

No commenter suggests that the act of emptying a non-bulk packaging when performed by a consignee after delivery should be regulated under the HMR. Such action clearly occurs after transportation is completed. The same is true of the act of emptying a bulk packaging after a carrier has delivered it to the consignee and departed the consignee's premises.

Commenters suggest that the proposed definition for "unloading incidental to movement" could result in confusion and ambiguity. "In simple situations where only one person is involved, the 'who is unloading' test may work quite well. Unfortunately, the reality of handling hazardous liquids is that both the consignee and the carrier are involved in the unloading because both parties have a strong interest in the safe handling of the materials. Even where the carrier is physically initiating and monitoring the unloading, the consignee is likely to be inspecting the receiving tanks, assuring scrubbers are functioning properly, monitoring pressures, checking for leaks and the like. * * * With this sharing of responsibilities, who is performing the unloading for the purposes of the Proposed Rule? Even if the carrier is primarily responsible for the unloading, the consignee arguably is performing unloading activities as well. This creates an ambiguity with respect to whether a particular unloading scenario is or is not transportation in commerce." (Unimin Corporation) Another commenter has a similar concern. "If more than one person is involved in the loading or unloading of hazardous materials, a determination by U.S. DOT should be made about who is *primarily* responsible for the loading or unloading, which would, therefore, determine whether that particular situation is or is not transportation in commerce as defined by the proposed rule. HM-223 also does not address which standard applies to loading or unloading operations that are done jointly by carrier and facility personnel. Multiple agencies enforcing different aspects of the loading, unloading and storage of hazardous materials could result in many differing interpretations of the same situation." (American Road and Transportation Builders Association)

We agree that the proposed definition could create some confusion when both carrier and consignee personnel are present and participating in an unloading operation. In this final rule, therefore, we are modifying the definition for "unloading incidental to movement" to specify that if carrier personnel are present during the

unloading of packaged hazardous materials from a transport vehicle or the unloading of a bulk package, such as a cargo tank or a rail tank car, into a storage tank or manufacturing process, then the unloading operation is considered to be incidental to the movement of the hazardous material and is subject to regulation under the HMR. This approach is consistent with our long-standing policy concerning hazardous materials incident reporting. Under §§ 171.15 and 171.16 of the HMR, carriers are required to report incidents that occur during the course of transportation. A carrier must report a loading or unloading incident in conformance with §§ 171.15 and 171.16 if carrier personnel are present at the time the incident occurs, even if carrier personnel are not participating in the loading or unloading operation. This is also consistent with current HMR requirements concerning unloading of cargo tanks in § 177.834(i)(2).

Note that, as with loading operations, even where the HMR specify requirements for unloading a packaging or container, OSHA requirements may also apply. For example, the HMR specify valving, piping, hose, and similar requirements as part of the specification packaging requirements for authorized transportation of hazardous materials and include periodic testing and maintenance requirements. In addition, for unloading operations involving liquefied compressed gases in cargo tanks, the HMR require an operator to develop and maintain operating procedures for emergency discharge control equipment and emergency shutdown of the unloading operation. OSHA regulations cover operational procedures for unloading operations with which a facility must comply and include requirements for facility equipment used for such unloading operations. Persons who perform unloading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to unloading operations—such as requirements for secondary containment or vapor recovery—may also apply.

A commenter suggests that if the HMR are not applicable "to the unloading of tank cars at a consignee facility, * * * other agencies are going to get involved in the construction, test, inspection, marking, labeling, securement rules and regulations. How does RSPA plan to enforce the HMR in part, if not in whole, on an operation that is not subject to the HMR?" (Farmland) This commenter appears to misunderstand the implications of the NPRM proposal

concerning rail tank car unloading. The NPRM proposed to exclude from regulation under the HMR rail tank car unloading operations performed by consignee personnel after delivery of the rail tank car to the consignee's premises and departure of the rail carrier. However, other aspects of the HMR continue to apply to a rail tank car. For example, HMR requirements applicable to rail tank car construction, inspection, and maintenance continue to apply to a rail tank car even if the unloading operation involving such tank car is not subject to the HMR and, indeed, even if the rail tank car does not contain a hazardous material. Similarly, HMR requirements concerning rail tank car marking continue to apply to a rail tank car.

In addition, as proposed in the NPRM, requirements related to the protection of train and engine crews operating within a shipper or consignee facility, such as posting warning signs, setting hand brakes, and blocking the wheels of hazardous materials tank cars placed for unloading would continue to apply, not because the tank car is being unloaded incidental to movement but because unloading of a tank car has the potential to affect the safety of rail carrier personnel. These requirements apply whether or not the carrier is present during the unloading operation.

In summary, the fact that a non-transportation function involving a rail tank car is not regulated under the HMR does not negate the design, construction, and maintenance standards for the rail tank car, nor does it negate HMR requirements governing pre-transportation and transportation functions applicable to the rail tank car. Further, design, construction, and maintenance regulations may be enforced at any time, irrespective of whether the tank car is involved in the transportation of hazardous materials, so long as the tank car is marked to certify that it has been constructed and maintained in accordance with HMR requirements.

Commenters representing intermodal transfer facilities express concern about the NPRM proposals for consignee unloading of rail tank cars. As explained by commenters, "[m]anufacturers of hazardous and non-hazardous commodities contract with [intermodal transfer facilities] to terminalize their products in rail tank cars and, under their direction, transload said product into cargo tanks then deliver to the end user, the consignee. [The intermodal transfer facility] at no time takes title to any of the products that [it] handle[s], this is clearly stated in * * * terminal contracts. [The intermodal transfer