

Petition for Rulemaking

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P-1279

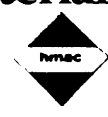
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DOCKET SECTION

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DOCKETS UNIT

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**Hazardous Materials Advisory Council**

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RSPA-98-4952-36

May 25, 1995

Mr. Alan I. Roberts  
Office of Hazardous Materials Safety  
DHM-1, Room 8420  
Research and Special Programs Administration  
Department of Transportation  
400 Seventh St., SW  
Washington, DC 20590

**Re:** Request for New Rulemaking on the  
Definition of "In Transportation"

Dear Mr. Roberts:

HMAC is an international, non-profit, educational organization devoted to promoting safety in the domestic and international transportation and handling of hazardous materials, substances and wastes. **HMAC** represents shippers, carriers of **all** modes, container manufacturers and reconditioners, emergency response and waste clean-up companies, and a variety of other companies and trade associations involved in the field of hazardous materials transportation. We are requesting a new rulemaking be opened to address the definition of "in transportation."

Critical to any application of the Hazardous Materials Regulations is a clear understanding of when materials/goods are considered to be "in transportation". Unfortunately, there is no clear definition of this term anywhere in the HMR (49 CFR Subchapter C) and even the definition of "transportation" found in Subchapter A, Part 107, lacks the specificity necessary for industry to follow. Accordingly, interpretations pertaining to the movement, loading, unloading and storage of hazardous materials incidental to transportation are frequently unclear and certainly not uniform.

HMAC has previously raised this issue with RSPA in our comments on HM-212 "Tank Cars and Cargo Tank Motor Vehicles: Attendance Requirements" submitted December 14, 1992. Allowing that our concerns might have been beyond the scope of the precise issues in that rulemaking, we offered them for consideration as a petition for rulemaking. RSPA has not acted upon that request and, more significantly, has recently begun to address this matter in a number of Preemption Determinations rather than through the rulemaking process. (See, for example, "California and Los Angeles County

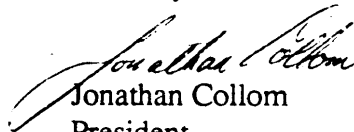
Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials,” 50 FR 8774 (February 15, 1995)).

We understand the tension that invariably exists between transportation safety and general environmental and workplace concerns as it relates to jurisdictional issues of the various responsible agencies and bodies. It is for that reason that HMAc feels a definition arrived at through the open forum process of public rulemaking, as opposed to piecemeal reactions to preemption determinations and/or other rulemakings, is essential to resolving the seminal issue of describing the outer boundaries of when goods are “in transportation”.

We are committed to assisting RSPA with this effort and have formed a task group to develop reasonable alternatives to present to you. HMAc recognizes that the decision as to what limits will be prescribed and how they will be developed is ultimately a governmental function; however, we strongly urge you to utilize the open process of rulemaking, and resist jurisdictional pronouncements in more closed venues.

Thank you for your consideration of our request.

Sincerely,

  
Jonathan Collom  
President

# Hazardous Materials Advisory Council



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September 21, 1995

Mr. Alan I. Roberts  
Office of Hazardous Materials Safety  
DHM-1, Room 8420  
Research and Special Programs Administration  
Department of Transportation  
400 Seventh St., SW  
Washington, DC 20590

Re: Definition of "In Transportation"  
(Petition: P- 1279)

Dear Mr. Roberts:

HMAC is an international, non-profit, educational organization devoted to promoting safety in the domestic and international transportation and handling of hazardous materials, substances and wastes. HMAC represents shippers, carriers of all modes, container manufacturers and reconditioners, emergency response and waste clean-up companies, and a variety of other companies and trade associations involved in the field of hazardous materials transportation.

## Background and Approach

This submission follows up on our letter of May 25, 1995 which petitioned RSPA to commence a rulemaking to more clearly describe when hazardous materials/articles are considered to be "in-transportation", including those periods of loading, unloading and storage incidental to transportation. While there are a number of decided and pending preemption determinations which are concerned with the scope of these terms, we are suggesting that RSPA deal with this issue in the abstract, i.e. outside the strictures of such necessarily fact-dependent scenarios. While HMAC's membership is most keenly focused on transportation safety issues, we clearly recognize the importance and validity of workplace and environmental concerns attendant with the transport and storage of hazardous materials and our recommendations have attempted to strike a reasonable balance among all these sometimes competing interests. While one cannot legitimately say that one of these concerns is always more important than the others, in order to reduce overlaps and inconsistent requirements, recognizable application lines should be drawn.

HMAC's primary goal is the safe transportation of hazardous materials, including accident prevention and protection of transportation workers, emergency responders, the general public, private and public property, and the environment. Another goal is to eliminate jurisdictional overlap and the existing and potential inconsistency in requirements which result. If the various governmental bodies with regulatory

responsibilities for the transportation of hazardous materials or for activities tangential to or intersecting with those responsibilities ( DOT, EPA, OSHA, State agencies, et al.) and the affected industries can agree on appropriate and reasonable jurisdictional boundaries. we believe these goals will be met. As a result, the regulated community's requirements and enforcement agencies' authorities will be clearer. In our view, clarity of requirements fosters both compliance and effective enforcement. The safe transportation of hazardous materials is thereby enhanced.

### The Commercial Life Cycle Continuum for Hazardous Materials in Transportation

1. Production of hazardous material or product
2. Loading of hazardous material or product into non-vehicle packagings at consignor site (Note: In the case of bulk transport, the packaging is also the transport vehicle and this process is eliminated.)
3. Loading of the hazardous material package into a transport vehicle at the consignor site.
4. Storage incidental to transportation at consignor site prior to travel
5. Travel and storage, loading and unloading incidental to transportation of hazardous material at points between consignor and consignee
6. Storage incidental to transportation at consignee site after travel and prior to removal/unloading
7. Unloading of the hazardous material or removal of the package from the transportation vehicle at the consignee site
8. Storage and/or use of the goods by the consignee or consumer

While it is clear that the first and last steps just mentioned are not part of the transportation cycle and that the fifth step (involving actual movement between sites) is, since transfers in and out of containers are not instantaneous, problems in interpretation mainly develop during those phases we have labeled 2, 3, 4, 6 and 7. Perhaps the most contentious area is whenever a shipment of hazardous material has been detained in transit at a consignee or consignor location and the question arises whether this is "storage incidental to transportation" or rather merely storage.

### Recommendation

So where does one draw the line? No bright line rule will fit all cases perfectly, but a reasonable accommodation based on safety and practical considerations could be fashioned. perhaps by obtaining detailed Memoranda of Understanding between the interested federal regulatory agencies and/or state bodies, which will give the necessary consistent and clear guidance to all parties regarding hazardous materials in transport without impeding non-transportation agencies' ability to regulate or enforce environmental and worker safety standards.

Our specific recommendations recognize the fact that transportation packagings, in general, are built to withstand the rigors of movement and, at the very least, have the same or more structural integrity than stationary tanks. Furthermore, our suggestions take into account our firm belief that it is during the transfer process that most incidents occur and that the fewer transfers that are made, the safer the overall operation will likely be. If filled packagings (or those in residue condition) are not treated as being either “in transportation” or in “storage incidental to transportation”, transfers of product to fixed storage or other facilities would likely result which would be costly and, more importantly, increase worker exposure and environmental incident risk. For this reason, we think worker health and safety can be best protected and environmental concerns reduced by minimizing the number of transfers to storage vessels where there are no additional safety benefits to be derived from doing so.

Given those predicates, we submit the following for your consideration:

“In Transportation”
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General Proposition: Except as specifically noted below, transport packagings (bulk and non-bulk)<sup>1</sup>, whether in full or residue condition, are “in-transportation” at all times when the packaging is under the custody and control of the originating and any subsequent carrier.

The following situations should be considered to be “in-transportation”:

- All movement of bulk packagings (excluding IBCs) conducted by a carrier on shipper or consignee controlled sites
- The following loading and unloading activities involving bulk packagings (excluding IBCs) :
  - \* attendance
  - \* assurance against container movement
  - \* packaging security (blue flags, derails, etc.)
  - \* bonding and grounding
  - \* preparation of the packaging for loading and discharge
  - \* operation of transport packaging cargo handling systems

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<sup>1</sup> DOT defines bulk packaging to include Intermediate Bulk Containers (IBCs). For purposes of this submission, IBCs (and Specification 56, 57, 106A and 110A tanks) are treated in the same manner as non-bulk packagings. HMAC believes this approach is appropriate because IBCs, and those “grandfathered” specification packagings just mentioned, are stored in places more vulnerable to rupture from handling incidents such as by forklift damage, are more accessible to plant workers and are more likely to be filled as inventory for future orders than are other bulk packagings.

- The following loading and unloading activities involving non-bulk packagings and IBCs :
  - \* assurance against transport vehicle movement
  - \* preparation and inspection of the transport vehicle for receipt or delivery
  - \* blocking and bracing of cargo against movement
- Transport vehicles intended for transport of non-bulk packages and IBCs are “in-transportation” from the time of loading of the first hazardous material at the first shipper’s location through discharge of the last hazardous material at the last consignee’s location
- Non-bulk packages and IBCs are “in-transportation” from the time the process of loading into the originating carrier’s transport vehicle begins through completion of unloading at the consignees’ facility.

“Storage Incident to Transportation”

General Proposition: Whether a material in a packaging is in “storage incident to transportation” is a function of whether or not the packaging continues to conform with DOT authorized packaging that is suitable for transportation under the hazardous materials regulations

- For bulk, prior to unloading
- For non-bulk, prior to removal from the transport vehicle.

The following situations should be considered to be “storage incident to transportation”:

- For Bulk Packagings (excluding IBCs):
  - \* loaded pursuant to or anticipation of consignee order for shipment
  - \* on-site movement and detention at consignor’s location subsequent to loading and prior to arrival of carrier motive power
  - \* in-transit storage between consignee/consignor for intermodal, interline transfers
  - \* following delivery, on-site movement and retention at a consignee’s controlled facility
- For Non-Bulk Packagings and IBCs:
  - \* detention at consignor’s location subsequent to loading for purposes of off-site transport
  - \* temporary retention at a carrier’s or intermediary’s (e.g. freight forwarder) facility awaiting inter-modal, interline or resolution of an OSD claim
  - \* loaded transport vehicle prior to unloading at consignee facility.

The following situations should NOT be considered to be “storage incident to transportation”:

- For Bulk Packagings (excluding IBCs)
  - \* where the packaging no longer conforms with DOT authorized packaging that is suitable for transportation under the hazardous materials regulations
  - \* where it is clear that there is no intention to use the packaging for transportation in the public domain (e.g. cargo tank not registered or licensed for operation on public roads, lifting frame removed from portable tank, rail tank car welded to in-plant rail, etc.)
- For Non-Bulk Packagings and IBCs
  - \* retention at the shipper’s location following filling and prior to loading on a carrier’s transport vehicle
  - \* following shipment by a carrier, packages are retained off the transport vehicle at a holding facility controlled by, or contracted by, the shipper
  - \* retention by or on behalf of the consignee following delivery by the carrier and unloading from the transport vehicle.

DOT Regulations

**General Proposition:** Where it is determined that DOT standards should exclusively apply, the failure of DOT to issue appropriate regulations does not warrant unilateral regulatory action by other agencies or bodies.

1. Production of hazardous material or product: Classification of materials standards which are prescribed by DOT will not apply during this activity.
2. Loading of hazardous material or product into non-vehicle packagings at consignor site: Only classification, packaging and hazardous communication standards which are prescribed by DOT will apply during this activity.
3. Loading of hazardous material package into transport vehicle at consignor site: Only classification, packaging, hazardous communication and loading standards which are prescribed by DOT will apply during this activity.
4. Storage incidental to transportation at consignor site prior to travel: Only classification, packaging, hazardous communication and transport vehicle standards which are prescribed by DOT will apply during this activity.
5. Travel and storage, loading and unloading incidental to transportation of hazardous material at points between consignor and consignee: Only standards which are prescribed by DOT will apply during this activity.
6. Storage of hazardous material at consignee site: Only classification, packaging, hazardous communication and transport vehicle standards which are prescribed by DOT will apply during this activity.

7. Unloading of the hazardous material or removal of the package from the transportation vehicle at the consignee site: Only classification, packaging, hazardous communication and unloading standards which are prescribed by DOT will apply during this activity.
8. Storage and/or use of the goods by the consignee or consumer: No standards which are prescribed by DOT will apply during this activity.


### Closing

We understand that there are a number of different viewpoints on when the various governmental authorities should be applicable to control various aspects of concerns pertaining to hazardous materials; in fact, we have had very spirited discussions within our diverse membership on this point. Accordingly, our submission has attempted to strike a reasonable balance among the legitimate concerns and needs of transportation safety, environmental protection, worker health and safety, and commercial practicality.

HMAC believes that adoption of our proposals will clarify the application of governmental regulations and minimize health and safety risks resulting from unnecessary transfers of hazardous materials from transportation packagings to storage containers. Moreover, our proposals recognize that in any specific situation an interested agency might be able to introduce extrinsic evidence which would refute the guidelines given. Nevertheless, we submit that adoption of the overall guidelines we have proposed will cover the overwhelming majority of cases.

HMAC stands ready to assist you further in this effort and is available to answer any questions at any time. Please feel free to call upon us.

Sincerely,



Jonathan Collom  
President