

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 commenter 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