

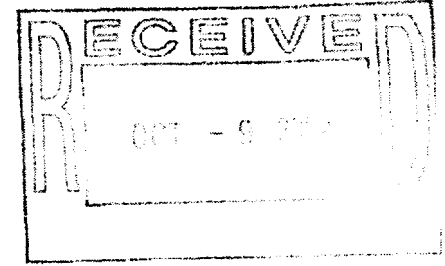
RSPA-98-4952-424



U.S. Department of Transportation
Research and Special Programs Administration

The Administrator
OCT 3 2002

400 Seventh Street, S W
Washington, D C 2059C



Mr. Michael Morrissette
Vice President
Dangerous Goods Advisory Council
1101 Vermont Avenue, NW
Washington, DC 20005

Dear Mr. Morrissette:

Thank you for your recent letter concerning the Research and Special Programs Administration's (RSPA) ongoing rulemaking to clarify the applicability of the Hazardous Materials Regulations (HMR) to specific functions and activities. I appreciate your offer to assist us in developing a final rule.

As you know, we initiated this rulemaking, known as HM-223, to better define the applicability of the HMR to loading, unloading, and storage operations at fixed facilities and to clarify relationships among Federal, state, local, and tribal agencies involved in the regulation of hazardous materials. We published a notice of proposed rulemaking (NPRM) on June 14, 2001. In the NPRM, we proposed to list in the HMR pre-transportation and transportation functions to which the HMR apply. Pre-transportation functions are functions performed to prepare hazardous materials for movement in commerce by persons who offer a hazardous material for transportation or cause a hazardous material to be transported. Transportation functions are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading, and storage of hazardous materials that is incidental to their movement. We further proposed to clarify that "transportation in commerce," for purposes of applicability of the HMR, begins when a carrier takes possession of a hazardous material and continues until the carrier delivers the package containing the hazardous material to its destination, as indicated on shipping documentation.

For the most part, the HM-223 NPRM proposed to codify in the HMR long-standing policies and interpretations concerning the applicability of the regulations to specific operations. The NPRM did not propose to terminate the applicability of the HMR to the loading and unloading of hazardous materials. Rather, the NPRM proposed to clarify loading and unloading operations that are subject to the HMR and loading and unloading operations that are subject to the regulations of other Federal agencies, such as the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). Thus, the NPRM did not include comprehensive safety standards and requirements for hazardous materials loading

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and unloading operations. We never intended this rulemaking to be a vehicle for establishing such requirements. The HMR currently include regulations for loading and unloading operations and for training persons who perform loading and unloading operations subject to HMR requirements.

You suggest that we apply new or existing consensus standards to address hazardous materials operations at transportation-related facilities. We are very much in favor of incorporating industry consensus standards into the HMR when such incorporation is appropriate. Indeed, the HMR currently incorporate over 100 consensus standards that have been developed by both domestic and international standards-setting organizations. However, a consensus standard is not appropriate for addressing the applicability questions that are at issue in the HM-223 rulemaking. We are not developing specific regulatory requirements in HM-223. Rather, we are clarifying functions to which the existing regulatory requirements apply.

As an alternative to consensus standards, you suggest that we initiate a negotiated rulemaking to develop standards for operations at transportation-related facilities. A negotiated rulemaking can be a successful method for developing standards under certain circumstances. However, a decision to utilize a negotiated rulemaking should be made very early in the process, well in advance of issuance of an NPRM. The goal of a negotiated rulemaking, after all, is to develop a consensus standard for proposal and consideration in an NPRM. The HM-223 NPRM was issued more than one year ago. We are currently developing a final rule. It is too late in the process to consider establishing a negotiated rulemaking committee for HM-223.

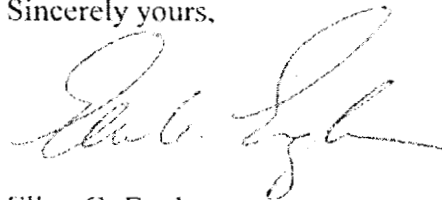
Even if timing were not an issue, we believe that the prospects for a successful negotiated rulemaking covering the applicability issues in HM-223 are extremely remote. Negotiated rulemakings can be successful in addressing a narrow set of issues that involve a limited number of constituent interests. This is not the case for the HM-223 rulemaking. There are a myriad of affected parties, including various industry groups and Federal, State, and local government agencies, with a multitude of conflicting interests. It is highly unlikely that all the affected parties could be adequately represented within a negotiating committee of workable size, or that they could achieve a consensus on the issues under consideration in HM-223.

Thank you again for your interest in this critical rulemaking. Clarifying the applicability of the HMR is an important and significant exercise. The HM-223 rulemaking will specifically identify those functions and operations that are regulated under the HMR, and those that are not. Further, the rulemaking will clarify the respective jurisdictional responsibilities of DOT, OSHA, and EPA for the regulation of hazardous materials in transportation and at fixed facilities consistent with current statutory and regulatory requirements. Finally, the rulemaking will address preemption standards for State, local, and tribal government regulation of hazardous materials transportation. This should result in improved compliance with the separate regulatory requirements of Federal and non-federal agencies and, thus, enhance hazardous materials transportation safety, reduce

risks to the environment from hazardous materials, and promote workplace safety at facilities that manufacture or handle hazardous materials.

A copy of your letter and this response will be placed in the HM-223 rulemaking docket. If you have any questions, please contact me or Ms. Patricia Klinger, Director, External Communications, at (202) **366-483 1**.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Ellen G. Engleman". The signature is written in black ink and is positioned above the printed name.

Ellen G. Engleman

Dangerous Goods Advisory Council



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August **28,2002**

Ms. Ellen G. Engleman, Administrator
Research and Special Programs Administration
U.S. Department of Transportation
Washington, DC 20590-0001

Re: DOT Docket No. RSPA-98-4952 (HM-223)

Dear Ms. Engleman:

This is in reference to the July 16,2002 letter from the National Transportation Safety Board to Secretary Mineta forwarding their recommendations I-02-1/-2 again expressing their concern about RSPA's proposed termination of the applicability of the hazmat regulations to the loading and unloading of hazardous materials. While the full report of the investigation that led to the most recent recommendations only became available recently, the letter to the Secretary is sufficiently explicit in regard to NTSB's concern.

In our January 24,2002, letter responding to your most recent proposals under HM-223, we suggested in the penultimate paragraph the application of new or existing industry consensus standards to address safety in the operation of hazmat transportation related facilities. We suggested this approach because of RSPA's successful adoption and application of consensus standards for a large variety of processes and procedures (49 CFR 171.7). As an alternative, we suggested a negotiated rulemaking proceeding leading to acceptable standards for application to the operation of transportation related facilities.

We anticipate a DGAC initiated consensus development approach would involve a substantial financial commitment on our part, and our board of directors will be deciding on our 2003 budget within the next month or two. Therefore, we would appreciate an early response in regard to your acceptance or rejection of our offer to produce appropriate standards as an alternative to RSPA's continuing its attempt to limit its regulations by excluding their application to most transportation related facilities.

We look forward to working with RSPA in resolving our jurisdictional differences and to provide you a way to provide appropriate response to the NTSB. I would appreciate a prompt response to this letter so that it can be reviewed by our board of directors at its meeting in September.

Sincerely,

Michael Morrissette
Vice President