

included in the docket. Under the NPRM and this final rule, the HMR apply to the loading of packaged or containerized hazardous materials into transport vehicles or freight containers and the filling of bulk packagings, such as cargo tanks and rail tank cars, in the same manner that the HMR currently apply to such operations. Similarly, under the NPRM and this final rule, the HMR apply to incidental storage of hazardous materials in the same manner as currently. The only changes proposed in the NPRM to the current applicability of the HMR involve certain rail storage and unloading operations. Rail issues are discussed in more detail below.

Loading incidental to movement. The NPRM proposed that, for purposes of applicability of the HMR, loading incidental to movement is loading *associated* with such movement. Thus, the NPRM proposed to define “loading incidental to movement” to mean loading of a hazardous material onto a transport vehicle, aircraft, or vessel or into a bulk packaging for purposes of transporting it when performed by a person employed by or under contract to a for-hire carrier. For private carriers, the NPRM proposed to define “loading incidental to movement” to mean loading of a hazardous material onto a transport vehicle, aircraft, or vessel or into a bulk packaging for purposes of transporting it when performed by the driver of the motor vehicle into which the hazardous material is being loaded immediately prior to movement in commerce of the hazardous material.

Many commenters express concern about the proposed definition for “loading incidental to movement.” Much of this concern relates to the way that the NPRM attempted to divide loading activities into pre-transportation and transportation activities. Thus, one commenter suggests that “[n]o other federal agency has similar rules governing the mechanics of loading * * * hazardous materials * * * For example, DOT regulates the blocking and bracing of packages in vehicles. If DOT walks away from the function of loading * * * by non-carrier personnel, no other federal agency has rules to fill the void on a safety concern so fundamental as blocking and bracing freight.” (Institute of Makers of Explosives) As discussed under “Pre-Transportation Functions” above, blocking and bracing and segregation of hazardous materials in a transport vehicle or freight container are and will continue to be regulated functions under the HMR, irrespective of the entity that performs the function. This final rule modifies the proposed definitions for “pre-transportation

functions” and “loading incidental to movement” to clarify this point.

Commenters are also concerned that, under the NPRM proposal for defining “loading incidental to movement,” it appeared that the HMR would not apply to the loading of bulk packagings for transportation in commerce. Commenters appear to have misunderstood this aspect of the NPRM. Loading or, more accurately, filling of a bulk packaging, such as a cargo tank or rail tank car, for purposes of transporting it is now and will continue to be a regulated function under the HMR whether the function is performed by shipper or carrier personnel. To eliminate confusion on this point, this final rule clarifies that filling of a bulk packaging and securing its closures is a pre-transportation function subject to HMR requirements. The final rule also clarifies that for a bulk packaging, “loading incidental to movement” means filling of and securing the closures on a bulk packaging by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. Thus, filling, or loading, of a bulk packaging for the purpose of transporting it is regulated under the HMR as a pre-transportation function if a shipper performs such filling or as a transportation function if a carrier performs such filling. Irrespective of the entity performing the function, filling, or loading, of a bulk packaging is regulated under the HMR.

It is important to note, however, that, even where the HMR specify requirements for loading a packaging or container, OSHA requirements may also apply. For example, the HMR specify filling limits for most hazmat packagings, including bulk packagings. Further, the HMR specify valving, piping, hose, and similar requirements as part of the specification packaging requirements for authorized transportation of hazardous materials. OSHA regulations cover operational procedures for loading operations with which a facility must comply and include requirements for facility equipment used for such loading operations. Persons who perform loading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to loading operations—such as requirements for secondary containment or vapor recovery—may also apply.

Unloading incidental to movement. The NPRM proposed that, for purposes of applicability of the HMR, unloading incidental to movement is unloading *associated* with such movement. Thus,

the NPRM proposed to define “unloading incidental to movement” to mean unloading of a hazardous material from a transport vehicle, aircraft, or vessel or from a bulk packaging when performed by a person employed by or under contract to a for-hire carrier. For private carriers, the NPRM proposed to define “unloading incidental to movement” to mean unloading performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement in commerce is completed. Under the proposed definition, hazardous materials unloading operations performed by consignees would not be subject to HMR requirements because they occur after movement of the hazardous materials in commerce is completed.

The preamble to the NPRM noted that, for the most part, our proposed definition of unloading incidental to movement is consistent with current HMR requirements, letters of interpretation, and administrative decisions we have issued to clarify the applicability of the HMR to unloading operations (66 FR 32433). As the preamble discussed, the proposals in the NPRM applicable to rail tank car unloading operations represent a change from current practice and interpretation. Currently, the tank car unloading requirements in Part 174 of the HMR apply to all unloading operations. However, we suggested in the preamble to the NPRM that rail tank car unloading operations performed by consignee personnel generally should be considered part of a manufacturing process rather than part of transportation.

Most commenters disagree with our proposed definition. “This is a significant change from current policy. No other federal agency has similar rules covering this issue and cannot fill this void.” (National Association of Chemical Distributors) Other commenters assert that the NPRM represents an effort by RSPA to relinquish its regulatory authority. “The Department of Transportation’s proposal to relinquish its regulatory authority over ‘post-transportation’ functions such as storage during movement and unloading yet retaining its regulatory authority over ‘pre-transportation’ functions and ‘transportation in commerce’ functions will jeopardize transportation safety as well as adversely impact the cost of hazardous materials transportation.” (Air Products and Chemicals, Inc.) Other commenters express concern about the “transfer” of regulatory authority from DOT to OSHA or EPA. “This proposed rule (HM-223)