


Comment

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Hazardous Materials Advisory Council
 DEPT. OF TRANSPORTATION
 Docket Section



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November 12, 1996

96 DEC 23 AM 11:25

RS PA-98-4952-37

Mr. Alan I. Roberts
 Office of Hazardous Materials Safety
 Dockets Unit, DHM-30, Room 8421
 Research and Special Programs Administration
 Department of Transportation
 400 Seventh St., SW
 Washington, DC 20590

Re: HM-223 ANPRM "Applicability of the
 Hazardous Materials Regulations to Loading,
 Unloading and Storage"

DOT/RS PA/OHMS
 DOCKETS UNIT
 95 NOV 15 AM 5:57

Dear Mr. Roberts:

The Hazardous Materials Advisory Council (HMAC) appreciates this opportunity to comment on the applicability of the Hazardous Materials Regulations to loading, unloading and storage activities. 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 organizations involved in the field of hazardous materials transportation.

A stated focus of this rulemaking is to clarify the applicability of the Hazardous Materials Regulations (HMR) to facilitate compliance. We fully agree that inconsistencies and overlaps in regulatory requirements can lead to confusion, an inadvertent lack of compliance and a diminution of safety. HMAC and the industry members it represents are strongly committed to a seamless system of consistent regulatory controls (i.e. without gaps) as that will engender increased awareness and foster the protection for people, property and the environment which the HMR are designed to do.

You have asked a number of specific questions regarding loading, unloading, storage and handling in the ANPRM; however, we feel that are a few general observations that are appropriate to be made before responding:

- As you proceed with this docket, you must constantly distinguish between bulk and non-bulk packagings. The differences in construction, handling techniques and inherent hazards associated with these markedly dissimilar categories of packaging, militates that a common regulatory approach will not adequately address the different circumstances surrounding these very distinct packagings.

*AC is the only international membership organization representing the entire hazardous materials transportation industry: shippers, carriers of all modes, inner manufacturers, and emergency response and waste clean-up companies.

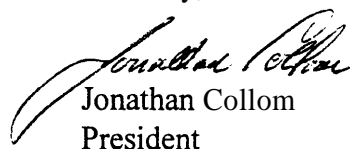
- We continue to believe that Intermediate Bulk Packagings (IBCs) and Specification 56, 57, 106A and 11 OA tanks should be treated in the same manner as non-bulk packagings for those reasons that were stated in our letter of September 21, 1995 (P- 1279).
- Even where other agencies' interests seem to be preeminent, DOT must maintain exclusive authority over the transportation container/packaging itself (specifications, markings and labeling).
- In those areas where the DOT interest is preeminent but DOT has not regulated in the past, we strongly encourage you to consult with other interested federal agencies before issuing additional regulations and, when appropriate, consider incorporating those regulations by reference into the HMR.
- Worker safety is an area where OSHA would have the preeminent interest except where DOT chooses to "exercise authority to prescribe or enforce standards and regulations affecting occupational safety or health." [29 USC 653 (b)(1)].
- It may be helpful to carefully distinguish by your terminology in this rulemaking between the placement/removal of hazardous materials in a bulk transportation container (i.e. loading and unloading) and the similar activity with respect to a non-bulk package (i.e. filling and emptying).

During the course of the public meeting and working groups facilitated by RSPA in this matter, DOT has raised several questions not contained in the published docket, including the incorporation of other agency regulations by reference into the HMR and the effect this would have on preemption. While HMAAC plans to address these issues in the future, we have limited this submission to the specific questions posed in the ANPRM. We therefore encourage RSPA to publish these and any other additional questions by supplemental notice in the Federal Register so that all interested parties might have the opportunity to respond to the same query.

Finally, our discussions have shown us that it is very difficult and nigh impossible to establish a bright line to mark where hazardous materials clearly enter or exit transportation in commerce. Therefore, we believe that the key to exercise of your jurisdiction needs to be grounded on the ~~intent of the shipper/signor and the consignee~~ helpful for you to refer back to our statement on the application of the HMR to the Commercial Life Cycle Continuum for Hazardous Materials in Transportation section of our September 21, 1995 letter as you approach this work.

We have attempted respond to your questions keeping the foregoing concepts clearly in mind as well as trying to minimize the effect, as far as possible, of the overlaps between agency jurisdiction. HMAAC has participated in all the public meetings you have held on this docket and remains committed to working with you to resolve these difficult but most important questions. Please do not hesitate to call upon me should you desire further information or seek assistance.

Sincerely,



Jonathan Collom
President

Enclosure

HM-223
Specific Questions & Answers

LOADING

**1. At what point is a package offered for “transportation in commerce”?
When filled? When a package is selected from inventory? When an offer (oral or
written) has been made to a carrier? When a shipping paper has been executed?
When the packaging is physically tendered to the carrier? At some other point?**

- **Non-bulk:** Except for application of DOT packaging selection, specifications, marking and filling requirements, these packages are not “in-transportation” until the actual loading into a transport vehicle commences.
- **Bulk:** Except for application of DOT specifications and marking requirements, these packages are not “in-transportation” until a hazardous material is placed in the transport vehicle/container.

2. (a) If the shipper is a private carrier, should any portion of the transportation, prior to movement onto a public road, be considered transportation in commerce?

There should be no difference in result based on the type of carrier involved. In all cases, where the movement is intended as a step in the eventual transport off-site, the activity should be considered “in-transportation ”.

(b) If the carrier is a contract or common carrier, should any movement on the shipper’s facility of a transport vehicle containing hazardous material be considered in transportation in commerce, including movement to an on-site storage facility?

Same response as in (a).

(c) Should public accessibility to the shipper’s facility have any bearing on whether in-plant movement is regulated?

No. Public access has no relevance to the jurisdictional issue. Transport packaging regulations--including communication requirements--should be adequate to protect all in the vicinity of the hazardous material, i.e. the public, workers and the environment and certainly those who come in casual contact with the package as a result of public access to the facility.

3. (a) Should the agency continue to regulate the loading of cargo tanks but not other bulk packagings (except where a function relates directly to safety during transportation away from the loading facility)?

No. All transport containers “in-transportation” should be subject to the application of the HMR. While the specific requirements might differ, the concept of regulatory inclusion/application needs to be consistent.

(b) Should regulation be limited to loading of cargo tanks or other bulk packaging only where contract or common carrier personnel are involved in the loading?

No. There is no valid reason to distinguish between the type of workers involved.

4. (a) Should the agency regulate the filling of non-bulk packagings beyond functions that directly relate to safety during transportation away from the filling facility?

Without further clarification, the question is too vague to appropriately respond.

(b) Should regulation be limited to the loading or filling of bulk or non-bulk packagings performed by contract or common carrier personnel only?

No. Again, as in the response to Question 3 (b), this is not a valid distinction.

5. Are there other factors for determining whether loading of hazardous materials is “incidental” to transportation in commerce?

No. The fact that the hazardous material is being placed into a transport vehicle is enough to invoke DOT jurisdiction.

UNLOADING

1. (a) Should RSPA continue to regulate rail tank car unloading by consignees?

Yes, this is an integral part of the shipping process. It is not just carrier activities that should concern RSPA, but any operation directly related to “in-transportation”.

(b) Should RSPA continue to regulate rail tank car unloading by consignees in light of OSHA’s comprehensive worker safety and health standards?

Yes. However, RSPA could decide that it wanted to refer to that agency if, in its opinion, OSHA possessed a greater expertise in that area. This could be done very effectively by incorporating by reference that agency’s regulations into the HMR.

(c) Should RSPA or FRA promulgate regulations for the protection of railroad workers while performing work assignments within plant boundaries?

Yes. Since rail carriers routinely conduct operations in their own switching yards that are highly similar, if not identical, to operations they conduct on plant sites, we would assume FRA already has adequate safety standards covering these operations. If, for some reason existing FRA standards are not adequate, we would expect FRA to issue whatever additional standards may be required.

(d) If RSPA continues to regulate rail tank car unloading by consignees, should RSPA only regulate to the extent that the unloading process is begun or, alternatively, completed, within a specified period of time (e.g. within two weeks of delivery to the consignee)? If so what time frame do you recommend?

No. Any specific time frame is essentially arbitrary.

2. Should RSPA regulate unloading for other than tank cars, of non-bulk or bulk packages when unloading does not involve a contract or common carrier?

Yes. RSPA should regulate the unloading of all transportation packagings. Furthermore, no distinction should be drawn between the type of workers involved.

3. Should public accessibility to a consignee's facility have any bearing on whether unloading is regulated?

No. Public access has no relevance to the jurisdictional issue. Transport packaging regulations--including communication requirements--should be adequate to protect all in the vicinity of the hazardous material, i.e. the public, workers and the environment and certainly those who come in casual contact with the package as a result of public access to the facility.

4. Since a private motor carrier may be both a carrier and consignee, at what point should transportation be considered complete for that carrier? (e.g. When a transport vehicle is delivered to the carrier's facility? When it is unloaded?)

The determination of when a hazardous materials package is no longer "in-transportation" is not contingent upon the status of a company as a carrier or a consignee; rather, this occurs only when unloading of the transport vehicle is complete (which in the case of a bulk container is when it is cleaned and purged) or when the transport vehicle becomes a storage container or its contents are directly put into use in a process. (The latter two being questions of fact/intent).

5. Are there other factors for determining whether unloading of hazardous materials is “incidental” to transportation in commerce?

No. The fact that the hazardous material is being removed from a transport vehicle is enough to invoke DOT jurisdiction.

STORAGE

1. Should the storage of a hazardous material on leased track, by any person, be regulated under the HMR? Why or why not?

Since DOT has regulatory responsibility for leased track located outside the plant site as well as the technical expertise for operations that occur on these tracks, concerns related to storage on such leased track would similarly be a DOT responsibility. Even to the extent that DOT has not regulated activities related to storage on such leased track in the past, it has not thereby been divested of its authority to do so.

2. Should the HMR continue to apply only to storage that may occur between the time a hazardous materials shipment is offered for transportation to a common, contract or private carrier and the time the shipment reaches its intended destination and is accepted by the consignee?

No. If the hazardous materials shipment is intended to be transported in commerce, then any storage is appropriately subject to the HMR. The continuum of application goes from the start of loading of the hazardous material into the transportation container, through unloading at the consignee site.

3. Should RSPA regulate only those hazardous materials shipments that are stored while under “active” shipping papers? If so, how should RSPA define “active” shipping papers?

This is an inappropriate term coined by a non-transportation agency and is not relevant to the question of materials being in commerce. Shipping papers are a consequence of hazardous materials being in commerce, they are not a precursor or a condition precedent/determinant to this finding.

4. Are there other factors for determining whether storage of hazardous materials is “incidental” to transportation in commerce?

No.

HANDLING

1. Which transportation-related activities should be included under the term “handling”?

All activities, including loading and unloading operations, conducted by a hazmat employee are deemed to be handling.

2. Which transportation-related activities, if any, should be excluded from the list of activities that constitute “handling”?

See foregoing response.

3. Are there any factors for determining when a hazardous materials transportation activity is “handling” within the meaning of Federal hazmat law and, therefore, regulated under the HMR?

See foregoing response.