

transfers some of the oversight responsibilities concerning the * * * unloading * * * of hazardous materials from the U.S. Department of Transportation * * * to other federal agencies, such as the Environmental Protection Agency * * * and the Occupational Safety and Health Administration * * *. [We] are concerned that this transfer of authority and jurisdiction * * * could result in regulatory gaps and confusion about which agency is responsible for enforcing these regulations. Also in question is the ability of other federal agencies to assume additional oversight responsibilities and whether these agencies would have the personnel, resources, or expertise to effectively monitor compliance with regulations * * * (American Road and Transportation Builders Association) Similarly, "[We are] specifically concerned about the lack of expertise that personnel from [other Federal agencies] have in rail tank car design, cargo tank design, and the operational parameters associated with bulk container * * * unloading. [We are] not convinced that, if RSPA relinquishes its regulatory authority over hazardous materials * * * unloading operations, other federal and state agencies will be able to effectively exercise the necessary safety oversight of these very specific areas of transportation." (National Transportation Safety Board)

The NPRM proposals concerning the definition of "unloading incidental to movement" do not represent an effort on our part to relinquish or abdicate our authority or transfer our authority to other Federal agencies. As we stated in the NPRM, generally our proposals concerning unloading incidental to movement are consistent with current HMR requirements, letters of interpretation and administrative decisions we have issued to clarify the applicability of the HMR to unloading operations from transport vehicles and bulk packagings other than rail tank cars. Further, except for rail tank car unloading, we have never promulgated regulations applicable to "post transportation functions" at consignee facilities. The HMR are promulgated under the mandate in 49 U.S.C. 5103(b) that the Secretary "prescribe regulations for the safe *transportation* of hazardous material in intrastate, interstate, and foreign commerce." (Emphasis added.) Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects of the *transportation* of hazardous material the Secretary considers appropriate." (Emphasis added.)

Congress recognized that post-transportation activities should be

regulated by Federal agencies, such as OSHA, EPA, and ATF, that generally have authority to regulate non-transportation activities at fixed facilities. For example, Congress directed that OSHA, and not DOT, issue regulations to require labels and placards affixed to hazardous materials packages in accordance with the HMR to remain on the packages after delivery until they are emptied. (See section 29, Public law 101-615, 1990.)

Commenters are correct that the NPRM proposals applicable to unloading of rail tank cars are a change from current practice and interpretation. As stated in the NPRM, the proposals applicable to rail tank car unloading operations stem from changes in the way rail tank cars are used in manufacturing processes and are consistent with RSPA's current regulation of cargo tank unloading operations.

Despite commenters' opposition, we continue to believe that the unloading of a rail tank car directly into a manufacturing process is more properly considered part of a manufacturing operation, not a transportation operation. The rail tank car has been delivered to the consignee by the rail carrier; in many cases, the rail tank car sits for several days, weeks, or even months prior to commencement of the unloading operation. Commenters assert that, because the vessel being unloaded is a DOT or UN specification packaging, all operations related to that vessel should be subject to regulation under the HMR. This position is difficult to support. DOT or UN specification packagings are used for many purposes besides transportation. For example, firefighters' equipment includes DOT specification cylinders as part of self-contained breathing apparatus. The DOT cylinder itself remains subject to DOT requirements for repair and maintenance. However, no one would assert that DOT should develop regulations for firefighters' use of self-contained breathing apparatus merely because that apparatus incorporates a DOT specification packaging. Similarly, it is difficult to argue that manufacturing operations should be subject to regulation under the HMR merely because such operations may incorporate a DOT or UN specification packaging as part of the process. OSHA is the Federal agency charged by the Congress with workplace safety oversight. OSHA has detailed requirements for process safety management that apply to all aspects of the manufacturing process, including rail tank car unloading into a process. The OSHA process safety management

standard is considerably more comprehensive than the current regulations in § 174.67 of the HMR that apply to rail tank car unloading operations. Overlaying the requirements in § 174.67 with the OSHA process safety management standard creates a duplicative and redundant regulatory regime that is confusing, potentially costly, and unnecessary.

Other commenters assert that the applicability of the HMR should be determined based on the function, not on the status of the person performing the function. "[A]n individual's employment or occupation should [not] dictate whether the HMR is applicable to the functions being performed. Each entity performing these functions should be subject to the same operational requirements, including training. Thus, the HMR should be applicable to these functions regardless of the status of the person who is performing the action." (American Chemistry Council) Similarly, a commenter suggests that limiting the applicability of the HMR to loading and unloading activities performed by a carrier "has no rational basis in fact. From a safety perspective, there is no difference between an unloading activity performed by a carrier and that same activity performed by the consignee's employee. * * * If RSPA is concerned about unloading that occurs long after the hazardous materials have been delivered to the consignee, then RSPA should address that narrow issue, rather than create an artificial jurisdiction test that is dependent upon the identity of whom is conducting the regulated activity." (American Trucking Associations)

We agree with commenters who suggest that the function being performed should dictate whether the HMR should apply to that function. As should be apparent by the discussion of this issue in the NPRM and this final rule, our determination as to whether the HMR should apply to the unloading of rail tank cars into manufacturing processes is based on our analysis of the function being performed. Unloading of a bulk packaging directly into a manufacturing process is not a transportation function; such unloading is a manufacturing function and should be treated as such for purposes of applicability of the HMR. Indeed, unloading of a bulk packaging after a carrier has delivered it to a consignee, detached its motive power, and departed the consignee's premises should not be regulated differently from unloading of a non-bulk packaging after a carrier has delivered it to a consignee and departed the consignee's premises.