

proposals clarify and make explicit in the HMR long-standing administrative and policy determinations concerning the applicability of the HMR to hazardous materials storage.

One commenter notes that the proposed definition of "storage incidental to movement" appears to include only storage of a material that is in the custody and control of a carrier from the time that the carrier picks up the shipment until it is delivered to the destination indicated on shipping documentation. "RSPA should \* \* \* move or revise the section on 'Storage incidental to movement of hazardous materials' so that it covers storage by any person incidental to movement." (Firestone) We agree. There are situations during transportation when a shipment is out of the direct possession and control of the carrier while it is being stored incidental to its movement in commerce. In this final rule, we modified the definition of "storage incidental to movement" to include storage by any person between the time that a carrier takes physical possession of a hazardous material for the purpose of transporting it until the package containing the hazardous material is delivered to the destination indicated on shipping papers or other documentation. Note that, as stated in the NPRM, for a hazardous material that is consigned by an offeror to a storage facility rather than an end user, the material is no longer in transportation in commerce once it has been delivered to the storage facility.

The temporary holding of a package containing hazardous materials at a motor carrier terminal for consolidation with other packages is clearly within the meaning of storage incidental to movement of a hazardous material in commerce as defined in this final rule. Further, for through shipments, storage incidental to movement in commerce also includes the temporary holding of a package, freight container, rail car, or other instrument of containment of a hazardous material at a marine terminal pending the arrival of a vessel onto which it will be loaded or prior to its inland movement by rail or highway. Similarly, the holding of a freight container or trailer at a carrier's intermodal container transfer facility is within the meaning of storage incidental to movement of a hazardous material in commerce as defined in this final rule. Storage incidental to movement of hazardous materials in commerce is subject to requirements in the HMR.

The NPRM stated that storage of a hazardous material at a transfer facility where a hazardous material is repackaged prior to re-shipment is not

storage incidental to movement as we proposed to define it. Consistent with previous administrative determinations and interpretations, as cited in the NPRM (66 FR 32432), we proposed that movement of a hazardous material would end at the facility to which the hazardous material was consigned for repackaging. A number of commenters express concern about this aspect of our proposed definition for "storage incidental to movement." "The preamble to the proposed rule appears to contemplate that the Hazardous Materials Regulations would not apply to the storage of hazardous materials 'intended' for repackaging at transfer facilities. Storage activities at transfer facilities, which are incidental to transportation, should not be exempt from RSPA regulation. To do otherwise will at best create confusion as to whether RSPA or Environmental Protection Agency regulations apply, and at worst a dangerous regulatory void." (National Private Truck Council) Another commenter notes that "[T]here would be nothing materially different between the packages in storage that are destined for repackaging and those that are not. Storage is storage is storage. Second, it flies in the face of federal law intended to promote intermodal movement in order 'to achieve national goals for improved air quality, energy conservation [and] international competitiveness.' Third, it is contrary to established precedent. Intermodal movements of hazardous materials are critical to commerce. Previously, RSPA recognized this fact in preemption proceedings." (Institute of Makers of Explosives) Commenters ask that we clarify what we mean by the term "repackaging" and explain why storage of hazardous materials prior to repackaging is not included in our definition of "storage incidental to movement." "[We] recommend a detailed definition of the term 'repackaging' in order to reduce uncertainty about RSPA's intent concerning this activity. \* \* \* Is it RSPA's intent to assert, as it has in the past, that repackaging is a "covered subject" under [Federal hazmat law] and that state regulations pertaining to repackaging that are not substantively the same as corresponding federal regulations are subject to preemption?" (Northeast Waste Management Officials Association)

As the commenters suggest, the act of repackaging a hazardous material for transportation is a covered subject under Federal hazmat law. 49 U.S.C. 5125(b). Repackaging is a pre-transportation function as that term is

defined in this final rule. Persons who repackaging a hazardous material must comply with all applicable HMR requirements concerning the selection and preparation of a hazardous materials package. Because the act of repackaging a hazardous material is a covered subject under Federal hazmat law, non-federal requirements that are not substantively the same as the HMR requirements applicable to repackaging are preempted.

The fact that repackaging is a regulated activity under the HMR does not mean that every activity associated with repackaging is also regulated under the HMR. For example, transportation of a hazardous material consigned to a facility for repackaging, as indicated on shipping papers or other documentation, ends when the hazardous material is delivered to the facility. Subsequent storage of the hazardous material prior to its repackaging is not storage incidental to movement as that term is defined in this final rule and is not regulated under the HMR. Similarly, storage of the hazardous material after it has been repackaged but prior to the time a carrier accepts it for transportation is not storage incidental to movement as that term is defined in this NPRM and is not regulated under the HMR. Moreover, the facility at which repackaging occurs may be subject to OSHA and/or EPA regulations governing worker safety and environmental protection and to non-federal regulations applicable to community right-to-know, fire protection, worker protection, building codes, zoning requirements, and the like.

Many commenters address the NPRM proposals concerning storage of rail cars on leased track. The NPRM proposed two alternatives for applying the HMR to such storage. First, storage on leased track could be considered storage by a consignee after movement in transportation of the rail car has been completed, as indicated by the destination on shipping documentation. In such situations, the rail carrier would be viewed as performing a warehousing function on behalf of the consignee, not a transportation function. Alternatively, storage of rail cars on leased track (other than leased track immediately adjacent to the shipper or consignee facility and exclusively for the shipper or consignee's use) could be considered storage incidental to movement because the cars have not been physically delivered to the consignee, and the carrier retains physical possession of the shipment.