

authority in areas where it might otherwise be preempted. Such "reverse preemption language" functions to nullify any effect the OSH Act's 4(b)(1) provision might otherwise have and thus ensures that OSHA's standards remain applicable.

Even without the reverse preemption language, OSHA would only be precluded from applying its standards to facilities that perform pre-transportation and transportation functions if DOT were to "exercise" its statutory authority, under Federal hazmat law, to prescribe or enforce occupational safety and health standards of regulations at these facilities. The Supreme Court recently held that mere possession by another Federal agency of unexercised authority is insufficient to displace OSHA's jurisdiction. *Chao v. Mallard Bay Drilling, Inc.*, 524 U.S. 235, 241 (2002). The Court further held that a Federal agency's minimal exercise of some authority over certain working conditions does not result in complete preemption of OSHA jurisdiction. *Id.* Because we neither affirmatively regulate the working conditions at facilities where pre-transportation and transportation functions are performed, nor assert comprehensive regulatory jurisdiction over the working conditions at these facilities, OSHA's standards and regulations would continue to apply at these facilities even in the absence of reverse preemption language. This final rule makes clear that we do not intend to exercise our statutory authority in a manner that precludes OSHA from regulating at facilities where pre-transportation and transportation functions are performed.

In the NPRM discussion of OSHA authority, we stated that functions regulated under the HMR should not also be subject to conflicting regulation by state and local governments and that other Federal requirements should be consistent with the HMR. At the same time, the HMR do not address the work environment within which such functions are performed nor do the HMR address the working conditions applicable to employees performing such functions. It is not appropriate for RSPA to become extensively involved in developing and enforcing a complex regulatory scheme covering working conditions for hazardous materials employees who, although performing various functions regulated under the HMR, are located in facilities that have characteristics similar to those of many industrial workplaces.

One commenter suggests that "allowing OSHA to regulate hazardous materials transportation workers opens

the door to a myriad of different state regulations covering these activities, as only RSPA is capable of preempting state occupational safety and health regulations that differ from the federal standard." This commenter further suggests that "RSPA consider incorporating by reference applicable OSHA rules. This option would allow RSPA to avail itself of OSHA's expertise without duplicating resources. * * * The primary benefit of such a strategy would be the promulgation of uniform hazardous materials transportation worker safety standards that would apply nationwide * * *" (American Trucking Associations) Other commenters suggest that RSPA could utilize the notice-and-comment rulemaking process to propose hazmat employee safety regulations, based on OSHA requirements, for inclusion in the HMR. "[W]e note that the Administrator has ample resources to publish a proposal, evaluate comments as to the efficacy and applicability of the proposed standard to hazmat transportation safety and craft a final rule. For years, the Administrator has done this with respect to consensus standards published by entities both domestic and international, and we see no reason why this successful approach can't be replicated with respect to OSHA and EPA." (National Tank Truck Carriers)

We disagree. As we stated in the NPRM, the OSH Act permits states to adopt and enforce worker safety standards that may be more stringent than the standards promulgated by OSHA. By contrast, Federal hazmat law preempts many state and local laws and regulations applicable to hazardous materials transportation that are not the same as the Federal requirements in the HMR. If we were to incorporate by reference OSHA's standards, then this could prevent states and localities from adopting more stringent worker safety standards and would thus undermine the intent of Congress as clearly expressed in the OSH Act. On the other hand, because OSHA standards are promulgated under authority of the OSH Act, states would be permitted to adopt more stringent requirements irrespective of the preemption provisions of Federal hazmat law. We do not believe that incorporating certain OSHA standards into the HMR would result in uniform Federal regulation of transportation worker safety in a manner consistent with Federal hazmat law or the OSH Act.

The NPRM proposed no change to the current division of responsibilities between OSHA and RSPA for the regulation of hazardous materials.

OSHA has concurrent authority in this area, and its standards protect workers who perform pre-transportation and other functions. Further, Congress authorized OSHA, rather than the Secretary of Transportation, to promulgate regulations applicable to workplace safety and occupational health, even in facilities where pre-transportation functions are performed. Such facilities are not excepted from OSHA requirements merely because certain of the activities performed at the facility are subject to HMR requirements. The facility must assure that functions subject to the HMR are performed in accordance with the HMR and must also assure that the workplace in which the functions are performed conforms to applicable OSHA requirements for occupational health and safety and that workers who perform such functions are protected from hazards.

Where hazmat employees perform pre-transportation functions as defined in this final rule, the HMR apply to the function being performed, and OSHA's requirements for occupational safety and health apply to the working conditions applicable to the hazmat employee performing the function. Examples include hazmat employees working in chemical plants, manufacturing facilities, and warehouses who determine a material's hazard class under the HMR and prepare packages for shipment. Preparation of hazardous materials packages for shipment must be performed in accordance with the HMR; however, OSHA standards apply to the working conditions under which the function is performed and to measures necessary to protect the employee performing the function, such as protective clothing and breathing equipment. The same is true for transloading operations at intermodal transfer facilities—the transloading function is regulated under the HMR, while OSHA regulations apply to the working conditions under which transloading is performed and the measures necessary to protect the employee performing transloading operations.

The relationship between the OSHA regulations and the HMR for transportation functions is more complex. Congress reauthorized Federal hazmat law in 1994 to "provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce." The "risks to life inherent in the transportation of hazardous material" include risks to both the general public and to transportation