

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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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