

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Parts 171, 173, 174, 175, 176, and 177****[Docket No. RSPA-98-4952 (HM-223)]****RIN 2137-AC68****Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage****AGENCY:** Research and Special Programs Administration, DOT.**ACTION:** Supplemental advance notice of proposed rulemaking.

SUMMARY: On July 29, 1996, the Research and Special Programs Administration published an advance notice of proposed rulemaking inviting public comment on the applicability of the Hazardous Materials Regulations to loading, unloading, and storage of hazardous materials. We are continuing to evaluate this issue to determine the best way to promote safety in transportation and transportation-related activities. To assure that agency decisions are based on the best information available and take account of the views of all interested persons, we are issuing this supplemental advance notice of proposed rulemaking to highlight comments received and request additional information.

DATES: Submit comments by July 26, 1999. To the extent possible, we will consider comments received after this date in making our decision on a proposed rule.

ADDRESSES: Submit comments to the Dockets Management System, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, D.C. 20590-0001. Comments should identify Docket Number RSPA-98-4952 and be submitted in two copies. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. You may also submit comments by e-mail to the following address:

"rules@rspa.dot.gov". The Dockets Management System is located on the Plaza level of the Nassif Building at the Department of Transportation at the above address. You can review public dockets there between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. You can also review comments on-line at the DOT Dockets Management System web site at "<http://dms.dot.gov/>."

FOR FURTHER INFORMATION CONTACT: Susan Gorsky (202) 366-8553, Office of

Hazardous Materials Standards, Research and Special Programs Administration; or Nancy Machado (202) 366-4400, Office of the Chief Counsel, Research and Special Programs Administration.

SUPPLEMENTARY INFORMATION:**I. Background**

On July 29, 1996, the Research and Special Programs Administration (RSPA, "we") published an advance notice of proposed rulemaking (ANPRM) seeking comments on the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to loading, unloading, and storage of hazardous materials. We also hosted three public meetings at which interested persons were invited to present ideas, proposals, and recommendations on the applicability of the HMR. Representatives of the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and DOT's Federal Railroad Administration (FRA) participated in the public meetings. The reader is referred to the ANPRM (61 FR 39522) for background information and a detailed discussion of the issues.

In addition to DOT, EPA, and OSHA, more than 200 interested persons participated in the public meetings. They included representatives of shippers, carriers, warehouses, state and local public safety agencies, and building and fire code safety organizations. We also received over 100 written comments.

II. Summary of Issues and Analysis of Comments

The HMR are promulgated in accordance with the mandate in 49 U.S.C. 5103(b) that the Secretary of Transportation "prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce." "Transportation" is defined as "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. 5102(12). "Commerce" is defined, as "trade or transportation in the jurisdiction of the United States between a place in a state or a place outside of the state; or that affects trade or transportation between a place in a state and a place outside of the state." 49 U.S.C. 5102(1).

The ANPRM noted that we have issued a number of interpretations, inconsistency rulings, and preemption determinations in response to requests from the public for clarification regarding the meaning of "transportation in commerce" and

whether particular activities are covered by that term, and therefore, subject to regulation under the HMR. The ANPRM identified loading, unloading, storage, and handling of hazardous materials as areas of particular confusion and concern and asked a number of questions about how RSPA should regulate these activities.

Commenters to the ANPRM generally agree that RSPA needs to more clearly specify activities that are subject to the HMR to eliminate existing confusion and uncertainty. Commenters further agree that elimination of regulatory overlaps among Federal regulatory agencies and between the Federal agencies and state/local public safety agencies would eliminate potentially inconsistent and unnecessary regulation and would promote more efficient and effective compliance with and enforcement of safety standards.

Developing a clear statement of applicability of the HMR will not be an easy task. Ideally, such a statement should cover all activities performed by hazardous materials shippers, carriers, and consignees that directly affect transportation safety and should apply equally to both bulk and non-bulk shipments. It should provide the regulated community with a clear understanding of when the HMR apply and the effect such applicability has on the regulatory activities of other Federal regulatory agencies and state/local public safety agencies.

Commenters generally agree that the following activities (which are subjects covered under DOT's preemption authority in 49 U.S.C. 5125(b)) should be subject to the HMR—classification of a hazardous material; preparation of a shipping paper, including emergency response information; selection of an appropriate packaging; marking and labeling of the package; and placarding of the transport vehicle. Similarly, commenters generally agree that activities related to the development of specifications for packagings authorized for transportation of hazardous materials, including all testing, retesting, reconditioning, and reuse requirements, should be subject to the HMR. These activities assure the integrity of hazardous materials packages during transportation and assist emergency responders in identifying and responding to specific hazards in the event of an unintentional release of material during transportation. Thus, commenters agree that RSPA should have exclusive regulatory authority in these areas.

Many commenters to the ANPRM propose to draw the boundaries for HMR applicability by answering two

critical questions: "When does transportation begin?" and "When does transportation end?" RSPA agrees that answering these questions would establish a simple framework for clarifying the applicability of the HMR to the regulated community and ultimately help clarify the relationships among various Federal, state, and local programs charged with protecting people and the environment from the risks of hazardous materials.

Commenters do not offer consistent answers to the questions "When does transportation begin?" and "When does transportation end?" However, three suggested approaches for developing answers do emerge: (1) Offeror (shipper) intent; (2) custody and control by a carrier; and (3) movement on public rights-of-way. These are discussed in more detail below. By focusing this ANPRM on these three approaches, however, we do not mean to suggest that we are not considering other approaches for determining the applicability of the HMR over hazardous materials transportation activities. For example, we may want to consider a combination of the three major approaches discussed here. We may want to develop an analysis that would distinguish activities that should be regulated under the HMR because they pose significant public safety risks from those that are adequately addressed by other Federal regulatory agencies or by state/local public safety agencies and from those that need not be regulated under the HMR because the public safety risk is limited or non-existent. Commenters are invited to discuss variations of the alternatives discussed below or to suggest new alternatives.

Following is a discussion of the three most commonly suggested approaches from commenters for answering the questions "When does transportation begin?" and "When does transportation end?" The discussion includes questions focused on the details of each approach. In answering the questions, please explain your responses and, when possible, provide examples of current practices that should or should not be considered subject to the HMR.

A. Offeror (Shipper) Intent

Applicability

An alliance of 16 associations (the Alliance) representing some of the nation's largest manufacturers, shippers, and transporters of hazardous materials suggests that a determination as to whether the HMR apply to a package containing hazardous materials should be based on an offeror's intent. A person's intent to offer a hazardous

material for transportation in commerce would be shown by placing the hazardous material in a packaging preparatory to shipment. An offeror's intent to ship a hazardous material would establish whether it is subject to the HMR. Under this scenario, the Alliance suggests that the following functions would be subject to regulation by RSPA:

1. *Transportation begins with the offeror's intent to ship a hazardous material.*

2. *Functions performed at offeror's (shipper's) facility.*

- Loading of non-bulk packages by the offeror or carrier onto a transport vehicle, vessel, or aircraft.
- Loading of bulk packagings by the offeror or carrier, including monitoring or attendance of the loading function.
- In-plant movements of bulk packages or transport vehicles loaded and qualified for off-site transportation.
- Unlimited storage of packages awaiting pick-up at the offeror's facility, including loaded rail cars at plant sites.

3. *In-transit movement of shipment.*

- Parking or staging of transport vehicles, including rail cars, incidental to movement.
- Loading, unloading, and handling, such as transferring a package from a vessel, aircraft, or transport vehicle to a staging area or to another transport vehicle, aircraft, or vessel.
- Storage of packages awaiting shipment to their ultimate destination.

4. *Functions performed at destination facility.*

- Long-term storage of packages at distribution facilities.
- Unlimited storage awaiting unloading at destination facility, including loaded rail cars at plant sites.
- In-plant movements of bulk packages or transport vehicles loaded with non-bulk packages.
- Unloading of a bulk package or a transport vehicle, vessel or aircraft loaded with non-bulk packages.

5. *Transportation ends at the completion of unloading of the bulk package or transportation vehicle, vessel, or aircraft at the destination facility.*

On the issue of private versus for-hire carriers, the Alliance states that the type of carriage is irrelevant to the question of whether activities are covered by the HMR. The Alliance suggests that the key question for applicability of the HMR is whether the shipment is intended to be, is being, or has been offered for transportation. For this reason, the Alliance opposes setting specific time limits for completing unloading of bulk packages, after which the HMR would not apply. Similarly, the Alliance rejects

the idea of determining the applicability of the HMR based on a shipment being under "active shipping papers." The Alliance also states that public accessibility to an originating, in-transit, or destination facility should have no bearing on the question of whether in-plant movements of hazardous materials should be subject to the HMR. Finally, the Alliance advocates RSPA regulation of unlimited storage of hazardous materials, including on leased track, if the hazardous material is intended to be or had previously been offered for transportation under the HMR.

Implications for Regulatory Overlap Among Federal Regulatory Agencies

The Alliance asserts that where there is an intent to offer for transport or to transport a hazardous material in an authorized package or transport vehicle, it should be presumed to be subject to the HMR. RSPA should broadly exercise its exclusive authority to establish rules governing storage, movement, and handling of hazardous materials in transportation as the Alliance would define it. The Alliance suggests that questions concerning shared or overlapping jurisdiction among RSPA, EPA, and OSHA should be resolved by examining each agency's "preeminent authority." In the Alliance's view, RSPA's preeminent authority is to establish uniform Federal transportation safety standards, OSHA's preeminent authority is for worker safety and health, and EPA's preeminent authority is for environmental protection. The Alliance suggests that RSPA should consider the appropriate boundaries of agency jurisdiction each time a new regulatory activity is proposed. Each activity would be considered separately, in consultation between or among the affected agencies, and the agency with the preeminent authority for that activity would regulate it, if regulation is necessary. Thus, OSHA would ensure that work practices are performed safely under existing rules, and EPA would assure that accidental releases of hazardous materials to the environment are properly handled. If there are gaps in the HMR, the Alliance suggests that RSPA should incorporate applicable regulations or standards of other Federal agencies into the HMR.

Implications for State/Local Regulation of Hazardous Materials

With reference to state and local regulation of hazardous materials transportation, the Alliance is very concerned about the need for national uniformity in hazardous materials regulation. The Alliance is particularly concerned that storage of hazardous

materials incidental to transportation not be subject to multiple regulatory regimes. The Alliance notes that RSPA is the Federal agency with expertise in the design of transportation equipment intended to carry hazardous materials and asserts that no other government entity, whether Federal, state, or local, has or should have jurisdiction to regulate transportation equipment at any point while it is in transportation, including storage incidental to transportation. Further, the absence of regulation concerning specific activities within RSPA's jurisdiction should not be construed as an invitation for regulation by state or local authorities. Any gaps in the HMR concerning activities that affect transportation should be filled by RSPA regulation. Any activity affecting transportation where regulation by states or local governments could present an obstacle to RSPA's responsibility to promulgate uniform Federal hazardous materials transportation safety standards should be regulated by RSPA.

Questions Pertaining to Defining "Transportation in Commerce" by Offeror Intent

A1. *Applicability.* The Alliance suggests that the applicability of the HMR to a hazardous material would be determined by an offeror's intent to transport. Evidence of "intent" would be placing a hazardous material inside a packaging and handling it according to the HMR.

A1(i). When specifically does transportation of a hazardous material begin? Upon selection of a packaging for the material; upon preparation of a package, including marking and labeling, for shipment; or upon preparation of shipping papers for the package?

A1(ii). How should the HMR distinguish between packages containing hazardous materials that are intended for transportation and packages of hazardous materials that are not intended for transportation? Provide specific examples, if possible.

A1(iii). If a hazardous material has been placed in a DOT specification packaging, does this constitute an intent to offer the package for transportation?

A1(iv). Should a properly marked and labeled package for which shipping papers have not been prepared be subject to the HMR? Why or why not?

A1(v). Are there additional indicia of intent that RSPA should use to determine when a hazardous material is in transportation? Provide specific examples, if possible.

A1(vi). Are there any Federal or state agency precedents for applying

regulations according to intent-based criteria? If so, please provide specific examples.

A1(vii). How would the concept of "intent" be enforced? For example, should DOT take enforcement action at any time that it finds a DOT specification package containing a hazardous material that does not fully conform to the requirements of the HMR? Should it take enforcement action when it finds any package that does not fully conform to the requirements of the HMR?

A1(viii). At what specific point or points could a shipper be in violation of the HMR?

A2. *Loading and unloading.* Under the scenario suggested by the Alliance, all loading and unloading operations would be subject to the HMR.

A2(i). Should the HMR cover loading and unloading of non-bulk packages to and from a transport vehicle? Why or why not?

A2(ii). Should loading and unloading of intermodal bulk containers be subject to the same regulations as loading and unloading of cargo tanks and tanks cars? Why or why not?

A2(iii). Should cargo tanks that are detached from their motive power be subject to the same regulations for unloading as cargo tanks that remain attached to their motive power? Why or why not?

A2(iv). Should the HMR cover unloading of cargo tanks or tank cars into manufacturing processes? Why or why not?

A2(v). Once it has been unloaded, should a bulk packaging containing a residue of a hazardous material continue to be subject to the HMR? If so, to what extent?

A3. *Storage.* Under the Alliance's proposal, shipments could be held in storage incidental to transportation indefinitely, whether at the shipper facility, the consignee facility, or at an in-transit facility.

A3(i). Is it appropriate to consider hazardous materials held in storage to be in transportation and, thus, subject to regulation under the HMR solely because such materials are packaged in conformance with the HMR? Why or why not?

A3(ii). To what extent should the storage of packages prior to loading on a transport vehicle be subject to the HMR? For example, should the HMR prescribe requirements for fire safety for warehousing of packages, worker safety standards for workers who handle packages after they have been filled, or operational standards for use of mechanical package handling equipment?

A3(ii). Under this proposal, should there be a time limit on storage, after which the material is no longer subject to the HMR? If so, what is a reasonable time limit? If not, why not?

A3(iii). Under this proposal, should a time limit on storage at originating or destination facilities be different from a time limit for in-transit storage facilities? Why or why not?

A3(iv). What other objective criteria could RSPA use to determine when a hazardous materials shipment is in storage incidental to transportation?

A3(v). Under this proposal, should different standards apply to hazardous materials stored in bulk packages, intermodal bulk containers (IBCs), and non-bulk packages? Why or why not?

A3(vi). Should the HMR distinguish between hazardous materials held in storage at a warehouse throughbilled for subsequent distribution to future customers and hazardous materials held by a wholesaler awaiting a future sale?

A3(vii). If packages held in storage are subject to the HMR, should the HMR also include standards for the warehouses or facilities where packages are stored?

A3(viii). Should a package held in storage that contains a residue of a hazardous material be subject to the requirements of the HMR? Why or why not?

A4. *Regulation by other federal/state/local agencies.* Determining the applicability of the HMR according to a shipper's intent, thereby permitting hazardous materials shipments to be held in unlimited storage subject to regulation by the HMR at originating, in-transit, and destination facilities, could preclude regulation by other Federal agencies or by state or local governments.

A4(i). Should hazardous materials shipments held in storage that is subject to regulation under the HMR be excepted from regulation by other Federal agencies or by state and local governments? Why or why not? If yes, how should the health and safety interests of other Federal agencies and state and local governments be addressed?

A4(ii). Should shipments held in storage be excepted from community right-to-know and risk management laws? Should shipments held in storage be excepted from the requirements of local fire codes or zoning laws? Why or why not? If yes, how should the health and safety interests of state and local governments be addressed?

A4(iii). What role, if any, should state/local public safety agencies have in regulating storage subject to regulation by the HMR? Should state/

local ordinances addressing storage facilities be subject to preemption by RSPA? Why or why not? If yes, how should state/local governments prepare for emergencies that may occur at storage facilities?

A4(iv). How is storage incidental to transportation different from storage generally? Are the risks to facility employees or to the surrounding communities less for hazardous materials shipments stored in DOT-authorized containers?

A5. *Preemption.* Commenters assert that the absence of RSPA regulation governing an activity affecting transportation does not mean that state or local governments are free to regulate the activity. When should the absence of an RSPA regulation preclude state or local regulation of an activity?

A6. *Rail storage on leased tracks.* Should materials stored on tracks owned by a railroad and leased to a shipper or consignee be regulated to the same degree as when the shipment is being transported by the rail carrier? Why or why not?

B. Carrier Custody and Control

Applicability.

Some commenters representing various hazardous materials shippers, carriers, and state and local law enforcement and safety agencies suggest that applicability of the HMR should be limited to the period when a hazardous material is received and accepted for transportation by a carrier until it is delivered to and accepted at its final destination. Under this scenario, proponents suggest that the following functions would be subject to regulation by DOT:

1. *Transportation begins when a package is accepted by a carrier and under its control.*

2. *Functions performed at offeror's facility.*

- Loading of non-bulk packages by the carrier onto a vessel, aircraft, or transport vehicle.
- Loading of bulk packagings by the carrier, including monitoring or attendance of the loading process.
- Carrier movements within the shipper facility.

3. *In-transit movement of shipment.*

- Parking or staging of transport vehicles, including rail cars, incidental to movement.
- Loading, unloading, and handling, such as moving a package from a vessel, aircraft, or transport vehicle to a staging area or to another vessel, aircraft, or transport vehicle.
- Storage of packages awaiting shipment to their known ultimate destination.

4. *Functions performed at destination facility.*

- Carrier movements within the consignee's facility.
- Unloading of bulk packages or of non-bulk packages from aircraft, vessels, or transport vehicles by carrier personnel.

5. *Transportation ends when the carrier delivers the shipment or package to its final destination and it is accepted by the consignee.*

Commenters who believe that carrier custody and control of a hazardous materials shipment should determine whether the shipment is subject to the HMR agree that whether the carrier is for-hire or private should be irrelevant. Rather, these commenters believe that the key question is the activity in which the carrier is engaged.

On the issue of public accessibility, commenters favoring the carrier-custody-and-control approach generally agree that public accessibility to an originating or destination facility should have no bearing on the question of whether in-plant movements of hazardous materials should be subject to the HMR. However, one commenter does suggest that the extent of public accessibility may bear on how loading or unloading functions are regulated. The commenter implies that loading or unloading conducted in facilities accessible to the general public, such as retail gas stations, shopping centers, or industrial parks, should be regulated more stringently than loading or unloading conducted at facilities where public access is limited or prohibited, such as chemical plants, refineries, or petroleum tank farms.

On the issue of setting specific time limits for unloading and storage incidental to transportation, most of the commenters who favor the carrier-custody-and-control approach agree that RSPA should not set a specific time limit for completing unloading. For these commenters, the issue is who is performing loading or unloading functions. Loading or unloading by carrier personnel would be covered by the HMR; loading or unloading by consignor/consignee personnel would not. However, some of these commenters suggest that loading and unloading of cargo tanks and tank cars should be regulated under the HMR, whether or not a carrier is involved.

The commenters who believe carrier custody and control of a hazardous materials shipment should determine whether it is subject to the HMR generally reject using the concept of "active shipping papers." Most are unclear as to what is meant by the term and equally uncertain as to how it could

be defined. These commenters also oppose application of the HMR to storage of rail cars because storage on private property should not be subject to the HMR.

Implications for Regulatory Overlap Among Federal Regulatory Agencies

The commenters who favor the carrier-custody-and-control approach do not have a uniform view on designating areas of regulatory responsibility among RSPA, OSHA, and EPA. Some suggest that RSPA should negotiate Memoranda of Understanding with OSHA and/or EPA to set forth specific, separate areas of responsibility. Others note that RSPA does not exercise all of its jurisdiction with respect to handling criteria for hazardous materials and suggest that RSPA should screen the rules of other agencies and incorporate into the HMR those that can be used effectively in transportation settings. These commenters suggest several examples—requiring notice to local governments, contingency plans, and other performance-based measures to ensure due diligence in handling hazardous materials—where RSPA should consider incorporating the regulations of other Federal agencies into the HMR.

Implications for State/Local Regulation of Hazardous Materials

Again, the commenters who favor the carrier-custody-and-control approach do not present consistent views on state and local government regulation of activities affecting hazardous materials in transportation. Some agree with the Alliance comments cited above that national uniformity of hazardous materials transportation regulation is critical. They urge RSPA to clearly define the point at which a shipment is offered for transportation and the circumstances under which a shipment is considered in storage incidental to transportation. Others suggest that RSPA should recognize the right of state and local governments to protect the health and safety of its citizens through regulations that may be more stringent than the HMR.

Questions Pertaining to Defining "Transportation in Commerce" in Terms of Carrier Custody and Control

B1. *Applicability of the HMR.*

B1(i). If transportation begins once a carrier accepts and assumes control of a package, at what point should a shipment handled by a private carrier be subject to the HMR? Why? What objective criteria can RSPA use to determine when a shipment has been "accepted" by a private carrier?

B1(ii). At what point should a package handled by a for-hire carrier be subject to the HMR? Why? What objective criteria can RSPA use to determine when a shipment has been "accepted" by a for-hire carrier?

B2. *Loading and unloading by carriers.* Under this scenario, only those loading or unloading operations conducted by carriers would be subject to regulation by RSPA.

B2(i). Should loading or unloading by a for-hire carrier be distinguished from loading or unloading by a private carrier? Why or why not?

B2(ii). Do safety considerations change depending on which entity performs loading or unloading? If so, how?

B3. *Loading and unloading by shippers or consignees.* Under this scenario, carrier loading or unloading operations would be subject to the HMR while shipper loading and consignee unloading would not.

B3(i). What distinguishes loading or unloading by a carrier from loading and unloading by shippers and consignees?

B3(ii). Do safety considerations change depending on which entity performs the operations? If so, how?

B4. *Loading and unloading of bulk and non-bulk shipments.*

B4(i). Should loading and unloading of bulk shipments to/from cargo tanks or tank cars be regulated more stringently than loading and unloading of non-bulk packages? Why or why not?

B4(ii). If yes, should shipper loading and consignee unloading of bulk shipments be subject to regulation by RSPA? Why or why not?

B5. *Loading and unloading at publicly accessible facilities.* Should loading or unloading operations conducted at publicly accessible facilities on or near public rights-of-way be regulated more stringently than loading or unloading at private facilities at which there is no public access? Why or why not?

B6. *Worker safety.*

B6(i). Should hazmat employees and non-hazmat employees performing the identical function (e.g., the unloading of hazardous materials from a cargo tank) be subject to identical worker safety standards? If so, under which Federal agency's regulations—RSPA or OSHA? Why?

B6(ii). Should new or additional regulatory emphasis be placed on the safety of transportation workers, in particular the operators of motor vehicles who are directed by their carrier employers to perform functions, such as the loading and unloading of cargo tanks, that were performed by shippers and consignees in the past?

B7. *Empty packages.* Once it has been unloaded by a carrier, should a bulk packaging containing a residue of a hazardous material continue to be subject to the HMR? If so, to what extent?

C. Movement on Public Rights-of-Way Applicability

Some commenters from state and local public safety agencies suggest that the HMR should apply only to movements of hazardous materials on public rights-of-way. The HMR would cease to apply once the shipment left the public right-of-way and arrived at its destination. One industry commenter offers a variation of this proposal, suggesting that the HMR should apply only to the time period when hazardous materials are being shipped "by means available to the public or on public rights-of-way." Using movement on public rights-of-way as the defining criterion for applicability of the HMR, proponents suggest that the following functions would be subject to regulation by RSPA:

1. *Transportation begins when the shipment exits the offeror facility and enters a public right-of-way.*

2. *In-transit movement of shipment.*

- Parking or staging of transport vehicles, including rail cars, incidental to movement.

- Loading, unloading, and handling, such as moving a package from a vessel, aircraft, or transport vehicle to a staging area or to another vessel, aircraft, or transport vehicle.

- Storage of packages awaiting shipment to their ultimate destination.

3. *Transportation ends when the shipment leaves the public right-of-way and arrives at its destination.*

On the issue of private versus for-hire carriers, commenters who suggest applying the HMR only to movements on public rights-of-way generally agree that the nature of the carrier should be irrelevant to the question of whether its activities are covered by the HMR. For these commenters, the key question is whether the activity occurs on private property or a public right-of-way. For the most part, these commenters do not believe that loading, unloading, or storage should be subject to the HMR because the activity occurs on private property rather than a public right-of-way. However, on the issue of setting specific time limits to define unloading and storage that are incidental to transportation, some of these commenters agree that setting a time limit by which loading should be completed—7 days, for example—would be helpful in determining

whether a material is subject to the HMR. Others suggest that storage in excess of "a couple of days" should not be viewed as storage incidental to transportation in commerce.

Implications for Regulatory Overlap Among Federal Regulatory Agencies

Commenters who want to limit the application of the HMR to movements of hazardous materials on public rights-of-way also state that DOT should have primary Federal regulatory jurisdiction only when a hazardous material is being moved on public rights-of-way. These commenters assert that it is generally recognized that DOT should have sole jurisdiction over movement on public thoroughfares of hazardous materials from their point of origin to their destination and, further, that DOT should have sole jurisdiction over container design, including all equipment attached to the container, and marking and labeling of the container. These commenters state that the area in need of clarification is when DOT will have sole jurisdiction at a fixed facility and when other agencies will have shared or joint jurisdiction at fixed facilities. These commenters suggest that OSHA should have primary jurisdiction over manufacture, loading, storage, unloading, and use of hazardous material; and EPA should have primary jurisdiction only where an actual or potential release threatens the environment.

Implications for State/Local Regulation of Hazardous Materials

Commenters representing state and local public safety agencies who favor applying the HMR only to movements on public rights-of-way assert that state or local government agencies should have the freedom to impose safety regulations to respond to localized conditions or needs. These commenters suggest that, just as EPA has a role in protecting the environment from unintentional releases of hazardous materials at fixed facilities or in transportation and OSHA has responsibility whenever worker safety is at stake, they should be permitted to regulate certain activities along with RSPA and other Federal agencies. These commenters believe that the concept of shared jurisdiction over a specific activity among Federal, state, and local agencies should be an explicit point recognized in the HMR.

In cases of overlapping jurisdiction, these commenters suggest the agency with regulations that are in place to protect life and safety should have precedence; in such cases, RSPA's preemption authority should be waived.

For loading and unloading activities, these commenters believe that DOT should focus primarily on the vehicle and vehicle container, while the facility and the environment around the vehicle container should be the responsibility of other agencies. Thus, these commenters suggest that the environment surrounding the loading or unloading activity, including spill control, drainage, water access, grounding and bonding, secondary containment, treatment systems, detection/monitoring systems, alarm systems, and related issues should be the responsibility of EPA, OSHA, and/or local public safety agencies.

Questions Pertaining to Defining
"Transportation in Commerce" as
Movements on Public Rights of Way

C1. *Applicability of the HMR.* What objective criteria should RSPA use to determine when a hazardous materials shipment is moving on a public right-of-way?

C2. *Movements on private rights-of-way.* If the HMR apply only to movements of hazardous materials on public rights-of-way, how should the HMR apply to movements of hazardous materials on private rights-of-way, such as railroad property?

C3. *Operations adjacent to public rights-of-way.* If the HMR apply only to movements of hazardous materials on

public rights-of-way, how should the HMR apply to loading, unloading, or storage of hazardous materials adjacent to public rights-of-way, such as gasoline stations, shopping centers, or industrial parks?

C4. *Unloading.* Current requirements of the HMR concerning unloading are intended to provide, in part, protection to the general public in instances where individuals and their private property are exposed to risks, e.g., bulk deliveries of petroleum products to homes, schools and retail outlets.

C4(i). Should the HMR be revised to specifically except these unloading requirements? If not, to what extent should the HMR address transportation-related functions that occur beyond the bounds of "public rights of way?"

C4(ii). If a state, local jurisdiction, or Indian tribe elects not to apply its own standard of safety, should the HMR contain a default provision that specifies minimal requirements?

III. Supplemental ANPRM Comment Period

We are continuing to evaluate this issue to determine the best way to promote safety in transportation and transportation-related activities. However, because most comments to the ANPRM were submitted at least two years ago, we are issuing this supplemental ANPRM to assure that we have the benefit of the most recent

information available and that we hear from a broad spectrum of interested organizations and individuals. If you submitted comments in response to the 1996 ANPRM, you may supplement or update your comments. If you did not submit comments in response to the 1996 ANPRM, you may do so until July 26, 1999. Your comments may address the issues outlined in the 1996 ANPRM or the questions listed in this supplemental ANPRM. You should explain the reason for any change you recommend. In particular, we encourage you to submit proposed regulatory text that would accomplish your objectives.

The 1996 ANPRM is available as part of the public docket established for this rulemaking under Docket No. RSPA-98-4952. You can view the 1996 ANPRM by accessing the DOT Dockets Management System web site at "<http://dms.dot.gov/>." If you do not have Internet access, you can call the Hazardous Materials Information Center at 1-800-467-4922 to obtain a copy.

Issued in Washington, DC on April 20, 1999 under authority delegated in 49 CFR Part 106.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

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