

ORIGINAL

6 2 1 5 4

HM-223 Working Group

DEPT. OF TRANSPORTATION

AUG 25 PM 1:23

August 25, 1999

- American Petroleum Institute*
- American Trucking Associations, Inc.*
- Association of Waste Hazardous Materials Transporters*
- Compressed Gas Association*
- The Chlorine Institute, Inc.*
- Chemical Manufacturers Association*
- Committee on Radionuclides and Radiopharmaceuticals*
- The Fertilizer Institute*
- Hazardous Materials Advisory Council*
- Institute of Makers of Explosives*
- National Association of Chemical Distributors*
- National Association of Chemical Recyclers*
- National Paint & Coatings Association*
- National Private Truck Council*
- National Tank Truck Carriers, Inc.*
- Nuclear Energy Institute*
- Petroleum Marketers Association of America*
- Reusable Industrial Packaging Association*
- Steel Shipping Container Institute*
- The Sulphur Institute*
- Vessel Operators Hazardous Materials Association*

Docket Clerk  
 U.S. Department of Transportation  
 Research and Special Programs Administration  
 Room PL 401  
 400 Seventh Street, SW  
 Washington, DC 20590-0001

RE: Docket RSPA-99-4952 (HM-223)-135  
 Applicability of the Hazardous Materials Regulations to  
 Loading, Unloading, and Storage

Dear Sir or Madam:

Please find enclosed three copies of the written comments of the HM-223 Working Group regarding the Research and Special Programs Administration docket referenced above.

Please date-stamp one copy of the comments and return it to Meredith Grider, CMA, at the address listed above. If you need additional information or clarification, please contact Ms. Grider at (703) 741-5256.

Sincerely,

*Meredith Grider*      *Cynthia Hilton*      *Paul Rankin*  
 Meredith Grider      Cynthia Hilton      Paul Rankin  
 Co-Facilitator      Co-Facilitator      Co-Facilitator

Enclosures

BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION  
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

---

DOCKET No. RSPA-99-4952 (HM-223)

APPLICABILITY OF THE HAZARDOUS MATERIALS REGULATIONS TO LOADING,  
UNLOADING, AND STORAGE

---

COMMENTS OF:

AMERICAN PETROLEUM INSTITUTE  
AMERICAN TRUCKING ASSOCIATIONS  
ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS  
COMPRESSED GAS ASSOCIATION  
THE CHLORINE INSTITUTE, INC.  
CHEMICAL MANUFACTURERS ASSOCIATION  
COMMITTEE ON RADIONUCLIDES AND RADIOPHARMACEUTICALS  
THE FERTILIZER INSTITUTE  
HAZARDOUS MATERIALS ADVISORY COUNCIL  
INSTITUTE OF MAKERS OF EXPLOSIVES  
NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS  
NATIONAL ASSOCIATION OF CHEMICAL RECYCLERS  
NATIONAL PAINT AND COATINGS ASSOCIATION  
NATIONAL PRIVATE TRUCK COUNCIL  
NATIONAL TANK TRUCK CARRIERS, INC.  
NUCLEAR ENERGY INSTITUTE  
PETROLEUM MARKETERS ASSOCIATION OF AMERICA  
REUSABLE INDUSTRIAL PACKAGING ASSOCIATION  
STEEL SHIPPING CONTAINER INSTITUTE  
THE SULPHUR INSTITUTE  
VESSEL OPERATORS HAZARDOUS MATERIALS ASSOCIATION

WEDNESDAY, AUGUST 25, 1999

---

## INTRODUCTION

### **The MM-223 Working Group is a Broad Group of Associations**

The association(s) listed above (hereafter referred to as “HM-223 Working Group”) appreciate the opportunity to make these comments regarding the US Department of Transportation’s (DOT) Research and Special Programs Administration (RSPA) Docket HM-223, titled “Applicability of the Hazardous Materials Regulations (HMR) to Loading, Unloading, and Storage.” The HM-223 Working Group represents a large portion of the hazardous materials transportation industry which has a significant interest in this supplemental advanced notice of proposed rulemaking (SANPRM).

Each of the associations in the HM-223 Working Group reiterate their support for comments they have previously filed in the docket. To avoid having to be repetitive in these comments, the HM-223 Working Group requests that DOT also review all previous comments of an association when discerning that association’s positions in this docket.

These associations also support the statement of the HM-223 Working Group, which was filed with DOT for the docket on May 14, 1999. That statement represents the general philosophy of how the hazardous materials transportation industry views the appropriate application of DOT’s jurisdiction to the transportation of hazardous materials. The industry is united in its belief that DOT should maintain its jurisdiction over the transportation of hazardous materials, including the loading, unloading and storage incidental to transportation of those materials. DOT is the agency to regulate the transportation-related aspects of loading, unloading, and storage. It is critical that DOT maintain and exercise, when necessary, its jurisdiction because DOT is the only agency with Federal preemption authority over state and local regulations. Without Federal preemption, shippers and carriers would be required to comply with a myriad of different and often conflicting state and local regulations that would substantially burden the free flow of goods in intrastate, interstate, and foreign commerce, and cause potentially conflicting and confusing regulatory schemes.

### **The Law is Clear**

Each Federal agency’s jurisdiction is determined based upon the intent of Congress when it passes statutes for that agency to implement. It seems to be unusual for a Federal agency to seek input from the general public about what its jurisdiction should be – particularly when the law is so clear. In this case, DOT’s jurisdiction is determined by the Hazardous Materials Transportation Act (HMTA). In that law, “transportation” is defined as “the movement of property and loading, unloading, and storage incidental to the movement,” (49 USC §5 102( 12)). *The law makes abundantly clear that DOT’s jurisdiction applies to loading, unloading, and storage incidental to transportation activities.* The Secretary of Transportation has an obligation to prescribe regulations to address these activities. It is not necessary for DOT to seek input from the public about the application of the HMR to loading, unloading, and storage incidental to transportation activities. Under HMTA, DOT must examine each specific activity that it may regulate, *including loading, unloading, and storage incidental to transportation activities*, and make a judgment on whether it is appropriate for the agency to exert its jurisdiction and regulate that activity.

### **Overlapping Jurisdiction Exists**

While the main thrust of our comments is DOT’s jurisdiction over the transportation of hazardous materials, the HM-223 Working Group also recognizes that some Federal laws allow for jurisdictional overlap among DOT and other Federal, state, and local agencies. The HMR

provide for a national, uniform system of regulation governing hazardous materials transportation. DOT *must* regulate the transportation-related aspects of loading, unloading, and storage incidental to transportation activities to ensure that one Federal standard is applied to hazardous materials transportation. DOT's regulation does not preclude other regulatory bodies from regulating those activities that are not within the **ambit** of the HMTA or do not interfere with the transportation of hazardous materials transportation in intrastate, interstate, or foreign commerce.

### **DOT's Jurisdiction is Broad**

The HM-223 Working Group commends RSPA for acknowledging in the SANPRM that there is agreement among commenters to the docket that elimination of regulatory overlaps would eliminate “potentially inconsistent and unnecessary regulation and would promote more efficient and effective compliance with and enforcement of safety standards.” (64 FR 227 18) On the same page, RSPA also acknowledges that parties agree there are certain activities that should be subject to the HMR, such as classification, packaging, marking, labeling, placarding, etc.

Where there is confusion is in the application of DOT's jurisdiction. The HM-223 Working Group believes that the SANPRM is flawed in that it is premised on proposing “to draw boundaries for HMR applicability by answering two critical questions: ‘When does transportation begin?’ and ‘When does transportation end?’” (64 FR 22718) The HM-223 Working Group does not agree

*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.* (64 FR 227 19)

The problem with this premise is that it suggests that physical movement is the determinant factor in DOT's jurisdiction. “Transportation,” by its definition, encompasses more than physical movement. We have already stated that the statutory definition of “transportation” in HMTA precludes DOT's jurisdiction being limited to the time of physical movement.

The legislative grant of jurisdictional authority to DOT with respect to hazardous materials is very broad. The agency may not, as a result of this rulemaking, carve out a more restrictive view through its own volition and interpretation. For example, RSPA states in the SANPRM the following:

*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.* (64 FR 227 19)

RSPA should examine DOT's jurisdiction as it overlaps with other Federal/state/local agencies any time it is considering exercising that jurisdiction. The HM-223 Working Group believes that consultation among affected agencies should occur any time an activity is considered for regulation that may impact the jurisdiction of another agency. But to make a statement implying that RSPA would distinguish among activities for regulation only because they may or may not pose a public safety risk is surprising. Of course RSPA regulations are in place to ensure public safety. But they also serve the purpose of ensuring *efficient* transportation, or the free flow of goods in intrastate, interstate, and foreign commerce. It would be inappropriate for RSPA to self-select those activities for it to regulate and those for other agencies to regulate. Inevitably there

will be a scenario in the future where RSPA may be called upon to regulate an aspect of hazardous materials transportation but because (as an example) the agency had determined in this docket that the activity in question “did not pose a public safety risk,” it would not be able to regulate. RSPA must continue to evaluate each specific activity proposed for regulation and determine then whether it is appropriate for the agency to regulate. RSPA may not limit the future application of DOT’s jurisdiction as a result of this rulemaking. That is not what Congress intended when it passed the HMTA and gave DOT this broad authority.

Furthermore, it appears that RSPA views the applicability of its jurisdiction on consignor/consignee sites as less clear than the application on transportation-related (e.g., carrier) sites. However, consignors are offerors of hazardous materials and consignees are the receivers. The HMR clearly apply to these facilities and the activities performed on them. In fact, in the HMR, Appendix A to Subpart D of Part 107, the guidelines for civil penalties are a list of frequently cited violations of the HMR. Many of them are applicable to consignors/consignees, including, for example, shipping paper violations and training requirements. The HM-223 Working Group believes that RSPA should view DOT’s jurisdiction as applying equally to all sites because transportation activities occur not only on carrier sites but also on consignor and consignee sites. RSPA should determine DOT’s jurisdiction based on any activities that occur during the normal course of transportation as set forth in the HMTA, regardless of the type of site where the activity is being performed.

In addition, any person has the right to petition DOT to conduct a rulemaking to determine whether an activity should be regulated (see 49 CFR Part 106). If any person, whether that person is an individual or regulatory body, believes that an activity should be regulated and that activity is transportation-related, the HM-223 Working Group encourages the person to petition DOT.

### **The HM-223 Working Group Supports Option A, Offeror (Shipper) Intent**

Although the HM-223 Working Group disagrees with the restrictive approach RSPA took in the SANPRM by basing jurisdiction on answering the questions “When does transportation begin?” and “When does transportation end?,” we will respond to all three approaches described in the SANPRM.

- The HM-223 Working Group supports option A, Offeror (Shipper) Intent. This support is described in comments currently on file in the docket, one dated November 30, 1996, and the other dated June 17, 1997.
- The HM-223 Working Group does not support option B, Carrier Custody and Control, or option C, Movement on Public Rights-of-Way as stand-alone determinants of DOT’s jurisdiction. The HM-223 Working Group believes that the approaches described in options B and C are encompassed in Option A.

It is clear that DOT’s jurisdiction applies when the hazardous material is in the custody and control of the carrier and when it is moving along a public right-of-way. However, if RSPA were to choose either option B or C as the method for determining how to apply DOT’s jurisdiction, it will not be able to issue national uniform standards for hazardous materials transportation. Under options B and C, once the hazardous material is *not* in the custody and control of the carrier or is *not* moving along a public right-of-way, that hazardous material and the package in which it is being transported may be subject to a multitude of differing state and local regulations that could interfere with intrastate, interstate, and foreign commerce. DOT’s Federal preemption authority would no longer apply and the free flow of goods in commerce would be threatened. Adoption of option B or C as a regulatory philosophy would eliminate, or

at least severely restrict, RSPA's authority to regulate offerors. Regulatory authority for classification, packaging selection, marking and labeling, filling and outage limits etc could arguably only be enforced against carrier acceptance personnel. Such an approach would also contravene clear Congressional intent that DOT regulate the loading, unloading, and incidental storage of a hazardous material, regardless of who controls it and where it is moving. Furthermore, under such an approach, RSPA would be abdicating its statutory authority.

The following is the HM-223 Working Group's responses to the questions in sections A, B, and C. The HM-223 Working Group answered the questions in sections B and C only to illustrate why these options are inappropriate for determining DOT's jurisdiction. Answering the questions in sections B and C should not be viewed as support for those options.

## RESPONSES TO QUESTIONS

### *A. Offeror (shipper) intent*

#### *A I. Applicability*

**AI(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?**

To answer this question, the HM-223 Working Group must restate the position filed in comments by the "Alliance" dated November 30, 1996:

A shipper's intent to ship a DOT-authorized container establishes whether that container falls under DOT or other agency jurisdiction. Consistent with established law, the critical factor in determining whether a particular shipping container is being stored incidental to transportation is the intent of the person or persons shipping and/or receiving the container. While subjective intent is the critical factor under the law, it can be examined by reliance upon objective facts. Thus, in order to facilitate a determination of intent, we suggest that the following rebuttable presumptions may be relied upon in the absence of other controlling facts:

When a material is loaded into the bulk container or, in the case of non-bulk shipments in the transport vehicle, in which the material will be shipped, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the container/vehicle must be presumed incidental to transportation. Other facts, e.g., the shipper's demonstrated intent or past practices with respect to the container/vehicle, may rebut the presumption that it is in transportation. If the container/vehicle is not suitable for transportation under the Hazardous Materials Regulations, or if the material in the container/vehicle is reloaded into a fixed storage container or is returned to the manufacturing process', it is not considered to be stored incidental to transportation.

---

<sup>1</sup> In the event of an overfilled container, the HM-223 Working Group reminds DOT that some material will have to be partially unloaded (e.g., returned to the manufacturing process) in order to meet the filling limit requirement, which would be subject to DOT regulation.

Classification of the material, selection of the packaging, preparation of the package (including marking, labeling, etc.), and preparation of the shipping papers are also indicators of a shipper's intent to place that package into transportation. RSPA should also refer to the rail and highway transportation scenarios filed by the "Alliance" in comments dated June 17, 1997, for further elaboration on the types of pre and post "in-transportation" activities that also indicate a shipper's intent.

Furthermore, the terms "in transportation" and "transportation in commerce" imply that the goods are actively moving, yet clearly the HMTA by its very terms is not so limited. The real issue is whether or not the HMR are applicable to hazardous materials themselves or actions taken to support the safe movement of those materials. The HMR unquestionably apply to the preparatory activities of classification, training and selection of packagings. Then, once the container is selected, the HMR requirements apply from the time filling (loading) of the container begins and the marks and labels (or placards) are applied through the unloading of the package at the customer destination. This would not preclude other agencies from establishing appropriate regulations for worker or public safety (e.g. stacking height for pallets, loading rack fall protection, fire protection systems and their function) or environmental protection. Nevertheless, the HMR would preempt any other regulations which conflict with the functions reserved exclusively to the HMR by the statute.

**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.**

Packages on consignor sites containing hazardous materials that are intended for transportation are in compliance with the HMR to the extent possible (e.g., the material is properly classified and the appropriate package is selected, marked, labeled and/or placarded). The only HMR requirement that will not be evident is the absence of the shipping paper, which is impossible to complete until the customer is identified and the destination of the shipment is known. Packages that are stored incidental to transportation do not preclude other regulatory bodies from also regulating in their appropriate fields, such as building and fire codes applying to the warehouse where non-bulk packages intended for transportation are being stored.

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

Yes – see answers to A1(i and ii).

**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?**

Yes – see answer to A1(ii).

**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.**

Refer to "Alliance" comments dated June 17, 1997. Additional (not primary or sole) indicators are designation and classification of the hazardous material; marking; labeling; placarding; training; shipping papers; loading; filling; securement; etc.

**A1(vi). Are there any Federal or state agency precedents for applying regulations according to intent-based criteria? If so, please provide specific examples.**

Intent is an element of many legal and regulatory standards. A few examples of intent as an element of regulations administered by DOT include:

“A person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to part 29 of this title if it has been determined by a court or Federal agency that the person **intentionally** --

(a) Affixed a label bearing a “Made in America” inscription, or an inscription with the same meaning, to a product not made in the United States, but sold in or shipped to the United States and used in projects to which this section applies, or

(b) Otherwise represented that any such product was produced in the United States.” [49 CFR 661.181

An air carrier or an officer, agent, or employee of an air carrier shall be **fin**ed under title **18** for **intentionally** -

(1) failing to make a report or keep a record under this part;

(2) falsifying, mutilating, or altering a report or record

under this part; or

(3) filing a false report or record under this part. [49 USC 463 10(a)]

The Secretary may -

(A) amend, modify, or suspend any part of a certificate if the Secretary **finds** the public convenience and necessity require amendment, modification, or suspension; and

(B) revoke any part of a certificate if the Secretary **finds** that the holder of the certificate **intentionally** does not comply with this chapter, sections 4130-41310(a), 41501, 41503, 41504, 41506, 41510, 41511, 41701, 41702, 41705-41709, 41711, 41712, and 41731-41742, chapter 419, subchapter II of chapter 42 1, and

section 4630 1 (b) of this title, a regulation or order of the Secretary under any of those provisions, or a term of its certificate. [49 USC 4 111 O(a)(2)]

The Interstate Commerce Commission (now Surface Transportation Board) has historically used “intent” to determine the nature of a shipment as either interstate or intrastate. There are any number of cases that could be quoted, but they are based on “initial, persistent intent.” [Rush, 17 MCC 661; Crude Talc, 44 MCC 714; Transway, Inc., 5 1 MCC 263]

Another concept that is related to “intent” is “acting knowingly.” RSPA has defined “acting knowingly” in the HMRs (see 49 CFR 107.3).

**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?**

These two questions are confusing in that the first references a “DOT specification package containing a hazardous material” and the second does not mention the words “DOT

specification” or “hazardous material.” One must assume that enforcement actions would address DOT specification packages, including those containing hazardous materials. In addition, DOT has authority over undeclared hazardous materials.

Enforcement should occur if a company claims that a package containing hazardous material is intended for shipment but does not conform to the HMR requirements. Packages go through various stages of preparation for transportation, including marking, labeling, placarding, filling, loading, preparation of shipping papers, etc. If a company demonstrates intent to ship through these actions, RSPA should consider an enforcement action whenever, in accordance with its internal policy guidelines, there is a clear violation of the HMR.

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

When the inspector’s observation and judgment make the conclusion that there is objective evidence of intent to ship the package.

*A2. Loading and unloading*

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

DOT has the jurisdictional authority to regulate loading and unloading of non-bulk packages to and from a transport vehicle. HMTA defines transportation as “the movement of property and loading, unloading, and storage incidental to the movement,” (49 USC 5 102( 12)). Parts 174, 175 and 177 already contain many requirements for loading and unloading non-bulk packages to and from transport vehicles. If RSPA determines that additional regulations are necessary, appropriate rulemaking procedures should be initiated.

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

DOT has responsibility for loading and unloading regardless of the type of package that is being used for transportation. Each type of package is different and RSPA should determine whether varying loading or unloading regulations are necessary for different packages.

**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?**

Yes. The connection of motive power to the cargo tank is not relevant to regulation under the HMR. The HMR should cover the unloading of a hazardous material from a cargo tank regardless of whether the motive power is attached, unless there is no intent to use that cargo tank for transportation. Motive power, by itself, is not an indicator of transportation.

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

DOT has the jurisdictional authority to regulate the unloading of cargo tanks or tank cars into manufacturing processes. HMTA defines transportation as “the movement of property and loading, unloading, and storage incidental to the movement,” (49 USC 5 102( 12)). If RSPA determines that regulation is necessary, then it should regulate unloading (as it affects transportation) of cargo tanks and tank cars regardless of whether the material is being unloaded into the manufacturing process. However, just because DOT’s jurisdiction covers loading,

unloading, and storage incidental to transportation activities, it does not preclude other Federal/state/local agencies from regulating those activities that are not within the ambit of HMTA or do not interfere with the transportation of hazardous materials in intrastate, interstate, or foreign commerce (e.g., Process Safety Management regulations). Again, however, the HM-223 Working Group urges RSPA to work with other Federal regulatory agencies when concurrent jurisdiction is exercised to avoid inconsistent regulations.<sup>2</sup>

**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?**

Yes. Residue amounts may still pose dangers to the public, employees or the environment. It should continue to meet current HMR requirements.

*A3. Storage*

**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?**

Yes, though the word “solely” should not be included in this question. Here is a restatement of the position filed by the “Alliance” in November 1996:

When a container/vehicle arrives at a consignee’s facility, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that the container/vehicle is delivered for unloading in the ordinary course of business. Thus, a presumption exists that the container/vehicle remains in transportation and storage is incidental to transportation until the container/vehicle is unloaded. As with other presumptions, facts may rebut the presumption.

Storage incidental to transportation includes storage of a loaded container at consignor and consignee sites, and transportation-related facilities such as intermodal transfer facilities, rail yards, etc.

**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?**

See response to A1 (ii). To elaborate, storage of non-bulk packages in warehouses on the plant site are subject to applicable fire and building code standards, OSHA and EPA requirements, and applicable state and local requirements (though clearly the package itself would remain subject to the HMR). Operational standards for use of mechanical package handling equipment should be prescribed by agencies other than DOT, though those agencies should consult with DOT when developing those standards. Workers who handle packages after filling on the chemical plant site are subject primarily to OSHA worker safety standards, but also to DOT standards, such as training requirements and attendance requirements. DOT should not relinquish its ability to “exercise authority to prescribe or enforce standards and regulations affecting occupational safety and health” (29 USC 653(b)(1)), when it is appropriate to exercise that authority. When

---

<sup>2</sup> The Compressed Gas Association believes that the unloading of cargo tanks and tank cars into a manufacturing process should not be subject to DOT’s jurisdiction.

appropriate, RSPA can incorporate standards of other agencies into the HMR. Moreover, it is essential that other agencies that have overlapping jurisdiction should consult with DOT and should not issue regulations that conflict with the HMTA when exercising their own jurisdiction.

**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?**

No – refer to “Alliance” comments dated June 1997. Any time limit is an arbitrary assignment. An arbitrary time limit could increase the risk of a hazardous material incident because it would force extra handling of hazardous materials. For instance, under a 90 day timeline, shippers using a rail car to store material temporarily, incidental to transportation, would be forced to transfer material to another temporary storage container, or to modify the rail car so that it complied with non-transportation Federal, state, and local regulations, if that car was not shipped within 90 days. Such action could, and likely would, increase the risk of environmental harm and worker exposure.

It is inappropriate for RSPA (or any other agency) to prescribe a time limit for storage incidental to transportation as it is the reason for the standstill and not the duration that determines whether the storage is incidental to transportation or 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?**

No – see response to the second A3(ii).

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

See response to A1(ii).

**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?**

See response to first A3(ii).

**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?**

Yes, there is a distinction between the two situations presented in this question. The throughbilled hazardous materials are in storage incidental to transportation. Throughbilling objectively indicates the consignor’s intent to ship those hazardous materials through the warehouse and on to customers. In contrast, the hazardous materials held by the wholesaler have reached their initial destination, as their consignor intended. The intent of the wholesaler, in turn, will determine whether those hazardous materials are in transportation.

**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?**

No – see response to the first A3(ii).

**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?**

Yes. Packages containing a residue should remain subject to current HMR requirements (see 49 CFR 173.29).

*A4. Regulation by other federal/state/local agencies*

**A4(i). Should hazardous materials shipments held in storage that is subject to regulation under the HMR be exempted 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?**

No. However, DOT must maintain its jurisdiction over transportation (including loading, unloading, and storage incidental to the movement) and regulate those transportation activities when regulation is needed. Other agency regulation should not conflict with the purposes of HMTA to ensure the safe and efficient transportation of hazardous materials, and should not interfere with intrastate, interstate, or foreign commerce.<sup>3</sup>

**A4(ii). Should shipments held in storage be exempted from community right-to-know and risk management laws? Should shipments held in storage be exempted 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?**

See answer to A4(i).

**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?**

See response to A4(i). State/local public safety agencies have a role in regulating storage facilities but such state and local regulations are also subject to DOT preemption authority. State/local regulations may not interfere with intrastate, interstate, or foreign commerce. HMTA, in conjunction with other laws governing community emergency preparedness such as SARA Title III, assist state/local governments in preparing 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?**

Storage incidental to transportation is different from storage generally in that transportation has not been completed. The material is either awaiting shipment or is waiting for unloading from DOT-authorized containers. DOT-authorized containers are designed to withstand the rigors of

---

<sup>3</sup> Nevertheless, DOT's jurisdiction unquestionably applies to the transport of hazardous materials by air, water, road, or rail, on, across, or along public roads, rail rights-of-way, the sky or the sea, including the loading, unloading, or storage incidental to the movement of these materials at mid-transportation facilities such as rail yards and freight terminals when the materials are in a carrier's care, custody, and control. See for example, IR-28, 55 FR 8884-94 (March 8, 1990); PD-8(R)-11, 60 FR 8774 at 8778 (February 15, 1995); PD-12(R), 62 FR 15970 at 15971 & 15972 (April 8, 1997); and, PD-14(R), 63 FR 67506, 67507 (December 7, 1998).

transportation and are designed to contain material in the event of an incident; thus, it should be presumed that the risk of exposure to material contained in a DOT-authorized container is reduced.

#### *A5. Preemption*

**A5(i). 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 a RSPA regulation preclude state or local regulation of an activity?**

Except as may be provided in the HMR, state and local regulations should not apply to transportation of hazardous materials in intrastate, interstate, or foreign commerce if the effect of those regulations would violate the established preemption tests in the HMTA, 49 USC 5 125. The absence of a RSPA regulation does not preclude state or local regulation, but it does not invite it either. DOT should issue Federal regulations to govern hazardous materials transportation when regulation is needed. Refer also to “Alliance” comments dated November 1996.

#### *Ad. Rail storage on leased tracks*

**A6(i). 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?**

Yes. Materials stored incidental to transportation on leased track should be regulated to the same degree as when the shipment is being physically moved by the rail carrier because those hazardous **materials** clearly have not yet reached their intended destination nor have they been unloaded, so DOT’s jurisdiction still applies. The HM-223 Working Group refers to the Alliance answer to the leased track question in the 1996 ANPRM on Docket HM-223:

The Alliance believes that RSPA should not distinguish between varying types of rail track. In fact, the Alliance asserts that a critical area of DOT’s preeminent authority is rail tracks and primary regulatory responsibility concerning rail tracks should be addressed by DOT. DOT is the only agency with expertise to address issues regarding rail tracks, whether it is leased track or not. A shipper’s intent to ship a rail car establishes whether that car falls under DOT or other agency’s jurisdiction. When a material is loaded into a rail car in which the material will be shipped, and the material remains in that rail car, and that rail car is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the rail car must be presumed incidental to transportation, whether it is on leased track or not.

Again, just because DOT’s jurisdiction and regulations apply in this scenario other regulatory agencies are not excluded from exerting their authority also, assuming that they have the jurisdiction and that the exercise of that jurisdiction does not interfere with intrastate, interstate, or foreign commerce. Furthermore, chemical plant sites frequently interact with their local fire departments to ensure that communities are prepared in the event of an incident and that the fire department is prepared to respond. This includes preparing for responses to potential incidents on leased track.

***B - Carrier Custody and Control, and C - Movement on Public Rights-of-Way***

RSPA is reminded of the HM-223 Working Group's statement regarding Options B and C stated in the introduction to these comments:

It is clear that DOT's jurisdiction applies when the hazardous material is in the custody and control of the carrier and when it is moving along a public right-of-way. However, if RSPA were to choose either option B or C as the method for determining how to apply its jurisdiction, it will not be able to issue national uniform standards for hazardous materials transportation. Under options B and C, once the hazardous material is *not* in the custody and control of the carrier or is *not* moving along a public right-of-way, that hazardous material and the package in which it is being transported may be subject to a multitude of differing state and local regulations that could interfere with intrastate, interstate, and foreign commerce. DOT's Federal preemption authority would no longer apply and the free flow of goods in commerce would be threatened. The legally improper adoption of option B or C as a regulatory philosophy would eliminate, or at least severely restrict, RSPA's authority to regulate offerors. Regulatory authority for classification, packaging selection, marking and labeling, filling and outage limits etc could arguably only be enforced against carrier acceptance personnel. Such an approach would also contravene clear Congressional intent that DOT regulate the loading, unloading, and incidental storage of a hazardous material, regardless of who controls it and where it is moving. Furthermore, under such an approach, RSPA would be abdicating its statutory authority.

The HM-223 Working Group elaborates on the problems with these proposals in the answers to the following questions. Answering the questions in these sections should not be viewed as support for those options.

***B1. Applicability of the HMR***

**BI(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?**

Transportation is defined in the HMTA to include loading, unloading, and storage. By this statutory definition, transportation has already begun when a carrier accepts and assumes control of a package. Distinctions should not be made between private and common carriers, as the function of the activity is the same whether private or common. For these reasons, RSPA should not attempt to identify criteria 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?**

See the response to B 1 (i). It is unnecessary to determine the point of acceptance since application of the HMR begins well before this point. Nevertheless, there should be no distinction drawn based on whether the carrier is "private" or "for hire".

*B2. Loading and unloading by carriers*

**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?**

No, see response to B 1 (i). Loading and unloading is the same regardless of the type of company performing the activity.

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

No. Each is subject to the same training requirements. See response to B1(i).

*B3. Loading and unloading by shippers or consignees*

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

Nothing. There is no valid reason to distinguish between the same functions performed by either the carrier or the shipper or consignees. The functions performed are the same and there should be no difference in what regulations are applicable.

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

No. See response to B3(i).

*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?**

Bulk and non-bulk loading and unloading requirements may be different but may or may not be more or less stringent. Many factors should be considered when developing these requirements, including the degree of the risk of the activity, such as the hazard of the material.

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

Yes, the same risks apply regardless of whether a shipper, carrier, etc., is performing the activity. There is no valid reason to distinguish between the same functions performed by either the carrier or the shipper or consignees. The functions performed are the same and there should be no difference in what regulations are applicable.

*B5. Loading and unloading at publicly accessible facilities*

**B5. 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?**

The regulations should address those actions required to make the transfer operation (i.e. loading or unloading) safe notwithstanding venue. However, in locations where there is public access

some ancillary requirements (e.g. increased attendance, emergency shut-off procedures) may be appropriate since these sites are not as controlled or engineered for spillage if a release occurs.

#### *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?**

Yes, since unloading is a hazmat activity by statute, the individual performing it is, by definition, a hazmat employee so the HMR apply. Both agencies should regulate – RSPA should regulate worker safety if the regulation is one that could interfere with the free flow of goods in commerce. DOT should not relinquish its ability to “exercise authority to prescribe or enforce standards and regulations affecting occupational safety and health” (29 USC 653(b)(1)), when it is appropriate to exercise that authority.

**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?**

One must assess whether current HMR requirements are adequate to protect the transportation worker. If deemed insufficient, then OSHA regulations could be incorporated into the HMR by reference.

**B7. 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?**

Yes. See response to A2(v).

#### *C1. Applicability of the HMR*

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

Objective criteria are not needed, as it is fairly obvious when a transportation package is moving along a public right-of-way. Movement along a public right-of-way is one criterion of many for determining when DOT's jurisdiction is applicable. However, a public right of way could be determined by legal definition, e.g. governmental title to the underlying property, right of access through easement, et al.).

#### *C2. Movements on public rights-of-way*

**C2. 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?**

The HMR should apply to transportation of hazardous materials in commerce on public and private rights-of-way. No distinction is necessary as each is logically subject to the HMR.

*C3. Operations adjacent to public rights-of-way*

**C3. If the HMR apply only to movements 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?**

As stated in our responses to Section A questions, we believe that the clear words of the HMTA bring these loading, unloading and storage operations squarely within the **ambit** of the HMR.

*C4. Unloading*

**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?”**

RSPA should be consistent in its application of the HMR. The HMR should apply to transportation of hazardous materials in commerce regardless of whether that is taking place on a public or private right-of-way, including “beyond the bounds of public rights-of-way.” HMTA is very clear that unloading requirements are subject to DOT’s jurisdiction.

**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?**

No “default provision” is necessary. The HMR specify the regulatory requirements with respect to the five covered subjects in 49 CFR 107.202(a) and any rule promulgated by a state, local jurisdiction, or Indian tribe must be “substantively the same” as the HMR, as defined in 49 CFR 107.202(d). Other non-federal regulations affecting hazardous materials are preempted in accordance with the provisions of 49 CFR 107.202(b). The **HM-223** Working Group supports the HMR and does not believe that “default provisions” should be added to the HMR.