

that would be reserved for the U.S. market.” They also state that the retrofitting requirement may create confusion for foreign markets not familiar with U.S. operations and maintenance. DGAC and the Council state that if the interim provisions allow an equivalent level of safety, it would be “far simpler” and “more efficient” to authorize the interim provisions on a permanent basis. Air Products adds that “safety can be achieved” by either the retrofitting requirement or by adopting the proposed interim conditions on a permanent basis.

As stated in the HM-218A NPRM and the June 21, 2001 final rule published under Docket HM-215D (66 FR 33316), we continue to believe that if a portable tank is to be unloaded in the same manner as a cargo tank, it should be equipped with the same emergency shutdown devices required for cargo tanks. To accommodate industry concerns about the amount of time required for retrofits, the NPRM proposed alternative unloading conditions for an interim period for IM portable tanks not currently equipped with a thermal means of remote activation of the internal self-closing stop-valve fitted on bottom discharge outlets. We never intended to make the alternative unloading procedures permanent because we do not believe that the alternative unloading procedures provide the same level of safety as a fusible link.

DGAC, the Council, and Air Products do not dispute the need for extra safety measures, but now assert that the interim provisions provide an *equivalent* level of safety to retrofitting and should be allowed as a permanent alternative to retrofitting. We disagree. In the February 22, 2002 NPRM, we stated that the conditions, as discussed later in this preamble, provide an *acceptable* level of safety during an interim period by reducing the possibility of fire and release of hazardous materials during the unloading of IM portable tanks. We do not believe that the conditions provide an *equivalent* level of safety on a long-term or permanent basis. A fusible link operates to shut down an unloading operation automatically, without the necessity for human intervention. The alternative procedures provided in the NPRM depend on human intervention to handle a fire during an unloading operation. While this is acceptable in the short term, we do not consider that the safety level provided is equivalent to that achieved by an automatic means to shut down unloading.

With respect to the comments that the requirement should be in alignment

with international standards, we agree that, generally, harmonization of domestic and international transportation requirements is a beneficial and worthy objective. However, as with all safety regulations, we review and consider each amendment to the international standards on its own merit. There are a number of instances where we impose more stringent requirements for the domestic transportation of hazardous materials than the international requirements. Our goal is to harmonize without sacrificing the current HMR level of safety.

In the HM-215D final rule, we estimated that the cost of installing a fusible link at the time an IM portable tank is manufactured is approximately \$40.00 to \$70.00 per portable tank; based on information provided by tank, tank valve, and component manufacturers. Installation at the time of manufacture avoids downstream retrofitting costs, costs associated with shipping delays, and logistical problems at a later date. In previous discussions, DGAC and the Tank Container Association stated that retrofitting portable tanks would cost approximately \$200.00 to \$250.00 per portable tank. We reiterate our earlier statements that, on the basis of these costs, it makes economic sense to install the devices at the time of manufacture.

DGAC and the Council ask whether we intend to compel foreign shippers to “retrofit part of their fleets that would be reserved for the U.S. market.” Just as U.S. exporters of hazardous materials are responsible for compliance with international and individual country requirements regarding hazardous materials transportation, foreign shippers are responsible for compliance with U.S. variations from international standards. If foreign shippers choose to operate in the U.S., they must comply with the HMR.

DGAC, the Council, and Air Products also oppose requiring shippers and carriers to share the responsibility for ensuring that unloading facilities are in compliance with OSHA and EPA regulations. They state that doing so will:

- Prompt differing interpretations of the requirements for the facility, especially when multiple shippers and carriers serve a particular facility.
- Pose problems with shippers and carriers who are unlikely to be aware of state or local requirements, other than OSHA’s.
- Pose conformance problems because foreign shippers would have no means to assure compliance, leaving the problem solely to the carrier.

The commenters believe that we should require the consignee to be the responsible party.

Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) requires the Secretary of Transportation to prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce. 49 U.S.C. 5103(b). Those regulations apply to persons transporting hazardous materials in commerce, persons who cause hazardous materials to be transported in commerce, and persons who manufacture and maintain packagings represented as qualified for use in transporting hazardous materials in commerce. 49 U.S.C. 5103(b)(1)(A). Thus, the HMR generally do not prescribe regulations for facilities to which hazardous materials are consigned; rather, the HMR apply to persons who prepare hazardous materials for transportation or who transport hazardous materials in commerce. For this reason, we are requiring a shipper and/or a carrier, rather than a consignee, to assure compliance with the conditions established for unloading a portable tank without removing it from the transport vehicle. Persons interested in a more detailed discussion of the applicability of the Federal hazardous materials transportation law and the HMR to specific functions and activities should review the NPRM published under Docket HM-223 on June 14, 2001 (66 FR 32420).

In addition, DGAC asks whether shippers and carriers would be held partly responsible should a problem occur during unloading, and fire or shutdown capabilities prove less than adequate. Any person, domestic or foreign, engaged in an activity regulated by federal, state or local requirements must understand and comply with all applicable regulations. Shippers and carriers engaged in the transportation of hazardous materials in commerce must be trained in the applicable requirements of the HMR and, additionally, are responsible for all applicable federal, state or local requirements. If an incident occurs when “fire or shutdown capabilities prove less than adequate,” upon investigation, it may be determined that either or both parties are responsible. We do not consider it burdensome for shippers and carriers to contact facilities to determine whether the applicable OSHA and EPA requirements have been met. The requirements in the HM-166Y final rule granted relief from the longstanding prohibitions in the HMR against unloading portable tanks while