

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