR requirements governing pre-transportation and transportation functions applicable to the rail tank car. Further, design, construction, and maintenance regulations may be enforced at any time, irrespective of whether the tank car is involved in the transportation of hazardous materials, so long as the tank car is marked to certify that it has been constructed and maintained in accordance with HMR requirements.

Commenters representing intermodal transfer facilities express concern about the NPRM proposals for consignee unloading of rail tank cars. As explained by commenters, ''[m]anufacturers of hazardous and non-hazardous commodities contract with [intermodal transfer facilities] to terminalize their products in rail tank cars and, under their direction, transload said product into cargo tanks then deliver to the end user, the consignee. [The intermodal transfer facility] at no time takes title to any of the products that [it] handle[s], this is clearly stated in * * * terminal contracts. [The intermodal transfer

facility] appears as the consignee on the waybill only for the purpose of communicating to the carrier (the railroad) that the rail tank car is to arrive at one of our terminals.'' (ACCU Chem Conversion, Inc.) Another commenter states that the NPRM proposals ''could spell the death knell for intermodal facilities where hazardous materials are transferred in bulk because states and localities would be free to impose unreasonable requirements making the operation of transfer facilities impractical.'' (Association of American Railroads) These commenters suggest that intermodal transfer operations should be considered transportation functions and, thus, urge us to retain the rail tank car unloading requirements currently in § 174.67 of the HMR.

We agree that a transloading operation at an intermodal transfer facility—that is, the act of directly transferring hazardous materials from one bulk packaging to another—is a function that should be regulated under the HMR. Transloading is a pre-transportation function in that it involves selection, preparation, and closing of packagings for the transportation of hazardous materials. The transfer of hazardous materials from one bulk packaging into another is a filling, or loading, operation as defined in this final rule. During transloading, the filling, or loading, of one bulk packaging occurs simultaneously with the emptying, or unloading, of a second bulk packaging. Further, a transloading operation at an intermodal transfer facility is a continuation of the movement of a hazardous material begun when a carrier takes possession of the hazardous material for the purpose of transporting it. Therefore, in this final rule, we are revising the definitions proposed in the NPRM for ''pre-transportation functions'' and ''loading incidental to movement'' and ''unloading incidental to movement'' to include transloading operations. We are also defining a new term—''transloading''—to mean the transfer of a hazardous material from one HMR-authorized bulk packaging to another for purposes of continuing the movement of the hazardous material in commerce.

Further, we agree that the rail tank car unloading regulations currently in § 174.67 of the HMR should be retained and applied to transloading of a hazardous material from a rail tank car to a cargo tank or other bulk hazardous materials packaging. Under Docket HM–212, we had proposed to revise the rail tank car unloading requirements to clarify and update them and account for technological advances. On March 27, 2000, we published a notice withdrawing the HM–212 NPRM. We withdrew the proposals in the HM–212 NPRM related to cargo tank unloading because we addressed cargo tank unloading in a final rule issued under Docket HM–225A (64 FR 28030). We announced that we would address the issues raised in the HM–212 NPRM concerning the proposed rewrite of rail tank car unloading requirements in the HM–223 rulemaking. Indeed, a number of commenters to the HM–212 NPRM suggested that it should be broadened to address issues related to the definition of the term ''in transportation'' and clarification of the respective roles of OSHA and RSPA with respect to the transfer of hazardous materials. In this final rule, we are incorporating revisions proposed in HM–212. See the discussion below for specific revisions to this section.

Note that, for purposes of the HMR, ''transloading'' does not include operations that involve the transfer of a hazardous material from one packaging to another for purposes of mixing, blending, or otherwise altering the hazardous materials. Further, ''transloading'' does not include movement of product to or from a bulk storage tank. For purposes of the HMR, ''transloading'' is a pure transfer from one bulk packaging to another at an intermodal transfer facility; operations conducted at a shipper facility before a hazardous material is offered for transportation or at a consignee facility after transportation is complete are not ''transloading'' and are not subject to regulation under the HMR. Note also that, while the HMR apply to transloading operations at fixed facilities, regulations of other Federal or non-Federal entities may also apply to such facilities (see discussion below).

Storage incidental to movement. In the NPRM, we proposed 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 proposed in the NPRM, storage incidental to movement would include temporary storage at a carrier facility where the package containing the hazardous material is to be transferred from one transport vehicle to another or from one transportation mode to another. Storage incidental to movement would also include the period during which a transport vehicle carrying hazardous materials is parked temporarily at an en route point such as a safe haven, rail yard, marine terminal, or at a truck stop, motel, restaurant, rest area, or similar location. As proposed in the NPRM and consistent with current policy, 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.

Some commenters support the NPRM proposal for defining storage incidental to movement. ''Storage of a hazardous material at an offeror facility prior to its acceptance by a carrier or storage of a hazardous material at a consignee facility after a carrier has delivered it should not be subject to the HMR. These areas should be under the jurisdiction of other agencies, such as OSHA and the local fire and building authorities.'' (Monsanto) Similarly, some commenters agree that ''when a hazardous material is transported to and held at a storage facility at the request of the consignee, as indicated on the shipping papers, transportation ends when the carrier delivers it to the storage facility and the storage facility signs for the material.'' (International Warehouse Logistics Association)

Other commenters, however, oppose the NPRM proposals applicable to storage incidental to movement. As discussed above, a number of commenters suggest that the HMR should apply from the time that a hazardous material is packaged until the time that the package is delivered to the consignee; for bulk packagings, these commenters suggest that the HMR should apply until the bulk package is emptied at the consignee facility. These commenters assert that broad application of the HMR to storage at both consignee and consignor facilities assures uniform, national regulation of hazardous materials in commerce. Some commenters also assert that the NPRM proposals applicable to storage of hazardous materials represent an effort by RSPA to ''relinquish'' its authority to regulate ''post-transportation'' activities involving hazardous materials.

We disagree. As we stated in the NPRM, the proposals applicable to storage of hazardous materials during transportation are generally consistent with previous administrative determinations and letters of interpretation concerning the applicability of the HMR to hazardous materials stored incidental to movement (66 FR 32434–32435). The proposals do not represent an effort on our part to relinquish previously exercised regulatory authority. Rather, the

proposals clarify and make explicit in the HMR long-standing administrative and policy determinations concerning the applicability of the HMR to hazardous materials storage.

One commenter notes that the proposed definition of ''storage incidental to movement'' appears to include only storage of a material that is in the custody and control of a carrier from the time that the carrier picks up the shipment until it is delivered to the destination indicated on shipping documentation. ''RSPA should * * * move or revise the section on 'Storage incidental to movement of hazardous materials' so that it covers storage by any person incidental to movement.'' (Firestone) We agree. There are situations during transportation when a shipment is out of the direct possession and control of the carrier while it is being stored incidental to its movement in commerce. In this final rule, we modified the definition of ''storage incidental to movement'' to include storage by any person between the time that a carrier takes physical possession of a hazardous material for the purpose of transporting it until the package containing the hazardous material is delivered to the destination indicated on shipping papers or other documentation. Note that, as stated in the NPRM, for a hazardous material that is consigned by an offeror to a storage facility rather than an end user, the material is no longer in transportation in commerce once it has been delivered to the storage facility.

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 defined in this final rule. Further, for through shipments, storage incidental to movement in commerce 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 defined in this final rule. Storage incidental to movement of hazardous materials in commerce is subject to requirements in the HMR.

The NPRM stated that storage of a hazardous material at a transfer facility where a hazardous material is repackaged prior to re-shipment is not storage incidental to movement as we proposed to define it. Consistent with previous administrative determinations and interpretations, as cited in the NPRM (66 FR 32432), we proposed that movement of a hazardous material would end at the facility to which the hazardous material was consigned for repackaging. A number of commenters express concern about this aspect of our proposed definition for ''storage incidental to movement.'' ''The preamble to the proposed rule appears to contemplate that the Hazardous Materials Regulations would not apply to the storage of hazardous materials 'intended' for repackaging at transfer facilities. Storage activities at transfer facilities, which are incidental to transportation, should not be exempt from RSPA regulation. To do otherwise will at best create confusion as to whether RSPA or Environmental Protection Agency regulations apply, and at worst a dangerous regulatory void.'' (National Private Truck Council) Another commenter notes that ''[T]here would be nothing materially different between the packages in storage that are destined for repackaging and those that are not. Storage is storage is storage. Second, it flies in the face of federal law intended to promote intermodal movement in order 'to achieve national goals for improved air quality, energy conservation [and] international competitiveness.' Third, it is contrary to established precedent. Intermodal movements of hazardous materials are critical to commerce. Previously, RSPA recognized this fact in preemption proceedings.'' (Institute of Makers of Explosives) Commenters ask that we clarify what we mean by the term ''repackaging'' and explain why storage of hazardous materials prior to repackaging is not included in our definition of ''storage incidental to movement.'' ''[We] recommend a detailed definition of the term 'repackaging' in order to reduce uncertainty about RSPA's intent concerning this activity. * * * Is it RSPA's intent to assert, as it has in the past, that repackaging is a ''covered subject'' under [Federal hazmat law] and that state regulations pertaining to repackaging that are not substantively the same as corresponding federal regulations are subject to preemption?'' (Northeast Waste Management Officials Association)

As the commenters suggest, the act of repackaging a hazardous material for transportation is a covered subject under Federal hazmat law. 49 U.S.C. 5125(b). Repackaging is a pre-transportation function as that term is defined in this final rule. Persons who repackage a hazardous material must comply with all applicable HMR requirements concerning the selection and preparation of a hazardous materials package. Because the act of repackaging a hazardous material is a covered subject under Federal hazmat law, non-federal requirements that are not substantively the same as the HMR requirements applicable to repackaging are preempted.

The fact that repackaging is a regulated activity under the HMR does not mean that every activity associated with repackaging is also regulated under the HMR. For example, transportation of a hazardous material consigned to a facility for repackaging, as indicated on shipping papers or other documentation, ends when the hazardous material is delivered to the facility. Subsequent storage of the hazardous material prior to its repackaging is not storage incidental to movement as that term is defined in this final rule and is not regulated under the HMR. Similarly, storage of the hazardous material after it has been repackaged but prior to the time a carrier accepts it for transportation is not storage incidental to movement as that term is defined in this NPRM and is not regulated under the HMR. Moreover, the facility at which repackaging occurs may be subject to OSHA and/or EPA regulations governing worker safety and environmental protection and to non-federal regulations applicable to community right-to-know, fire protection, worker protection, building codes, zoning requirements, and the like.

Many commenters address the NPRM proposals concerning storage of rail cars on leased track. The NPRM proposed two alternatives for applying the HMR to such storage. 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 would be viewed as performing a warehousing function on behalf of the consignee, not a transportation function. 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.

Commenters who support the first alternative agree that ''rail cars stored on leased track should not be considered ''storage incidental to movement'' in commerce subject to applicable HMR requirements. Rail cars stored on leased track * * * would then be subject to local regulations, including Federal Risk Management Program (RMP) * * * regulations. * * * This information would assist the local emergency response agencies [to] assess the threat and security of leased tracking.'' (Contra Costa Health Services)

Commenters who support the second alternative assert that ''[e]stablishment of a system where rail cars on the general railroad system do not have to comply with RSPA's regulations addressing shipping papers, securement, and placarding would undermine safety. * * * Furthermore, rail cars on leased track are not always stationary. They are moved. Surely the public interest requires RSPA to apply its hazardous materials regulations to rail cars containing hazardous materials moving on railroad tracks.'' (Association of American Railroads) Commenters also state that ''[t]here could be severe consequences to railroads and their customers were RSPA to conclude that hazardous materials cars on leased track were outside the scope of RSPA's regulations. States and localities could impose unreasonable secondary containment and other requirements making the placement of tank cars on leased track infeasible. There may be inadequate capacity to handle these cars in any other manner, thus dramatically affecting the ability of railroads to transport these cars to destination and the ability of the railroads' customers to continue their operations.'' (Association of American Railroads) Commenters also suggest that ''storage of rail cars on leased track should be considered ''incidental'' because the cars have not been delivered to the ultimate consignee.'' (Farmland) As well, commenters state that rail card ''stored on leased track should be considered in transportation. * * * Interim storage locations are not the ultimate destination of the shipments, and the railroad maintains effective custody and control of the shipments.'' (Monsanto)

After consideration of the comments received on this issue and in consultation with the Federal Railroad Administration (FRA), we conclude that rail cars stored temporarily on leased track, except for leased track that is outside the control and responsibility of the rail carrier and used exclusively for the movement of cars shipped to or from the lessee, is storage incidental to movement and subject to regulation under the HMR. This determination is consistent with previously articulated interpretations (as discussed in the NPRM, 66 FR 32435), with current FRA policies, and with the definitions adopted in this final rule. See specifically the discussion of the ''general railroad system of transportation'' under the section entitled ''THE EXTENT AND EXERCISE OF FRA'S SAFETY JURISDICTION'' in Appendix A to 49 CFR Part 209.

The concepts embodied by the term ''leased track'' are often taken out of context. As currently set forth in § 171.8 of the HMR, ''private track or private siding'' is defined to mean:

> Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way and includes track or a portion of track which is devoted to the purpose of its user either by lease or written agreement, in which case the lease or written agreement is considered equivalent to ownership.

The key term in the definition is ''Devoted to the purpose of its user,'' a phrase equivalent to the idea of ''exclusive use'' or ''ownership.'' Either track is used by a railroad, or it is devoted to the exclusive use of another entity. The key to defining ''private track'' is not the existence of a lease or even a deed of title, but the devotion of that track to the sole purpose of some person other than the railroad. Track may be leased for many purposes for the convenience of the lessee. Many of these leases do not exclude the railroad from using the track for its transportation purposes in addition to the lessee's purposes. Where the railroad has not ceded its care, custody, and control of the track to the lessee, such track remains railroad track and not private track. Where the lessee (in a transportation context, usually a shipper or receiver of rail cars) assumes the care, custody, and control of the track, the track is ''devoted'' to the purposes of its user and is private track. Rail cars containing hazardous materials that are stored on private track are not stored incidental to movement and are not subject to the HMR; rail cars containing hazardous materials that are stored on railroad track are stored incidental to movement and are subject to the HMR. As explained below, to avoid future misinterpretation, in this final rule we are amending the definition in § 171.8 of ''private track or private siding.''

As noted above, to conclude that a rail car is stored incidental to movement, we must determine whether the railroad carrier actually exercises ownership or control over the cars and trackage; the facial legal status of the cars and trackage, as expressed in a lease or written agreement between the parties, is not determinative. Private track may be located directly adjacent to a shipper or consignee facility or within a facility some distance from either the shipper or ultimate consignee. The lessee may have exclusive use of the leased track, or the track also may be used for movement of rail cars other than those of the shipper or consignee. Notwithstanding the terms of any written agreement between the lessee and the rail carrier, if the general system railroad controls the track, then the track is not ''private'' track for purposes of the HMR.

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 track that is leased for business purposes not relevant to the safety of the cars or the products they contain. These interim storage locations are not the ultimate destination of the shipments, and, in almost all such cases, the railroad maintains effective custody and control of them, which in this final rule is the primary consideration for determining the applicability of the HMR to transportation functions. However, the fact that a hazardous material is in a tank car does not necessarily mean that a railroad is responsible for it. If an entity elects to accumulate hundreds of cars of liquefied petroleum gas or anhydrous ammonia on its own property in order to have supplies readily available when needed, this business decision removes the car from transportation for purposes of the HMR.

Under the Federal Railroad Safety Act (FRSA) and other rail safety laws, FRA has treated leased track as being outside the general railroad system and, sthus, 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. Regardless of the terms of a lease or other written agreement, cars on railroad tracks in railroad yards or sidings distant from the consignee are still on the general railroad system and are ordinarily 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 ordinarily in any practical sense controlled by the distant shipper or consignee. Further, the risks associated with rail transportation of hazardous materials exist whenever a rail car loaded with hazardous materials is on the general railroad system. However, where cars are stored on private track—that is, on track the use of which by actual practice is restricted to movements of the lessee's cars and over which the railroad exerts no control and has no responsibility for the cars on that trackage—custody and control of the rail cars shifts to the lessee, and the storage is not subject to the HMR.

FRA's discussion of plant railroad trackage in Appendix A to 49 CFR part 209 is in accord with the definition in § 171.8 of the HMR of ''private track or private siding'' as modified in this final rule. In this final rule, we are also modifying the definitions proposed in the NPRM to clarify that storage of rail cars containing hazardous materials is storage incidental to movement and subject to regulation under the HMR, except for storage of rail cars on private track. Note that rail cars containing hazardous materials that are stored temporarily on railroad track that does not meet the definition of ''private track or siding'' are subject to all applicable HMR requirements during such storage. For example, rail cars must at all times be accompanied by appropriate shipping documentation, including emergency response information and an emergency response telephone number in accordance with Subparts C and G of Part 172. Further, placards required by Subpart F of Part 172 must remain on the rail cars throughout the time they are stored on public track. In addition, tank cars stored on railroad track that does not meet the revised definition of ''private track or siding'' are subject to the requirements for security plans in Subpart I of Part 172. The security plan must include an assessment of possible transportation security risks and appropriate measures to address the assessed risks. Specific measures put into place by the plan may vary commensurate with the level of threat at a particular time. At a minimum, a security plan must include elements related to personnel security, unauthorized access, and en route security.

As we noted in the NPRM, continuing the current policy that rail cars stored on railroad track are stored incidental to movement may necessitate separate rulemaking to address related safety and emergency response issues. For example, we are considering whether the § 174.14 requirements concerning expedited movement should apply to such incidental storage. Further, we are considering 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 to plan for and respond to incidents involving such rail cars.

Several commenters asked us to clarify the applicability of the HMR to the storage of hazardous wastes subject to Resource Conservation and Recovery Act (RCRA) requirements. ''Under the Resource Conservation and Recovery Act (RCRA), EPA storage requirements do not kick in for up to ten days if hazardous waste is packaged according to the HMR. In adopting the so-called 'ten-day' rule, 'EPA believe[d] that transporters who hold hazardous waste for a short period of time in the course of transportation should not be considered to be storing hazardous wastes and should not be required to obtain an RCRA permit or [to] comply[] with the substantive requirements for storage for the holding of wastes which is incidental to normal transportation practices.' '' (Institute of Makers of Explosives) Commenters are concerned as to ''how the proposed rule will apply to RCRA 10-day transfer facilities where hazardous wastes are temporarily stored en route to their destination. EPA allows transporters to store hazardous wastes for up to 10 days at transfer facilities without the need to obtain RCRA permits. These hazardous wastes are considered to be in transit from a customer to a [treatment, storage, or disposal (TSD)] facility. We assume that DOT's basic interpretation that a hazardous material is in transportation until it is 'delivered to its destination as indicated on the shipping paper' means that hazardous wastes held at a 10-day transfer facility are in 'storage incident to transportation,' provided the shipping paper indicates that a TSD facility is the wastes' destination.'' (Environmental Technology Council) Commenters are also concerned that the proposed definition for ''storage incidental to movement'' in the NPRM is inconsistent with current policy and practice. In accordance with EPA regulations, the ten-day storage provision applies to facilities at which hazardous wastes may be repackaged during the ten-day storage period. The NPRM discussion of issues related to ''storage incidental to movement'' indicated that storage of a hazardous material at a carrier facility where a hazardous material is repackaged prior to reshipment is not storage incidental to transportation as we proposed to define it.

The EPA regulations addressing the transportation of hazardous wastes include a provision addressing storage at hazardous waste ''transfer facilities.'' *See* 40 CFR 263.12. EPA regulations define a ''transfer facility'' to mean a ''transportation related facility * * * where shipments of hazardous waste are held during the normal course of transportation.'' See 40 CFR 260.10. These facilities normally conduct transfers of waste containers between transport vehicles and/or modes of transportation, and the transfer activities conducted there may include activities which today's rule describes as consolidation of packages, intermodal container transfers, through shipments, or repackaging. These are activities that are common to hazardous waste transfer facilities, and thus there is considerable similarity or overlap between the activities that occur at RCRA transfer facilities and the activities discussed in today's rule as storage incidental to movement.

The substantive EPA regulation addressing hazardous waste transfer facilities states that a transporter may store hazardous wastes at a transfer facility without a RCRA storage permit for up to 10 days, provided that the waste is stored in DOT approved packages. 40 CFR 263.12. This provision is intended only to provide transporters who store hazardous wastes in the normal course of transportation at transfer facilities with an exemption from the requirement to obtain a RCRA storage permit for their temporary storage activities, and to exempt them from the various substantive requirements that would otherwise apply to RCRA-permitted treatment, storage, or disposal facilities under 40 CFR part 264 or 265.

A transfer facility under RCRA regulations is strictly an intermediate, temporary storage facility operated by a transporter. Under EPA policies, a RCRA transfer facility cannot be the destination facility named on the manifest for the receipt and management of the waste. Rather, the transfer facility storage and transfer activities occur while the hazardous waste shipment is considered to be under the custody and control of one of the hazardous waste transporters identified on the manifest. The manifest shows any changes of custody among transporter companies, but it does not record waste receipts and transfers at transfer facilities. As long as the transportation-related facility meets the criteria established by EPA regulation

for ''transfer facilities'' (*i.e.*, storage in the normal course of transportation, storage in DOT approved packages, and storage not exceeding 10 days), then the storage and related transfer activities are allowed under RCRA regulations, and the transfer facility qualifies for the exemption from RCRA permitting.

The transfer facility permitting exemption described in EPA regulations is available to RCRA transfer facilities regardless of whether they conduct through-shipment transfers, intermodal container transfers, consolidation activities, or repackaging activities. Nothing in today's rule discussing storage of hazardous materials at transfer facilities and repackaging activities is intended to affect in any way whether a hazardous waste transfer facility is eligible for the permitting exemption for 10-day storage at RCRA transfer facilities regulated under 40 CFR 263.12.

Moreover, since a RCRA transfer facility cannot be the destination facility on the hazardous waste manifest, the discussion in today's rule—indicating that transportation under the HMR ends upon delivery of hazardous materials to a transfer facility to which materials have been consigned for repackaging—is simply not applicable to RCRA transfer facilities. This rule's policy on consignment of materials to a transfer facility is limited to those instances where the consignment to the facility for repackaging is indicated specifically on the shipping paper or other documentation, *i.e.*, where the facility that will engage in repackaging is shown by the shipping paper to be the destination for that movement. A RCRA transfer facility conducting repackaging activities for hazardous waste shipments will not appear as the destination to which a hazardous waste shipment is being consigned. Therefore, our interpretation addressing consignments for repackaging is not applicable to a RCRA transfer facility. Instead, the more general policy on storage incidental to movement under the HMR applies continuously to the holding of hazardous wastes at RCRA transfer facilities. In other words, for the entire period of time that hazardous wastes are transported to, arrive at, and are held by a RCRA transfer facility, transportation under the HMR continues until the hazardous waste is delivered to the permitted facility named as the destination facility on the hazardous waste manifest.

However, our interpretation that transportation under the HMR ends upon delivery to a consignment facility conducting repackaging applies fully to a RCRA permitted facility that receives a hazardous waste shipment as the destination facility on a hazardous waste manifest, and then conducts repackaging activities. Many waste management firms with RCRA permits have integrated transportation and waste treatment, storage, and disposal operations. It is not uncommon for such a waste management firm to pick up small waste shipments from numerous generator sites, and then transport them to one of its permitted sites for storage and consolidation or repackaging. The permitted storage facility is listed on the manifest as the destination facility for the waste shipment, and so cannot be considered to be a ''transfer facility'' under RCRA regulations. However, if such a facility receives a waste shipment that is consigned to it under the manifest for repackaging, this shipment would fall within the policy in today's rule on consignments for repackaging. Transportation under the HMR would end upon delivery to the destination facility on the manifest. The repackaging of the waste would then give rise to the start of pre-transportation functions aimed at preparing the repackaged waste shipment for its transportation to another destination facility under a new hazardous waste manifest.

E. State/Local Requirements and Preemption

One of the primary purposes of Federal hazmat law is to assure a nationally uniform set 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:

(1) Complying with the non-Federal regulation and complying with Federal hazmat law or the HMR or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible (dual compliance test; 49 U.S.C. 5125(a)(1)); or

(2) The non-Federal requirement is an obstacle to carrying out Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (obstacle test; 49 U.S.C. 5125(a)(2)).

Further, Federal hazmat law preempts a non-Federal requirement applicable to any one of several specified covered subjects if it is not substantively the same as Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (covered subjects test; 49 U.S.C. 5125(b)).

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, another Federal law may authorize non-Federal requirements. 49 U.S.C. 5125(a) and (b). 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).

Commenters generally support the strong preemption provisions in Federal hazmat law and credit preemption of inconsistent state and local hazardous materials transportation requirements for contributing to the strong hazardous materials transportation safety record. As discussed above in this preamble, many commenters are concerned that the NPRM undermines national regulatory uniformity and opens the door to inconsistent and conflicting regulation of hazardous materials by state, local, and tribal governments. We do not agree that the NPRM's proposals for defining the parameters of the applicability of the HMR undermine the preemption provisions of Federal hazmat law. As noted several times herein and in the preamble to the NPRM, the proposals are generally consistent with current provisions in the HMR and with current policies outlined in letters of interpretation, preemption determinations, and other administrative decisions. The fact that numerous commenters are apparently unfamiliar with these current requirements merely highlights the need to clarify the applicability of the HMR in the HMR itself, which is the precise purpose of this final rule. This final rule clarifies for the regulated industry and for state, local, and tribal governments those areas where non-Federal regulation is likely to be preempted and those areas where non-Federal agencies may impose regulations.

Several commenters suggest revisions to the language proposed in the NPRM in § 171.1(f) to clarify where and to what functions non-Federal requirements may apply. For example, one commenter suggests that this section reference the preemption standards in subsection C of 49 CFR part 107 rather than repeat the standard in the HMR. We believe that such repetition in the HMR is helpful; however, we have revised this section to indicate that procedures for preemption

determinations can be found in Part 107.

The preemption provisions of Federal hazmat law effectively preclude state, local, and tribal governments from regulating pre-transportation functions, as defined in this final rule, 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) transloading a hazardous material at an intermodal transfer facility from one HMR-authorized bulk packaging to another HMR-authorized bulk packaging for the purpose of continuing the movement of the hazardous material in commerce; (5) securing a closure on a filled hazardous materials package or container or on one containing a residue of a hazardous material; (6) marking a package to indicate that it contains a hazardous material; (7) labeling a package to indicate that it contains a hazardous material; (8) preparing a shipping paper; (9) providing and maintaining emergency response information; (10) reviewing a shipping paper to verify compliance with the HMR or international equivalents; (11) for persons importing a hazardous material in to the United States, providing the shipper with information as to the requirements of the HMR that apply to the shipment of the material while in the United States; (12) certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR; (13) blocking and bracing a hazardous materials package in a freight container or transport vehicle; (14) segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo; and (15) selecting or providing placards for a transport vehicle to indicate that it is carrying hazardous materials. We have not attempted, in this final rule, 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 final rule 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 final rule, 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 of a hazardous material onto a transport vehicle, aircraft, or vessel or into a bulk packaging; (3) unloading of a hazardous material from a transport vehicle, aircraft, or vessel or from a bulk packaging when carrier personnel are present; and (4) 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 final rule are subject to applicable non-Federal community right-to-know, fire protection, worker protection, environmental protection, building code, and zoning requirements. Moreover, although the HMR apply to pre-transportation functions as defined in this final rule, 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, environmental protection, building code, 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, February 15, 1995). 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, February 15, 1995). 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, December 7, 1998).

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.

F. OSHA, EPA, and ATF Programs and Regulations

OSHA. 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 standards that address the handling of hazardous materials at fixed facilities. These include standards 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 standards also address hazard communication requirements at fixed facilities, including container labeling, retention of transportation placards, and other forms of warning, material safety data sheets, and employee training. (29 CFR 1910.1200) In addition, facilities that handle and store hazardous materials must comply with OSHA standards 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.

EPA. EPA's mission 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.

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.

ATF. Congress enacted Title XI of the Organized Crime Control Act of 1970 to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials. Chapter 40 of the 1970 Act is entitled Importation, Manufacture, Distribution and Storage of Explosive Materials. ATF has been delegated the authority to enforce Chapter 40. ATF has promulgated regulations contained in 27 CFR part 555 to implement its provisions.

For example, § 555.30 contains requirements for licensees, permittees, carriers of explosives materials, and other persons to report the theft or loss of explosive materials within 24 hours of discovery. ATF regulations also contain detailed provisions governing the storage of explosive materials. These storage regulations address numerous issues including: (1) A requirement to inspect storage facilities at least every seven days (section 555.204); (2) where magazines may be located (section 555.206); (3) construction requirements of magazines, including locking mechanisms (sections 555.207–211); and (4) quantity restrictions and restrictions on the items that may be stored together (section 555.213).

Relationship of Federal hazmat law to other statutes and regulations. 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 provisions of this final rule 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 standards 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 and with state and local regulations that address environmental protection.

Facilities at which pre-transportation or transportation functions are performed may be subject to EPA regulations and additional OSHA standards applicable to hazardous materials at fixed facilities. 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. Further, facilities at which pre-transportation or transportation functions are performed may also be subject to ATF regulations applicable to licensing and permitting and safe handling, including storage, of explosives. Questions as to the applicability of EPA or ATF regulations or standards to particular facilities or operations should be directed to the appropriate EPA, OSHA, or ATF office.

OSHA Programs and Standards. 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 or serious physical harm and to comply with occupational safety and health standards. Occupational Safety and Health Act of 1970 (OSH Act) (84 Stat. 1590, as amended, 29 U.S.C. 653(b)(1).

To avoid duplicative regulation, section 4(b)(1) of the OSH Act provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies * * * *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. (Emphasis added.)

However, when enacting and codifying the Federal hazmat law and several other Federal statutes, Congress recognized that OSHA is the most appropriate agency for addressing certain workplace hazards and, therefore, included explicit language that preserves OSHA's regulatory

authority in areas where it might otherwise be preempted. Such ''reverse preemption language'' functions to nullify any effect the OSH Act's 4(b)(1) provision might otherwise have and thus ensures that OSHA's standards remain applicable.

Even without the reverse preemption language, OSHA would only be precluded from applying its standards to facilities that perform pre-transportation and transportation functions if DOT were to ''exercise'' its statutory authority, under Federal hazmat law, to prescribe or enforce occupational safety and health standards of regulations at these facilities. The Supreme Court recently held that mere possession by another Federal agency of unexercised authority is insufficient to displace OSHA's jurisdiction. Chao v. Mallard Bay Drilling, Inc., 524 U.S. 235, 241 (2002). The Court further held that a Federal agency's minimal exercise of some authority over certain working conditions does not result in complete preemption of OSHA jurisdiction. Id. Because we neither affirmatively regulate the working conditions at facilities where pre-transportation and transportation functions are performed, nor assert comprehensive regulatory jurisdiction over the working conditions at these facilities, OSHA's standards and regulations would continue to apply at these facilities even in the absence of reverse preemption language. This final rule makes clear that we do not intend to exercise our statutory authority in a manner that precludes OSHA from regulating at facilities where pre-transportation and transportation functions are performed.

In the NPRM discussion of OSHA authority, we stated that functions regulated under the HMR should not also be subject to conflicting regulation by state and local governments and that other Federal requirements should be consistent 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.

One commenter suggests that ''allowing OSHA to regulate hazardous materials transportation workers opens the door to a myriad of different state regulations covering these activities, as only RSPA is capable of preempting state occupational safety and health regulations that differ from the federal standard.'' This commenter further suggests that ''RSPA consider incorporating by reference applicable OSHA rules. This option would allow RSPA to avail itself of OSHA's expertise without duplicating resources. * * * The primary benefit of such a strategy would be the promulgation of uniform hazardous materials transportation worker safety standards that would apply nationwide * * *'' (American Trucking Associations) Other commenters suggest that RSPA could utilize the notice-and-comment rulemaking process to propose hazmat employee safety regulations, based on OSHA requirements, for inclusion in the HMR. ''[W]e note that the Administrator has ample resources to publish a proposal, evaluate comments as to the efficacy and applicability of the proposed standard to hazmat transportation safety and craft a final rule. For years, the Administrator has done this with respect to consensus standards published by entities both domestic and international, and we see no reason why this successful approach can't be replicated with respect to OSHA and EPA.'' (National Tank Truck Carriers)

We disagree. As we stated in the NPRM, the OSH Act permits states to adopt and enforce worker safety standards that may be more stringent than the standards promulgated by OSHA. 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. If we were to incorporate by reference OSHA's standards, then this could prevent states and localities from adopting more stringent worker safety standards and would thus undermine the intent of Congress as clearly expressed in the OSH Act. On the other hand, because OSHA standards are promulgated under authority of the OSH Act, states would be permitted to adopt more stringent requirements irrespective of the preemption provisions of Federal hazmat law. We do not believe that incorporating certain OSHA standards into the HMR would result in uniform Federal regulation of transportation worker safety in a manner consistent with Federal hazmat law or the OSH Act.

The NPRM proposed no change to the current division of responsibilities between OSHA and RSPA for the regulation of hazardous materials. OSHA has concurrent authority in this area, and its standards protect workers who perform pre-transportation and other 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 final rule, the HMR apply to the function being performed, and OSHA's requirements 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 standards apply to the working conditions under which the function is performed and to measures necessary to protect the employee performing the function, such as protective clothing and breathing equipment. The same is true for transloading operations at intermodal transfer facilities—the transloading function is regulated under the HMR, while OSHA regulations apply to the working conditions under which transloading is performed and the measures necessary to protect the employee performing transloading operations.

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. For example, the HMR include a variety of requirements for communication of the hazards associated with a specific hazardous materials shipment, such as shipping papers, package marks and labels, and placards. The HMR also require a shipping paper to include a telephone number for information about responding to an emergency involving the shipment. A shipper must also include emergency response information about the specific hazardous material being shipped with the documentation that accompanies the shipment. These hazard communication requirements are intended to assist emergency responders to handle hazardous materials transportation incidents. The HMR also require hazmat employees (employees who perform functions that affect the safe transportation of a hazardous material) to receive safety training concerning emergency response information for the materials handled, protective measures, and methods and procedures for avoiding accidents. The HMR specify that training provided in accordance with OSHA requirements may be used to satisfy the HMR safety training requirements.

OSHA standards include requirements for emergency action and fire prevention plans at facilities. The OHSA standard for process safety management includes requirements for emergency response to hazardous materials incidents at a facility. OSHA also has promulgated a standard for emergency response to hazardous materials incidents at fixed facilities. The OSHA Hazardous Waste Operations and Emergency Response Standard, 29 CFR 1910.120, includes requirements to protect workers in this environment and to help them handle hazardous wastes safely and effectively. The OSHA standard includes specific response procedures, including requirements for protective equipment and training for emergency response personnel.

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.

Where the functions performed by hazmat employees are intrinsic to the operations of carriers that transport hazardous materials in commerce, the Secretary of Transportation, as well as OSHA, exercises regulatory authority under Federal hazmat law for occupational safety and health issues related to those hazmat employees. One commenter asks for clarification of how OSHA and RSPA will exercise their shared authority concerning worker safety protections for transportation workers. ''A driver loading or unloading a cargo tank is subject to the exact same health risks as a warehouse employee performing the same task. It should go without saying that both employees are entitled to the same worker safety protections, and OSHA is the agency to provide those protections. *** [T]he HMR is primarily geared towards the important task of preventing a release of hazardous materials during transportation. *** OSHA, on the other hand, is better able to focus its resources on the safety of workers who, despite the DOT regulations, may nevertheless be exposed to hazardous materials during loading, unloading, and storage. In this respect, OSHA regulates aspects of the work environment that DOT admittedly does not have the resources to regulate itself, including matters such as personal protective equipment, permissible exposure limits, ventilation, hazard communications, and medical surveillance. Employers should not be able to avoid responsibility for protecting their employees through compliance with these and other OSHA requirements, simply because DOT regulates other aspects of hazardous materials transportation.'' (International Brotherhood of Teamsters)

We agree. As the Mallard Bay decision makes clear, allowing complete preemption of OSHA regulations where another agency has exercised only limited authority over certain working conditions would result in large gaps in worker safety regulations that would be inconsistent with the purpose of the OSH Act. While, as we stated in the NPRM, DOT is uniquely qualified to play the primary Federal regulatory role in the protection of transportation workers, we recognize that OSHA also has a role in the protection of such workers. Therefore, in this final rule, we are modifying the regulatory language proposed in the NPRM to clarify that each facility at which pre-transportation or transportation functions are performed is subject to applicable standards and regulations of other Federal agencies.

As discussed elsewhere in this preamble, OSHA and DOT will continue to share regulatory authority for certain transportation functions. Thus, for loading or unloading operations, the HMR apply to the packaging, including valving, piping, and hoses that are included as part of a DOT specification packaging standard, to filling and closure requirements for a packaging, and to specified operational procedures when loading or unloading is performed by or in the presence of carrier personnel. The OSHA regulations apply to facility equipment, including hoses, piping, and valves that are part of and maintained by the facility, and to operational procedures for a facility at which loading or unloading operations are performed. Persons loading or unloading hazardous materials at a facility may be subject to both HMR and OSHA requirements.

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 making in this final rule 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 might 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 contemplated by EPCRA. 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 are adopting in this final rule 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 RSPA's longstanding policy, as defined in this final rule, 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 definitions in this final rule, hazardous materials in the following non-transportation situations are subject to applicable 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.

Clean Air Act, § 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 § 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 § 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 § 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 § 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).

Consistent with prior RSPA interpretations and administrative determinations (as cited previously in this preamble and in the preamble to the NPRM), the provisions in this final rule clarify 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 following delivery to the consignee and after departure of the carrier from the consignee facility, including unloading into a manufacturing process.

(3) Hazardous materials stored at a consignee facility after delivery.

(4) Hazardous materials temporarily stored at a transfer 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.

The federal and state jurisdictional issues arising under hazardous waste transportation law can be quite complex. At a threshold level, EPA and DOT have joint statutory responsibilities for developing the regulations that apply to hazardous waste transportation and to the pre-transportation functions that are usually conducted by hazardous waste generators. EPA and DOT are required by law to consult on the development of hazardous waste transportation regulations, and as a result, the two agencies' regulations in this area are inter-related. EPA has incorporated DOT's pre-transportation requirements into its hazardous waste generator regulations (*see* 40 CFR Part 262, Subpart C); *i.e.*, generators that send waste off-site for treatment, storage, or disposal must comply with all applicable requirements of the HMR, including the requirements for packaging, marking, and labeling materials. In addition, generators are required to prepare, and transporters are required to carry, the Uniform Hazardous Waste Manifest for their off-site shipments. The HMR incorporate the Uniform Hazardous Waste Manifest requirements for hazardous waste shipments and permit such a manifest to be used to meet HMR requirements for shipping papers provided it contains all the information required under Subpart C of Part 172 of the HMR.

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 defined in this final rule—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. The EPA regulations establish a comprehensive set of requirements that include administrative controls and facility standards aimed at controlling the management of hazardous wastes at every point in the waste cycle.

As is typical of many EPA environmental programs, RCRA hazardous waste programs are implemented primarily by authorized state agencies. While the RCRA statute generally allows authorized state programs to include additional or more stringent requirements than those established under EPA's regulations (*see* RCRA § 3009), the authority of RCRA authorized state programs to enact requirements that are more stringent than federal requirements is limited in the area of hazardous waste transportation. This follows from the fact that RCRA § 3003(b) requires that hazardous waste transporter regulations adopted by EPA under RCRA Subtitle C must be consistent with the requirements of the federal hazmat law and the HMR. RCRA state program requirements for hazardous waste transportation must also be consistent with federal hazmat law and regulations issued thereunder, or they may be subject to preemption. Usually, authorized state programs adopt hazardous waste transportation regulations that essentially mimic the federal hazardous waste pre-transportation and transportation regulations adopted by EPA. However, when state program regulations on hazardous waste transportation exceed those developed by EPA, there is at least the potential for these additional state law requirements to raise issues of consistency with hazardous materials law and the HMR, and thus give rise to preemption concerns.

The Federal/state jurisdictional issues that arise under hazardous waste law can become quite complex when RCRA authorized states adopt different or more stringent hazardous waste program requirements affecting facilities where transportation related activities are conducted. These issues have been raised most prominently in recent years at hazardous waste ''transfer facilities.'' Transfer facilities consist of dedicated, temporary storage facilities that are operated by or for hazardous waste transporter companies. Under EPA standards (*see* 40 CFR 263.12 and § 260.10), hazardous wastes may be stored at transfer facilities without a RCRA permit for up to 10 days in DOT approved packages, as long as the waste shipment remains under an active manifest, and the storage occurs in the normal course of transportation. Typically, such facilities handle transfers of waste containers between vehicles, intermodal transfers, through shipments, and consolidation of wastes in the normal course of transportation.

By their nature, hazardous waste transfer facilities involve hazardous materials activities subject to the HMR (loading, unloading, handling, repackaging, storage incidental to movement), as well as hazardous waste storage and transportation related activities subject to RCRA. Several RCRA authorized states have enacted additional regulatory controls that exceed the minimal requirements specified in EPA's transfer facility regulation. This additional layer of state environmental regulation under RCRA has given rise to issues and litigation surrounding the states' authority to impose additional requirements at transfer facilities, and how these state requirements relate to this Department's jurisdiction over hazardous materials under the hazardous materials laws and the HMR.

The types of additional controls imposed on RCRA transfer facilities by authorized states may run the gamut from licensing requirements similar to those imposed on hazardous waste storage facilities, to facility design and operation criteria that may include berm or curb specifications, secondary containment requirements, floor material specifications for container storage areas, aisle space or setback requirements, waste compatibility standards, container inspection requirements, and requirements for spill prevention or mitigation equipment at loading docks and transfer areas. In addition, states have imposed requirements for personnel training in hazardous waste management, contingency planning, and closure planning and financial assurance requirements to ensure that wastes are properly removed and facilities and sites are properly decontaminated when

hazardous waste operations cease at transfer facilities. (These are just a few examples of state-imposed controls and standards which RCRA authorized states and EPA have identified to us; we do not mean to suggest that this is an exhaustive listing.)

As is the case with OSHA-regulated worker safety requirements, the fact that pre-transportation or transportation functions subject to the HMR are performed at a hazardous waste facility, including a RCRA transfer facility, does not preclude EPA, RCRA authorized state agencies, or local government bodies from also imposing regulatory requirements at that facility. In particular, RCRA authorized state hazardous waste programs may impose facility requirements that exceed the regulatory requirements enacted by EPA, when these additional requirements are aimed at addressing the hazardous waste management aspects of the facility, and are aimed at accomplishing environmental protection objectives such as preventing releases of hazardous wastes to the environment or protecting the environment in the event of a release. Such state environmental regulations are permissible as long as they are not aimed at regulating the transportation or pre-transportation functions that are covered by the HMR, and do not affect the performance of HMR-regulated transportation or pre-transportation functions.

Should a state hazardous waste regulation be found to affect the performance of HMR-regulated functions, it will be evaluated on a case-by-case basis under the preemption criteria of 49 U.S.C. 5125. That is, state law requirements in RCRA authorized programs that differ from federal transportation or pre-transportation requirements will be evaluated to determine if they fail the dual compliance, obstacle, or covered subject tests discussed previously in this preamble section. Thus, for example, RCRA authorized state agencies may not impose packaging standards differing from those included in the HMR; they may not impose manifesting requirements differing from those adopted by EPA and DOT; and they may not prohibit facilities from handling (*e.g.*, consolidating or repackaging) hazardous wastes at transfer facilities or other facilities that are subject to regulation under both RCRA and the HMR. There are, of course, other state law requirements beyond these few examples that could affect the performance of transportation or pre-transportation functions in ways that would be inconsistent with hazardous materials law and the HMR.

Otherwise, facilities that perform both hazardous waste management functions and transportation/pre-transportation functions must ensure that the functions subject to the HMR are performed in accordance with the HMR, and must also assure compliance with applicable EPA or State law requirements addressing the environmental concerns associated with the hazardous waste management functions at the facilities. Thus, in the example of a RCRA transfer facility, preparation of hazardous waste packages for shipment must be performed in accordance with the HMR. The facility must also comply with the RCRA authorized states' environmental regulations addressing the facility's hazardous waste storage functions, such as berm and floor design requirements, secondary containment requirements, aisle space and container inspection requirements, personnel training requirements, and the like. There is a broad scope to the possible environmental protection requirements that might be imposed under state law and not pose any significant jurisdictional issue under the hazardous materials laws and the HMR.

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.

ATF Programs and Regulations. As explained above, ATF regulations at 27 CFR part 555 address the import, manufacture, distribution, and storage of explosives. The regulations are promulgated under Chapter 40 of Title XI of the Organized Crime Control Act of 1970. Section 845(a) of Chapter 40 states that most provisions of Chapter 40 shall not apply to:

> any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety.

Accordingly, when explosives fall within this exception, they are not governed by the ATF regulatory requirements set forth above. Thus, explosives that are stored incidental to movement, as that term is defined in this final rule, are not subject to ATF requirements, but instead are subject to HMR requirements applicable to such storage. However, § 845(a) does not apply in situations where facility personnel perform pre-transportation functions with respect to preparing explosives for transportation. Thus, as is the case with certain OSHA and EPA regulations, a facility at which pre-transportation functions are performed may also be subject to ATF regulations applicable to operations at that facility.

The HMR do not contain storage and theft/loss reporting requirements that directly correspond to the ATF regulations. The HMR require hazardous materials stored incidental to movement to meet all the applicable shipping paper, emergency response information, hazard communication, packaging, and operational requirements that apply when shipments are actually moving in transportation. In addition, the Federal Motor Carrier Safety Regulations impose requirements on motor vehicles that include requirements for storage incidental to movement. For example, a motor vehicle that contains Division 1.1, 1.2, or 1.3 explosives must be attended at all times, including during incidental storage, unless the motor vehicle is located on the motor carrier's property, the shipper or consignee's property, or at a safe haven. In addition, a motor vehicle containing a Division 1.1, 1.2, or 1.3 explosive may not be parked on or within 5 feet of the traveled portion of

a public highway or street; on private property without the consent of the person in charge of the property; or within 300 feet of a bridge, tunnel, dwelling, or place where people work or congregate unless for brief periods when parking in such locations is unavoidable. ATF has expressed some concern that explosives stored incidental to their movement in transportation and, thus, falling within the § 845(a) exception, may present potential safety and security risks. For example, ATF suggests that such explosives could be stored close to non-related residential and commercial structures, as well as to highways and roadways that are commonly traveled by the general public. ATF is concerned that unsafe amounts of explosives could be stored in one location and may not be adequately secured. Because the HMR do not contain a restriction on the amount of time explosives may be stored incidental to movement, ATF sees these regulatory deficiencies as especially problematic. Moreover, the fact that explosives lost or stolen while in transit do not have to be promptly reported as lost or stolen could hinder law enforcement in preventing harm and gathering intelligence.

We recognize there is a need to evaluate and address these issues in the regulation of explosives stored incidental to movement. However, this final rule is not the appropriate vehicle for imposing safety and security requirements on explosives stored incidental to movement. This final rule addresses specific situations, activities, and operations to which the HMR apply, not what the safety and security standards should be when the HMR do apply. In order to enhance the safety and security of hazardous materials, including explosives, stored incidental to transportation, we intend to propose additional requirements for hazardous materials stored incidental to transportation. We intend to consider industry and government standards, including the ATF regulations in part 555, for guidance in formulating our proposals with respect to explosives.

Finally, ATF also has concerns about ''safe havens.'' The FMCSRs permit explosives to be stored for an indefinite period in a ''safe haven.'' ATF has found that safe havens have been located next to major highways and used for extended periods to store explosives. Because the issue of safe havens is addressed in the advance notice of proposed rulemaking issued jointly by RSPA and FMCSA under docket HM–232A on July 16, 2002 (67 FR 46622), we will not address it in this final rule. However, we will address these concerns in the near future.

IV. Revisions to § 174.67

On September 14, 1992, we published an NPRM under Docket HM–212 (57 FR 42466), proposing several changes to the HMR as they apply to loading and unloading of hazardous materials from rail tank cars and cargo tanks. We proposed to amend the following sections of the HMR:

- Section 174.67(i) pertaining to unloading of tank cars and § 177.834(i) pertaining to the loading of cargo tanks to provide for the use of signaling systems to meet attendance requirements.
- Sections 174.67(i) and 174.67(j) to allow a tank car containing hazardous materials, under certain conditions, to remain standing with the unloading connections attached when no hazardous material is being transferred.
- Section 177.834 to remove a requirement that an attendant must be within 25 feet of the cargo tank motor vehicle during loading operations that are monitored by a signaling system.

Our goals were to provide tank car and cargo tank operators the flexibility to design loading and unloading procedures appropriate to specific facilities and circumstances, to accommodate new technologies in the current regulatory scheme, and to incorporate certain exemptions into regulations of general applicability. We received about forty (40) comments in response to the NPRM from manufacturers, distributors, shippers, carriers, and industry associations. Overall, commenters supported the proposed rule, stating that it provides flexibility and economic relief to industry with no diminution in safety.

The HM–223 NPRM proposed to delete the rail tank car unloading requirements in § 174.67, except for certain provisions related to protection of train and engine crews, because changes in the way rail tank cars are unloaded made the § 174.67 requirements obsolete. As discussed above, however, we have reconsidered the proposal in light of comments suggesting the transloading operations should be regulated under the HMR. Therefore, in this final rule, we are adopting certain changes to § 174.67 to update and clarify requirements and to incorporate the provisions of certain exemptions into the HMR. This final rule specifies that the requirements in § 174.67 apply to transloading operations. As discussed above, actions that assure that a tank car that is being loaded or unloaded does not inadvertently enter transportation or endanger transportation personnel (i.e., posting warning signs, setting brakes, blocking wheels) are regulated under the HMR. Unloading of rail tank cars by consignees after delivery by the carrier is not regulated under the HMR, except as described in this paragraph. As stated previously in this preamble, unloading of rail cars at a facility after delivery by and departure of the rail carrier is subject to OSHA regulations applicable to worker protection and safety.

This final rule incorporates revisions to § 174.67 applicable to: (1) Securing tank cars during unloading to prevent movement of the tank cars and entry to the unloading area by other rail equipment; (2) written safety procedures; (3) monitoring of tank car unloading; and (4) permitting tank cars to remain standing with unloading connections attached. Except for those applicable to monitoring of tank car unloading, the revisions proposed in this interim final rule are currently authorized under over 80 exemptions granted to operators of tank car unloading facilities.

The revisions to the tank car unloading monitoring requirements incorporate procedures that are currently permitted by interpretation. The HM–212 NPRM included a proposal to permit monitoring of tank car unloading by use of a signaling system that includes surveillance equipment (television monitors and video cameras) and remote shut-off equipment. A number of commenters suggested that the proposal should be expanded to authorize systems other than television or video surveillance equipment, noting that sensors coupled with alarms can be as effective as visual surveillance in detecting unintentional releases. Indeed, in the case of a hazardous material that exists as a gas under ambient conditions, a sensor is more effective than visual surveillance. After further consideration of general industry practices, we determined that a signaling system need not be equipped with television monitors and video cameras to effectively meet the attendance requirements as was proposed in the NPRM. Other types of signaling systems are also acceptable. This final rule reflects this change and is consistent with letters of clarification issued over the past several years applicable to monitoring of tank car unloading.

This final rule revises § 174.67 as follows:

1. Paragraph (a)(2) incorporates provisions, currently required under exemptions, relevant to blocking the wheels of tank cars during unloading.

2. Paragraph (a)(3) incorporates provisions, currently required under exemptions, relevant to securing access to the track where unloading operations are conducted. This paragraph requires facilities to use derails, lined and blocked switches, portable bumper blocks, or other equipment to prevent access by other rail equipment, including motorized service vehicles.

3. Paragraph (a)(4) modifies the provisions in current paragraph (a)(3) to permit operators some flexibility in the wording used on caution signs.

4. Paragraph (a)(5) incorporates provisions, currently required under exemptions, relevant to written safety procedures. This paragraph requires operators to maintain written safety procedures, such as those that meet the requirements of OSHA regulations in 29 CFR 1910.119 and 120, that are immediately available in the event of an emergency. However, this provision is not intended to preempt the process safety management, hazardous waste operations and emergency response, or any other OSHA standards.

5. Paragraph (j) incorporates provisions currently permitted by interpretation relevant to monitoring of unloading operations. To eliminate confusion in wording noted by commenters, paragraph (i) is modified in this final rule to clarify that the attendance requirement may be met either by physical on-site attendance providing an unobstructed view of the tank car unloading operation as currently authorized under the HMR or by a signaling system, including video systems, sensors, or mechanical equipment, that provides a level of observation equivalent to on-site attendance.

6. Paragraph (j) is revised to specify that attendance is not required when piping is attached to a top discharge outlet of a tank car equipped with a protective housing specified in § 179.100–12 provided that all valves on the tank car are tightly closed, the piping is not connected to a hose or other unloading equipment, and the piping extends no more than 15.24 centimeters (6 inches) from the outer edge of the protective housing within which the discharge outlet is enclosed. This provision eliminates the need for an operator to disconnect piping when the unloading operation is interrupted or temporarily discontinued, thereby reducing wear on the unloading service equipment.

7. Current paragraph (k) is redesignated paragraph (l). New paragraph (k) incorporates provisions, currently required under exemptions, relevant to tank cars left standing with unloading connections attached while no product is being transferred. Paragraph (k) requires the facility operator to designate an employee responsible for on-site monitoring of the transfer facility who is familiar with the properties of the products contained in the tank cars and procedures to be followed in the event of an emergency. The designated employee must have the ability and the authority to take responsible actions in the event of an emergency.

V. Section-by-Section Review

General

In § 171.8, we 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 are replacing the term ''movement'' when it appears in the HMR in a context where the new definition would be inappropriate. These changes are in §§ 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 final rule, we are retitling this section ''Applicability of HMR to persons and functions.'' We are adding 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 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. Paragraph (a) restates requirements in current paragraphs (a)(3) and (b) of § 171.1.

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. Paragraph (b) includes a non-exhaustive list of pre-transportation functions to which the HMR apply.

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. Paragraph (c) also defines the points at which transportation in commerce begins and ends and lists transportation functions included in the term ''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. In this final rule, the definitions have been revised from those proposed in the NPRM to reflect commenters' concerns and suggestions.

Paragraph (d) lists specific functions that are not subject to the HMR.

Paragraph (e) states that facilities at which pre-transportation or transportation functions are performed in accordance with the HMR may also be subject to applicable standards and regulations of other Federal agencies.

Paragraph (f) states that facilities at which pre-transportation or transportation 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. Paragraph (f) also sets forth the criteria established in Federal hazmat law for making preemption determinations and notes that preemption procedures are in Subpart C of 49 CFR Part 107.

Paragraph (g) restates the penalties for noncompliance with the HMR that are currently in paragraph (c) of § 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 are revising this section to clarify those persons and activities that are subject to the requirements of the HMR. Generally, the revisions adopted in this section restate more clearly the current requirements and prohibitions.

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.

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.

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.

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.

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.

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.

Paragraph (g) restates requirements in current paragraph (c) of § 171.2. 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. 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 requires 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 paragraph (g), like the current requirements in § 171.2(a), apply whether or not the packaging is used for the transportation in commerce of a hazardous material.

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

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 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.

Paragraph (j) prohibits any person from marking or representing that a packaging 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 paragraph restates a prohibition in current paragraph (f)(1) of § 171.2.

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 paragraph restates a prohibition in current paragraph (f)(2) of § 171.2.

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 paragraph also prohibits any person from unlawfully tampering with a package or transportation conveyance used to transport hazardous materials. This paragraph restates a prohibition in current paragraphs (g)(1) and (g)(2) of § 171.2.

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 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 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 are revising definitions for the terms ''carrier,'' ''person,'' and ''private track and siding.'' We are adding definitions for the following terms: ''Administrator,'' ''Associate Administrator,'' ''commerce,'' ''consignee,'' ''hazmat,'' ''HMR,'' ''loading incidental to movement,'' ''movement,'' ''pre-transportation function,'' ''Secretary,'' ''storage incidental to movement,'' ''transloading,'' ''transportation or transport,'' ''transportation facility,'' and ''unloading incidental to movement.'' We are deleting the definition for the term ''sheathing'' because it is confusing and not necessary to an understanding of the HMR.

Part 173

Section 173.1. We are removing paragraph (c) and redesignating current paragraph (d) as paragraph (c). Current paragraph (c) is redundant with the revisions to §§ 171.1 and 171.2.

Section 173.10. The NPRM proposed removing the requirements in this section. A number of commenters oppose the deletion. Upon consideration of the comments and consultation with FRA, we agree that the section should not be removed.

Section 173.30. In the NPRM, we proposed to remove this section because it conflicts with the new definitions of ''loading incidental to movement'' and ''unloading incidental to movement'' proposed in §§ 171.1 and 171.8. Upon further consideration, we have decided to retain this section with modifications to clarify that persons who are subject to the loading and unloading requirements of the HMR must comply with all applicable loading and unloading regulations.

Section 173.31. We are adding 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 are revising § 174.67 as discussed earlier in this preamble to incorporate revisions to rail tank car unloading requirements to incorporate certain exemptions provisions and clarify and update the requirements.

VI. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under Executive Order 12866 and the

Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of significant public interest. A regulatory evaluation is available for review in the public docket for this rulemaking.

For the most part, the provisions of this final rule 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 concerns rail tank car unloading operations. This final rule excludes consignee unloading of rail cars from regulation under the HMR, thereby reducing the costs of compliance with the HMR for rail tank car unloading facilities. In addition, this final rule expands application of current requirements for placing warning signs, setting brakes, and blocking wheels during rail tank car unloading operations to loading operations, as well. 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.

B. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule preempts state law and will 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 final rule addresses covered subject item(s) 1–5 above and preempts state, local, and Indian tribe requirements not meeting the ''substantively the same'' standard. This final 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 § 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. 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.

In addition, following publication of the NPRM, we wrote to the above-listed organizations to provide them with a copy of the NPRM. We encouraged the organizations to submit comments on the NPRM and invited them to meet with us to discuss the specifics of the proposals in the NPRM. None of the organizations requested a meeting nor did they submit comments.

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 final 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 final 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.

In addition, following publication of the NPRM, we wrote to the NCAI to provide a copy of the NPRM. We encouraged NCAI to submit comments on the NPRM and invited its representatives to meet with us to discuss the specifics of the proposals in the NPRM. NCAI did not request a meeting or submit comments.

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

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. We have determined that the requirements in this final rule will not have a significant impact on a substantial number of small entities.

Need for the proposed rule. 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. The regulations may govern any safety aspect of hazardous materials transportation the Secretary considers appropriate. The law defines ''transportation'' to mean ''the movement of property and loading, unloading, or storage incidental to the movement,'' but does not define with specificity the particular activities that fall within the term ''loading, unloading, or storage incidental to movement.''

We have 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. In addition, there is uncertainty concerning the extent to which other Federal, state, and local agencies may regulate hazardous materials safety, especially at fixed facilities. Although the interpretations and administrative determinations we have issued are publicly available, the regulated industry, Federal agencies, state and local governments, 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. Thus, we have initiated a rulemaking to consolidate, clarify, and revise, as necessary, these interpretations and administrative decisions and make them part of the HMR.

Description of Proposed Actions. The final rule clarifies the applicability of the HMR by focusing on a carrier's possession of hazardous materials for the purpose of transporting them in commerce. Thus, the HMR would apply to the following functions:

1. *Packaging functions.* All functions related to the design, manufacture, maintenance, and use of packagings authorized for the transportation of hazardous materials in commerce. These functions include testing, retesting, and reconditioning functions designed to assure the integrity of authorized packagings.

2. *Pre-transportation functions.* All functions performed in advance of transportation in commerce to prepare a shipment of hazardous materials for transportation. These functions affect the safety of hazardous materials shipments during transportation and include:

—Determining the hazard class of a hazardous material;
—Selecting a hazardous materials packaging;
—Placing warning signs, blocking wheels, and setting brakes on tank cars placed for loading or unloading with closures open;
—Filling a hazardous materials packaging;
—Securing a closure on a filled hazardous materials package or container;
—Marking a package to indicate that it contains a hazardous material;
—Labeling a package to indicate that it contains a hazardous material;
—Preparing a hazardous materials shipping paper;
—Providing and maintaining hazardous materials emergency response information;
—Reviewing a hazardous materials shipping paper to verify compliance with the HMR or international equivalents;
—For persons importing a hazardous material into the United States, providing the shipper with information as to the requirements of the HMR that apply to the shipment of the material while in the United States;
—Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR;
—Blocking and bracing a hazardous materials package in a freight container or transport vehicle;
—Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo; and
—Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it is carrying hazardous materials.

3. *Transportation functions.* Functions performed as part of the movement of hazardous materials in commerce. These functions include:

—Loading incidental to movement (*i.e.*, loading of non-bulk packages, portable tanks, or IBCs into freight containers or transport vehicles by carrier personnel; loading of cargo tank motor vehicles by carrier personnel; loading of rail tank cars by carrier personnel);
—Unloading incidental to movement (*i.e.*, unloading of non-bulk packages, portable tanks, or IBCs from freight containers or transport vehicles by carrier personnel; unloading of cargo tank motor vehicles by carrier personnel; unloading of rail tank cars by carrier personnel); and
—Storage incidental to movement (*i.e.*, storage of a hazardous materials package between the time the package leaves the shipper's premises and the time it arrives at the consignee's facility; storage of rail tank cars on track leased from carrier by consignee).

Generally, the clarifications outlined above are consistent with current regulatory requirements and previously issued administrative decisions and interpretations concerning the applicability of the HMR and maintain the current status quo. However, for rail transportation, the clarifications included in the final rule represent a change from current practice and interpretation. Because tank car unloading by consignees is generally part of a manufacturing or distribution process and, as such, is inappropriate

for regulation as a transportation function under the HMR, in this final rule, we state that the unloading of a tank car by a consignee within its facility is not subject to the HMR. This approach is consistent with RSPA's current regulation of cargo tank unloading and takes into account the changes in industry rail tank car unloading practices since the regulations in Part 174 were promulgated. Transloading operations—that is, the transfer of a hazardous material at an intermodal facility directly from a rail tank car to a cargo tank motor vehicle for the purpose of continuing the movement of the hazardous material in commerce—would continue to be regulated under the HMR, as such operations currently are regulated.

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. FRA wants to assure that, at the point of physical interface between the general system of rail transportation and the facility rail system, rail 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 rail crew safety or adversely affecting movement along the general system of rail transportation. Therefore, in this final rule, we retain current requirements for posting warning signs, setting hand brakes, and blocking the wheels of hazardous materials tank cars placed for unloading with closures open. We further 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 rail 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.

In this final rule, we have rewritten the regulations applicable to rail transloading operations in § 174.67 of the HMR. The final rule permits facilities to use signaling systems to monitor operations and incorporates certain exemptions provisions authorizing tank cars to stand with unloading connections attached during intermittent operations. Eliminating the need for exemptions and permitting facilities flexibility in monitoring operations will significantly reduce operating costs for these facilities and will result in a reduction in administrative costs for the Federal government.

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 final rule reduces the costs of compliance with the HMR by eliminating the current requirement that rail tank car consignees comply with unloading requirements in § 174.67. For facilities at which rail tank cars are loaded with hazardous materials, because operators are currently posting warning signs, setting hand brakes, and blocking wheels of rail cars placed for loading as part of their standard operating procedures, the selected alternative imposes no costs of compliance related to preventing access to the tank car during loading.

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. Based on data for 1997 compiled by the U.S. Census Bureau, it appears that upwards of 95 percent of firms who are subject to the HMR are small businesses. These entities will incur no new costs to comply with the HMR under this final rule.

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 provisions in this final rule will not 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 operations, including containment and transfer operations, involving 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 operations involving 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 designed to prevent accidental releases into the environment of hazardous materials at fixed facilities, codified at 40 CFR Part 68. 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 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 final rule will impose no new costs of compliance with HMR requirements. This final rule will reduce the overall costs of compliance for companies that operate rail tank car unloading facilities. I hereby certify that this final rule will not have a significant economic impact on a substantial number of small businesses.

This final rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

E. Paperwork Reduction Act

This final rule 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 contained in the heading of this document can be used to cross-

reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This final rule 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 final rule. An environmental assessment has been placed in the public docket for this rulemaking.

I. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

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 are amending 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. Section 171.1 is revised to read as follows:

§ 171.1 Applicability of Hazardous Materials 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, as the Secretary considers appropriate. 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 Administrator issues the Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through180) 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 each person who offers a hazardous material for transportation in commerce, causes a hazardous material to be transported in commerce, or transports a hazardous material in commerce and who performs or is responsible for performing a pre-transportation function, 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, but are not limited to, the following:

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

(2) Selecting a hazardous materials packaging.

(3) Filling a hazardous materials packaging, including a bulk packaging.

(4) Transloading a hazardous material at an intermodal transfer facility from one bulk packaging to another bulk packaging for purposes of continuing the movement of the hazardous material in commerce.

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

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

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

(8) Preparing a shipping paper.

(9) Providing and maintaining emergency response information.

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

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

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

(13) Loading, blocking, and bracing a hazardous materials package in a freight container or transport vehicle.

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

(15) Selecting, providing, or affixing placards for a freight container or 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, or, in the case of a rail car, until the car arrives at a private track or siding. 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 with respect to that particular package. 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 § 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 for the purpose of transporting it, including blocking and bracing a hazardous materials package in a freight container or transport vehicle, and segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo, when performed by carrier personnel or in the presence of carrier personnel. For a bulk packaging, loading incidental to movement is filling the packaging with a hazardous material for the purpose of transporting it when performed by carrier personnel or in the presence of carrier personnel (except as delegated at § 1.46(t) of this title), including transloading.

(3) *Unloading incidental to movement of a hazardous material.* Removing a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel, or, for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee and prior to the delivering carrier's departure from the consignee's facility or premises or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. (Emptying a hazardous material from a bulk packaging while the packaging is on board a vessel is subject to separate regulations 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 by any person 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 with respect to that particular package. Storage incidental to movement includes rail cars containing hazardous materials that are stored on track that does not meet the definition of ''private track or siding'' in § 171.8 of this subchapter, even if those cars have been delivered to the destination shown on the shipping document.

(d) *Functions not subject to the requirements of the HMR.* The following are examples of activities to which the HMR do not apply:

(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 following delivery of the hazardous material by the carrier to its destination and departure from the consignee's premises of the carrier's personnel or, in the case of a private carrier, departure of the driver from the unloading area.

(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, or, in the case of a rail car, storage of a rail car on private track.

(4) Rail and motor vehicle movements of a hazardous material exclusively within a contiguous facility boundary where public access is restricted, except to the extent that the movement is on or crosses a public road or is on track that is part of the general railroad system of transportation, unless access to the public road is restricted by signals, lights, gates, or similar controls.

(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 pre-transportation or transportation 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.* (1) Each facility at which pre-transportation or transportation 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. 5125.

(2) Under § 5125, a non-Federal law or regulation may be preempted, unless otherwise authorized by another Federal statute, if—

(i) Complying with both the non-Federal law or regulation and a

requirement of Federal hazardous materials transportation law or the HMR is not possible;

(ii) 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

(iii) 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—

(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 these documents;

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

(E) 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.

(3) Preemption determination procedures are in subpart C of part 107 of this chapter.

(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 or activity prescribed in part 178, 179, or 180 of this subchapter, an approval issued under this subchapter, 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. 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 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 § 171.8, the definition for ''sheathing'' is removed; definitions for ''carrier,'' ''person,'' and ''private track or private siding,'' are revised; and definitions for ''Administrator,'' ''Associate Administrator,'' ''commerce,'' ''consignee,'' ''hazmat,'' ''HMR,'' ''loading incidental to movement,'' ''movement,'' ''pre-transportation function.'' ''Secretary,'' ''storage incidental to movement,'' ''transloading,'' ''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 within a single state; 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 by carrier personnel or in the presence of carrier personnel of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel for the purpose of transporting it, including the loading, blocking and bracing a hazardous materials package in a freight container or transport vehicle, and segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo. For a bulk packaging, *loading incidental to movement* means filling the packaging with a hazardous material for the purpose of transporting it. *Loading incidental to movement* includes transloading.

* * * * *

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

* * * * *

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 transporting 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 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, including a bulk packaging.

(4) Transloading a hazardous material at an intermodal transfer facility from one bulk packaging to another bulk packaging for purposes of continuing the movement of the hazardous material in commerce.

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

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

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

(8) Preparing a shipping paper.

(9) Providing and maintaining emergency response information.

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

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

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

(13) Loading, blocking, and bracing a hazardous materials package in a freight container or transport vehicle.

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

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

* * * * *

Private track or *Private siding* means:

(i) Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way, or

(ii) Track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee and/or a general system railroad for purpose of moving only cars shipped to or by the lessee, and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage.

* * * * *

Secretary means the Secretary of Transportation.

* * * * *

Storage incidental to movement means storage of a transport vehicle, freight container, or package containing a hazardous material by any person 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 with respect to that particular package. *Storage incidental to movement* includes rail cars containing hazardous materials, even if they have been delivered to the destination indicated on the shipping document, except those stored on private track.

* * * * *

Transloading means the transfer of a hazardous material at an intermodal transfer facility from one bulk packaging to another for purposes of continuing the movement of the hazardous material in commerce.

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

* * * * *

Unloading incidental to movement means removing a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel or, for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee and prior to the delivering carrier's departure from the consignee's facility or premises or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. (Emptying a hazardous material from a bulk packaging while the packaging is on board a vessel is subject to separate regulation as delegated at § 1.46(t) of this title.) *Unloading incidental to movement* includes transloading.

* * * * *

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).

■ 7. Section 173.30 is revised to read as follows:

§ 173.30 Loading and unloading of transport vehicles.

A person who is subject to the loading and unloading regulations in this subchapter must load or unload hazardous materials into or from a transport vehicle or vessel in conformance with the applicable loading and unloading requirements of parts 174, 175, 176, and 177 of this subchapter.

■ 8. 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) The unloader must secure access to the track to prevent entry by other rail equipment, including motorized service vehicles. Derails, lined and blocked switches, portable bumper blocks, or other equipment that provides an equivalent level of security may be used to satisfy this requirement.

(2) 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.''

(3) 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]

■ 9. In addition, in Part 173, the word ''movement'' is revised to read ''shifting'' in each of 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).

■ 10. In addition, in Part 173, the term ''freedom of movement'' is revised to read ''free moving'' in the table in § 173.62(c) under Packing Instruction 131, each time it appears.

§§ 173.185, 173.219, and 173.308 [Amended]

■ 11. In addition, in Part 173, the word ''movement'' is revised to read ''moving'' in each of the following places:

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

PART 174—CARRIAGE BY RAIL

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

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

■ 13. In § 174.67, paragraphs (a)(1) through (a)(3) are revised, paragraph (a)(4) is redesignated as paragraph (a)(6), new paragraphs (a)(4) and (a)(5) are added, paragraphs (i) and (j) are revised, paragraph (k) is redesignated paragraph (l), and a new paragraph (k) is added, to read as follows:

§ 174.67 Tank car unloading.

(a) For transloading operations, the following rules must be observed:

(1) Unloading operations must be performed by reliable persons properly instructed in unloading hazardous materials and made responsible for careful compliance with this part.

(2) The unloader must apply the handbrake and block at least one wheel to prevent movement in any direction. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent movement in both directions.

(3) The unloader must secure access to the track to prevent entry by other rail equipment, including motorized service vehicles. Derails, lined and blocked switches, portable bumper blocks, or other equipment that provides an equivalent level of security may be used to satisfy this requirement.

(4) The unloader must place caution signs on the track or on the tank cars to warn persons approaching the cars from the open end of the track that a tank car is connected to unloading equipment. The caution signs must be of metal or other durable material, rectangular, at least 30 cm. (12 inches) high by 38 cm. (15 inches) wide, and bear the word, ''STOP''. The word ''STOP'' must

appear in letters at least 10 cm. (3.9 inches) high. The letters must be white on a blue background. Additional words, such as ''Tank Car Connected'' or ''Crew at Work'' may also appear.

(5) The unloading facility operator must maintain written safety procedures (such as those it may already be required to maintain pursuant to the Department of Labor's Occupational Safety and Health Administration requirements in 29 CFR 1910.119 and 1910.120) in a location where they are immediately available to hazmat employees responsible for tank car unloading.

* * * * *

(i) Throughout the entire period of unloading and while a tank car has unloading equipment attached, the facility operator must assure that the tank car is:

(1) Attended by a designated hazmat employee who is physically present and who has an unobstructed view of the unloading operation; or

(2) Monitored by a signaling system (*e.g.*, video system, sensing equipment, or mechanical equipment) that is observed by a designated hazmat employee located either in the immediate area of the tank car or at a remote location within the facility, such as a control room. The signaling system must—

(i) Provide a level of surveillance equivalent to that provided in subparagraph (1) of this paragraph (i); and

(ii) Provide immediate notification to a designated hazmat employee of any system malfunction or other emergency so that, if warranted, responsive actions may be initiated immediately.

(j) Attendance is not required when piping is attached to a top outlet of a tank car, equipped with a protective housing required under § 179.100–12 of this subchapter, for discharge of lading under the following conditions:

(1) All valves are tightly closed.

(2) The piping is not connected to hose or other unloading equipment and is fitted with a cap or plug of appropriate material and construction.

(3) The piping extends no more than 15.24 centimeters (6 inches) from the outer edge of the protective housing.

(k) In the absence of the unloader, a tank car may stand with unloading connections attached when no product is being transferred under the following conditions:

(1) The facility operator must designate an employee responsible for on-site monitoring of the transfer facility. The designated employee must be made familiar with the nature and properties of the product contained in the tank car; procedures to be followed in the event of an emergency; and, in the event of an emergency, have the ability and authority to take responsible actions.

(2) When a signaling system is used in accordance with paragraph (i) of this section, the system must be capable of alerting the designated employee in the event of an emergency and providing immediate notification of any monitoring system malfunction. If the monitoring system does not have self-monitoring capability, the designated employee must check the monitoring system hourly for proper operation.

(3) The tank car and facility shutoff valves must be secured in the closed position.

(4) Brakes must be set and wheels locked in accordance with paragraph (a)(2) of this section.

(5) Access to the track must be secured in accordance with paragraph (a)(3) of this section.

* * * * *

§§ 174.110, 174.112, and 174.115 [Amended]

■ 14. In addition, in Part 174, the word ''movement'' is revised to read ''shifting'' in each of 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

■ 15. 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]

■ 16. In § 175.81(a), the word ''movement'' is revised to read ''shifting''.

PART 176—CARRIAGE BY VESSEL

■ 17. 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]

■ 18. In Part 176, the word ''movement'' is revised to read ''shifting'' in each of 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.

■ 19. In Part 176, the word ''movement'' is revised to read ''motion'' in § 176.93(a)(1).

■ 20. In Part 176, the word ''movement'' is revised to read ''moving'' in each of the following places:

■ a. Section 176.78(f)(8); and

■ b. Section 176.168(g).

PART 177—CARRIAGE BY PUBLIC HIGHWAY

■ 21. 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]

■ 22. In Part 177, the word ''movement'' is revised to read ''shifting'' in each of 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

■ 23. 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]

■ 24. 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).

■ 25. In Part 178, the word ''movement'' is revised to read ''motion'' in § 178.704(d)(3).

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Elaine E. Joost,

Acting Deputy Administrator.

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