

residue of hazardous material remains.” (American Chemistry Council) Other commenters suggest that DOT or UN specification bulk packagings should be regarded as “instruments of commerce” and should be “under DOT’s jurisdiction at all times and in all places.” (Dangerous Goods Advisory Council)

We disagree. As we stated in the NPRM, in clarifying the applicability of the HMR, we must consider how such clarification will affect other Federal and non-Federal programs that govern hazardous materials operations at fixed facilities. We must, therefore, look to Congressional and agency intent as expressed in the body of statutes and regulations exercising Federal jurisdiction over hazardous materials where transportation and non-transportation activities intersect. The Occupational Safety and Health Act (OSH Act), which provides the statutory authority for regulatory programs administered by OSHA, the authorizing statutes for the regulatory programs administered by EPA, and the Organized Crime Control Act of 1970, which provides the statutory basis for ATF programs applicable to the safety and security of explosives, express different statutory purposes. We must interpret and implement Federal hazmat law in a way that fulfills its statutory purpose and is consistent with the statutory purposes of the OSH Act, the Organized Crime Control Act, and EPA’s statutes.

A broad definition of “transportation in commerce” that encompasses all activities that occur beginning when a bulk packaging is filled and continuing until no residue of hazardous material remains or that considers DOT or UN specification bulk packagings to be “instruments of commerce” would result in DOT regulation of long-term storage operations at both shipper and consignee facilities. This would have the effect of limiting and, perhaps, precluding regulation of hazardous materials stored at fixed facilities by other Federal and non-Federal government agencies. Federal and non-Federal programs for worker and environmental protection and the safety and security of explosives, established under the OSH Act, EPA’s authorizing statutes, and the Organized Crime Control Act, could be adversely affected. Such an outcome clearly would be contrary to the intent of Congress as expressed in these laws and Federal hazmat law.

Commenters also suggest that broadening the proposed definition of “transportation in commerce” in the NPRM supports one of the primary

purposes of Federal hazmat law—to promote nationally uniform regulations applicable to hazardous materials transportation. “It has long been recognized that safety is enhanced dramatically when there are national, uniform standards governing the conduct at issue. Management efforts to track, implement, and report on different local, state, and Federal regulations only bring confusion and therefore, decrease the level of safety to our society and the environment.” (National Paint and Paint Coatings Association, Inc.) Many commenters suggest that the proposed definition in the NPRM, which keys transportation in commerce to carrier control and possession of a hazardous material, will make it “unmanageable to comply with the separate requirements of various Federal, state, and local authorities. This will invite state and local government to create different and perhaps conflicting rules regarding the loading and unloading of hazardous materials destined for or emerging from transportation and performed by persons other than the carrier’s driver. Furthermore, this proposal would provide for local and state jurisdictions to set forth hazardous materials regulations without guidance or oversight by DOT.” (American Chemistry Council) Another commenter suggests that “if [a company] has multiple facilities within the United States then arguably each facility may be subject to differing state and local laws and regulations, thus precluding [the company] from implementing a consistent, best practices safety program. Uniformity is essential in the handling and transport of hazardous materials.” (Dow)

Commenters misunderstand the reason for nationally uniform regulations applicable to the transportation of hazardous materials. As commenters note, nationally uniform regulations facilitate transportation by eliminating the necessity to comply with conflicting sets of regulations as hazardous materials move across jurisdictional boundaries. Further, as commenters also agree, nationally uniform regulations enhance transportation safety by reducing confusion and simplifying the task of compliance. “Uniformity, clarity and consistency are essential when addressing the movement, loading, unloading, and storage of hazardous materials in intrastate and interstate commerce.” (Dow) We agree. However, there is no transportation safety rationale for nationally uniform regulations applicable to fixed facility

operations other than activities defined in this final rule as pre-transportation or transportation functions. The employees at a fixed facility do not cross jurisdictional lines and so are not faced with the possibility of complying with different sets of possibly conflicting regulatory requirements. Further, Congress recognized that non-transportation operations involving hazardous materials at fixed facilities need not be governed by one set of nationally uniform regulations in both the OSH Act and the various statutes that authorize EPA’s programs by explicitly permitting non-Federal entities to impose requirements for worker or environmental protection at fixed facilities that are *more stringent* than Federal requirements. As we stated in the NPRM, Congress expressly recognized that state and local governments have a legitimate role in the regulation of hazardous materials at fixed facilities, and this role should be accommodated to the extent possible within the context of a nationally uniform hazardous materials transportation safety regulatory program. Our definitions for pre-transportation and transportation functions, as proposed in the NPRM and adopted with modifications in this final rule, provide a set of nationally uniform regulations governing functions that affect the safe transportation of hazardous materials in commerce and governing the actual transportation in commerce of hazardous materials. At the same time, the definitions adopted in this final rule permit other Federal agencies, states, and local governments to exercise their legitimate regulatory roles at fixed facilities.

A number of commenters assert that, in the NPRM, RSPA proposed to “withdraw” from the regulation of loading, unloading, and storage incidental to movement in a way that is inconsistent with our Congressional mandate. “\* \* \* Congress has directed DOT to take a broad approach to the regulation of hazardous materials transportation. RSPA’s proposal to adopt a narrow definition of ‘transportation in commerce’ and withdraw from its regulation of loading, unloading, and, to a significant extent, incidental storage is inconsistent with its Congressional mandate.” (Association of American Railroads) A careful reading of the NPRM indicates that this is not, in fact, the case.

As we stated in the NPRM, the regulatory clarifications we proposed are based on long-standing administrative decisions and regulatory interpretations, which were cited in the NPRM (66 FR 32432–32436) and