



**US Army Corps
of Engineers** ®

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US Army Corps of Engineers

HTRW CX Regulatory Fact Sheet FY04-04

Title: Applicability of the Hazardous Materials Regulations to "Persons Who Offer" Hazardous Materials for Transportation in Commerce

Date: 24 Sep 2004

SARS RIN#:
2137-AE04

Action Type: Notice of Proposed
Rulemaking

Cite: 69 FR 57245

Executive Summary: Persons who offer hazardous material for transportation in commerce, cause a hazardous material to be transported in commerce, or transport a hazardous material in commerce and who perform or is responsible for performing a pre-transportation function are required to comply with hazardous material regulations. However, existing regulations do not define "offeror". This action proposes to define a "person who offers or offeror" within the hazardous material regulations. It also clarifies that there may be more than one offeror of a shipment and clarifies the extent of offeror responsibilities.

Army/DoD Impact: This proposal seeks to codify long-standing interpretations regarding hazardous material transportation regulations. Thus, no negative impact is anticipated. However, this will be of interest to DoD personnel responsible for conducting pre-transportation activities or overseeing contractors responsible for performing pre-transportation activities. This would include Defense Reutilization and Marketing Office (DRMO) contracting officer representatives overseeing hazardous waste disposal contracts and installation personnel overseeing offsite shipments of remediation waste, asbestos, lead-based paint wastes, and other hazardous materials. It will also be of interest to persons signing hazardous material and/or hazardous waste shipping documents.

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Comments Due To RSPA: 23 Nov 2004

Full Text Document Location:

<http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-21535.pdf>

Key Elements of the Proposed Rule:

The Research and Special Programs Administration (RSPA) regulates the transportation of hazardous material, including hazardous waste, via the Hazardous Material Regulations (HMR) found in 49 CFR. The HMR, in 49 CFR 171.1(b), states that the HMR apply to "each person who offers a hazardous material for transportation in commerce, causes a hazardous material to be transported in commerce, or transports a hazardous material in commerce and who performs or is responsible for performing a pre-transportation function." However, existing regulations do not define the term "offers". Via this action, RSPA proposes to define the term "person who offers or offeror". This action also clarifies that there may be more than one offeror of a shipment and the extent of individual offeror responsibilities.

Proposed Definition of Offeror

"Person who offers or offeror" is proposed to be defined in 49 CFR 171.8 as follows:

"(1) Any person who does either or both of the following:

- (i) Performs, or is responsible for performing, any pre-transportation function required under this subchapter for transportation of the hazardous material.
- (ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier that transfers, interlines, or interchanges hazardous material to another carrier for continued transportation is not an offeror when it does not perform any pre-transportation function."

Pre-transportation, as used in this proposed definition, was defined in a rule finalized on 30 October 2003, 68 FR 61905. Pre-transportation functions are required to assure the safe transportation of a hazardous material in commerce and includes:

- (1) Determining the hazard class of a hazardous material.
- (2) Selecting a hazardous materials packaging.
- (3) Filling a hazardous materials packaging, including a bulk packaging.
- (4) Transloading a hazardous material at an intermodal transfer facility from one bulk packaging to another bulk packaging for purposes of continuing the movement of the hazardous material in commerce.
- (5) Securing a closure on a filled or partially filled hazardous materials package or container or on a package or container containing a residue of a hazardous material.
- (6) Marking a package to indicate that it contains a hazardous material.
- (7) Labeling a package to indicate that it contains a hazardous material.
- (8) Preparing a shipping paper.
- (9) Providing and maintaining emergency response information.
- (10) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.
- (11) For each person importing a hazardous material into the United States, providing the shipper with timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States.
- (12) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

(13) Loading, blocking, and bracing a hazardous materials package in a freight container or transport vehicle.

(14) Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo.

(15) Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it contains a hazardous material.

Clarifications

The Preamble discussion explains there may be more than one offeror of a shipment and clarifies the extent of offeror responsibilities. It notes that while a person who performs a pre-transportation function is considered to be an offeror, that person is not necessarily responsible for proper performance of all pre-transportation functions associated with a particular shipment. It is the person who signs the shipper's certification, who is also an offeror, that is responsible for assuring all applicable regulatory requirements are met. The persons who perform or are required to perform one or more pre-transportation functions are responsible only for the performance of those functions. It also clarifies that a freight forwarder, who arranges for transportation, but performs no pre-transportation function is not an offeror for the purposes of the HMR.

This action proposed to amend 49 CFR 171.2 to make explicit that:

- There may be more than one offeror of a shipment of hazardous materials.
- Each offeror is responsible for complying with the requirements of the HMR with respect to any pre-transportation function that it performs or is required to perform. However, each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform.
- For a shipment involving more than one offeror, each offeror may rely on information provided by another offeror, unless the offeror knows or, in the exercise of reasonable care, should know that the information is incorrect. In a similar manner, a carrier may rely on information it receives from an offeror or a prior carrier, unless the carrier knows or, in the exercise of reasonable care, should know that the information is incorrect.

Applicability to DoD

When pre-transportation functions are performed by DoD personnel (such as package selection, marking, labeling, or placarding, etc.), DoD would be an "offeror" of hazardous material and thus responsible for ensuring compliance with the HMR for each of the pre-transportation functions conducted. When pre-transportation functions are conducted via contractors to DoD or are required to be conducted by contract clauses, the contractor will also meet the definition of an offeror and will also be responsible for complying with the HMR for those specific pre-transportation functions. The person signing the shipping document certification (whether contractor or DoD staff), however, is ultimately responsible for ensuring compliance with all HMR requirements. However, this does not relieve other offerors of their individual responsibilities.

Here is an example of a typical scenario regarding offsite shipment of hazardous waste. Generally the installation will accumulate waste in a container that will

subsequently be used to ship waste offsite. The person determining the packaging is appropriate for shipment is performing a pre-transportation function and is thus an "offeror". The Defense Reutilization and Marketing Office (DRMO) contractor will typically inspect the container to ensure it is adequate and add any necessary marking and labeling. Performing these functions also constitute pre-transportation functions, and thus the contractor is also an offeror. Both the installation personnel and the contractor personnel are responsible for properly performing their specific tasks. However, it the person signing that shipping document certification statement that is responsible for ensuring compliance will all aspects of the HMR. Thus if the facility person and the DRMO contracting officer representative jointly sign a hazardous waste manifest, both are offerors and both are responsible for ensuring the shipment meets all HMR requirement.