

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 NPRM 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