Federal Register

Friday,
April 15, 2005

Part III

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171 and 174

Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171 and 174

[Docket No. PHMSA–98–4952 (HM–223)]

RIN 2137–AC68

Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule; response to appeals.

SUMMARY: On October 30, 2003, the Research and Special Programs Administration, predecessor agency to PHMSA, published a final rule to clarify the applicability of the Hazardous Materials Regulations to functions and activities related to the safe and secure transportation of hazardous materials in commerce, including loading, unloading, and storage operations. In response to appeals submitted by persons affected by the final rule, this final rule amends certain regulations and makes editorial corrections.

DATES: This final rule is effective June 1, 2005.

FOR FURTHER INFORMATION CONTACT: Susan Gorsky (202) 366–8553, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration; or Donna O'Berry (202) 366–4400, Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration.

SUPPLEMENTARY INFORMATION:

I. Background

On October 30, 2003, the Research and Special Programs Administration (RSPA), the predecessor agency to the Pipeline and Hazardous Materials Safety Administration (PHMSA), published a final rule to clarify the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation (68 FR 61906). As discussed more fully in the NPRM issued under this docket (June 14, 2001; 66 FR 32430), the purpose of the rulemaking was to address uncertainty in the regulated community and among Federal, state, and local agencies with hazardous materials safety responsibilities concerning whether and to what extent the HMR apply to particular activities and operations related to the transportation of hazardous materials in commerce. In addition, the rulemaking was intended to address uncertainty concerning the extent to which state and local agencies may regulate hazardous materials safety, particularly at facilities where the distinctions among pre-transportation, transportation, and non-transportation operations are not clearly articulated.

Clarifying the applicability of the HMR helps to eliminate uncertainty on the part of the regulated public, thereby facilitating compliance and enhancing hazardous materials safety and security. Clarifying the applicability of the HMR also has the beneficial effect of reducing or eliminating confusion concerning regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA) that apply to materials that are also covered by the HMR. To the extent that DOT does not regulate in a particular area, ATF and OSHA are free to regulate to the full extent of their regulatory authority. However, where DOT does regulate in a particular area, ATF and OSHA may have limited authority to regulate in the same area. Moreover, facilities at which functions are performed in accordance with the HMR may also be subject to applicable standards and regulations issued by EPA to implement statutorily authorized programs. In addition, clarifying the applicability of the HMR helps states, local governments, and tribal governments to determine areas where they may regulate without being subject to preemption under Federal hazardous materials transportation law.

Federal hazardous materials transportation law (Federal hazmat law), codified at 49 U.S.C. 5101 *et seq.*, authorizes the Secretary of Transportation to establish regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. Further, Federal hazmat law authorizes the Secretary to apply the regulations to persons who: (1) Transport hazardous materials in commerce; (2) cause hazardous materials to be transported in commerce; or (3) manufacture, mark, maintain, recondition, repair, or test a packaging or container (or component thereof) that is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce. 49 U.S.C. 5103(b)(1)(A). The law authorizes the Secretary to prescribe regulations governing any safety aspect of the transportation of hazardous materials in commerce that the Secretary considers appropriate. 49 U.S.C. 5103(b)(1)(B). Federal hazmat law defines ''commerce'' to mean trade or transportation in the jurisdiction of the United States; between a place in a state and a place outside of the state; or that affects trade or transportation between a place in a state and a place outside of the state. 49 U.S.C. 5102(1). The law defines ''transportation'' to mean ''the movement of property and loading, unloading, or storage incidental to the movement.'' 49 U.S.C. 5102(12). The statute does not define with specificity the particular activities that fall within the terms ''loading incidental to movement,'' ''unloading incidental to movement,'' or ''storage incidental to movement'' used in the statutory definition of ''transportation.''

It is clear that Federal hazmat law directs the Secretary of Transportation to address the safety and security of hazardous materials transportation, that is, the actual movement of hazardous materials in commerce and the activities related to that movement that are performed by persons who transport hazardous materials in commerce. Federal hazmat law also recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce or by persons who manufacture and maintain containers that are represented or sold as qualified for use for such transportation.

In conformance with Federal hazmat law, the HMR currently impose regulatory requirements on persons who: (1) Perform functions in advance of transportation to prepare hazardous materials for transportation; (2) perform transportation (*i.e.*, movement and incidental loading, unloading, and storage) functions; or (3) manufacture or maintain containers that are represented or sold as qualified for use for transportation of hazardous materials in commerce. Functions performed in advance to prepare hazardous materials for transportation—now called ''pre-transportation functions''—include determining the hazard class of a material, preparing a shipping paper, providing emergency response information, selecting an appropriate packaging, filling a packaging, marking and labeling a package, and placarding a transport vehicle. ''Transportation functions'' include the movement of a hazardous material by rail car, motor vehicle, aircraft, or vessel and certain aspects of loading, unloading, and storage operations that are ''incidental'' to such movement. Under the HMR, training requirements apply to persons

who perform pre-transportation and transportation functions and to persons who manufacture or maintain packagings certified or sold as qualified for use in transportation in commerce.

We have issued a number of interpretations, inconsistency rulings, and preemption determinations in response to requests from the public for clarification concerning the meaning of ''transportation in commerce'' and whether particular activities are covered by that term and, therefore, are subject to regulation under the HMR. Loading, unloading, and storage were areas of particular confusion and concern. Although the interpretations and administrative determinations we have issued are publicly available, the regulated industry, government agencies, and non-Federal governments had not been consistently aware of their existence and availability. Further, some of the interpretations and decisions we have issued needed to be revised in light of changes in the Secretary of Transportation's and other Federal agencies' statutory authority. In the October 30, 2003 final rule, we consolidated, clarified, and revised, where necessary, these interpretations and administrative decisions and made them part of the HMR.

The final rule amended the HMR to incorporate the following new definitions and provisions:

• We defined a new term—''pre-transportation function''—to mean a function performed by any person that is required to assure the safe transportation of a hazardous material in commerce. When performed by shipper personnel, loading of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel and filling a bulk packaging with hazardous material in the absence of a carrier for the purpose of transporting it is a pre-transportation function as that term was defined in the October 30, 2003 final rule. Pre-transportation functions must be performed in accordance with requirements in the HMR.

• We defined ''transportation'' to mean the movement of property and loading, unloading, or storage incidental to the movement. This definition is consistent with the definition of ''transportation'' in Federal hazmat law. Transportation in commerce begins when a carrier takes physical possession of a hazardous material for the purpose of transporting it and continues until delivery of the package to its consignee or destination as evidenced by the shipping documentation under which the hazardous material is moving, such as shipping papers, bills of lading, freight orders, or similar documentation.

• We defined ''movement'' to mean the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel.

• We defined ''loading incidental to movement'' to mean the loading by carrier personnel or in the presence of carrier personnel of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel for the purpose of transporting it. For a bulk packaging, we defined ''loading incidental to movement'' to mean the filling of the packaging with a hazardous material by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. Loading incidental to movement is regulated under the HMR.

• We defined ''unloading incidental to movement'' to mean the removal of a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel or the emptying of a hazardous material from a bulk packaging after a hazardous material has been delivered to a consignee and prior to the delivering carrier's departure from the consignee facility or premises. Unloading incidental to movement is subject to regulation under the HMR. Unloading by a consignee after the delivering carrier has departed the facility is not unloading incidental to movement and is not regulated under the HMR.

• We defined ''storage incidental to movement'' to mean storage by any person of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document. However, in the case of railroad shipments, even if a shipment has been delivered to the destination shown on the shipping document, if the track is under the control of a railroad carrier or track is used for purposes other than moving cars shipped to or from the lessee, storage on the track is storage incidental to movement. We revised the definition of ''private track or private siding'' to make this clear. Storage at a shipper facility prior to a carrier exercising control over or taking possession of the hazardous material or storage at a consignee facility after a carrier has delivered the hazardous material is not storage incidental to movement and is not regulated under the HMR.

• We amended § 171.1 of the HMR to list regulated and non-regulated functions. Regulated functions include: (1) Activities related to the design, manufacture, and qualification of packagings represented as qualified for use in the transportation of hazardous materials; (2) pre-transportation functions; and (3) transportation functions (movement of a hazardous material and loading, unloading, and storage incidental to the movement). Non-regulated functions include: (1) Rail and motor vehicle movements of a hazardous material solely within a contiguous facility where public access is restricted; (2) transportation of a hazardous material in a transport vehicle or conveyance operated by a Federal, state, or local government employee solely for government purposes; (3) transportation of a hazardous material by an individual for non-commercial purposes in a private motor vehicle; and (4) any matter subject to U.S. postal laws and regulations.

• We amended § 171.1 of the HMR to indicate that facilities at which functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other Federal agencies or to applicable state or local government laws and regulations (except to the extent that such non-Federal requirements may be preempted under Federal hazmat law). Federal hazmat law does not preempt other Federal statutes nor does it preempt regulations issued by other Federal agencies to implement statutorily authorized programs. The final rule was intended to clarify the applicability of the HMR to specific functions and activities. It is important to note that facilities at which pre-transportation or transportation functions are performed must comply with OSHA and state or local regulations applicable to physical structures—for example, noise and air quality control standards, emergency preparedness, fire codes, and local zoning requirements. Facilities may also have to comply with applicable state and local regulations for hazardous materials handling and storage operations. Facilities at which pre-transportation or transportation functions are performed may also be subject to EPA and OSHA regulations. For example, facilities may be subject to EPA's risk management; community right-to-know; hazardous waste tracking and disposal; and spill prevention, control and countermeasure requirements, and OSHA's process safety management and emergency

preparedness requirements. Similarly, facilities at which pre-transportation functions are performed may also be subject to ATF regulations concerning the handling of explosives. In particular, the October 30, 2003 final rule clarified that the exception in 40 U.S.C. 845(a)(1), which excepts from ATF regulation ''any aspect of the transportation of explosive materials * * * which are regulated by the United States Department of Transportation'', does not apply in situations where facility personnel perform pre-transportation functions with respect to preparing explosives for transportation.

II. Appeals of the Final Rule

We received 14 appeals of the final rule from Ag Processing Inc. (AGP); Akzo Nobel (Akzo); Archer Daniels Midland Company (Archer Daniels); the Association of American Railroads (AAR); the Dangerous Goods Advisory Council (DGAC); the Dow Chemical Company (Dow); DuPont; Eastman Chemical Company (Eastman); the Institute of Makers of Explosives (IME); Norfolk Southern Corporation (Norfolk Southern); the Spa and Pool Chemical Manufacturers' Association (SPCMA); the Sulphur Institute; the Utility Solid Waste Activities Group (USWAG); and Vermont Railway, Inc. (Vermont Railway).

Appellants raised a number of issues related to the consistency of the final rule with Federal hazardous materials transportation law; state and local regulation of hazardous materials facilities; the relationship of the HMR to regulations promulgated by OSHA, EPA, and ATF; the definitions adopted in the final rule for ''unloading incidental to movement,'' ''transloading,'' and ''storage incidental to movement;'' and the consistency of the HM–223 final rule with security regulations adopted in a final rule issued under Docket No. HM–232. A number of appellants indicated an intention to file additional information to supplement their appeals. To date, however, we have received no supplemental information.

The October 30, 2003 final rule was to become effective on October 1, 2004. On May 28, 2004, we published a document delaying the effective date of the final rule until January 1, 2005 (69 FR 30588). On December 8, 2004, we published a document further delaying the effective date until June 1, 2005 (69 FR 70902). Delaying the effective date provided us with sufficient time to fully address the issues raised by the appellants and to coordinate the appeals document fully with the other Federal agencies that assisted us in developing the HM–223 final rule.

Specific issues raised by the appellants are addressed in detail below.

III. Appeals Granted

A. Transloading

The October 30, 2003 final rule defined a new term—''transloading.'' Transloading was defined as the transfer of a hazardous material at an intermodal transfer facility from one bulk packaging to another for purposes of continuing the movement of the hazardous material in commerce. In the October 30, 2003 final rule, transloading is identified as both a pre-transportation and a transportation function. A number of appellants expressed concern that the final rule's treatment of ''transloading'' was inconsistent and could lead to confusion as to whether storage of hazardous materials at a transloading facility is considered storage incidental to movement and subject to HMR requirements. ''HM–223 is inconsistent in its treatment of transloading * * * [PHMSA should] clarify transloading as a transportation function. The distinction between transportation and pre-transportation functions is particularly important with respect to storage issues since storage incidental to transportation is regulated by [PHMSA].'' (Akzo) Another appellant notes that ''designating transloading as a pre-transportation function would be inconsistent with [PHMSA]'s approach to other intermodal facilities.

* * * The similarities between transloading facilities and other intermodal facilities are apparent. In both cases, the facilities typically are carrier owned but operated by contractors or licensees pursuant to agreements with railroads. In both cases, the materials being transported are in the midst of the transportation process, with origin and destination points at different locations.'' (AAR) One appellant suggests that we add to the definition of ''storage incidental to movement'' an indication that ''storage incidental to movement includes storage of transport vehicles and packages at transloading facilities.'' (IME)

We agree with the appellants that storage of hazardous materials at transloading facilities is storage incidental to movement and subject to regulations applicable to such storage under the HMR. As one appellant notes, in 1995 and 2001, we found that Federal hazardous materials transportation law preempts state requirements prohibiting transloading operations in New York and Missouri (December 6, 1995, 60 FR 62527; and July 6, 2001, 66 FR 37089). An explicit determination in the HMR that storage at transloading facilities is considered storage incidental to movement for purposes of the HMR is, therefore, consistent with previously published administrative determinations on the issue.

Appellants also ask us to consider revising the definition of ''transloading'' to cover transloading operations that take place at facilities other than intermodal transfer facilities. ''[PHMSA should] remove the words 'at an intermodal facility' from its definition of transloading. Transloading does occur at consignee facilities. * * * It is safer and more efficient to perform this transloading at a plant site than to transport these packages to an intermodal facility.'' (Akzo Nobel) We agree that the location at which transloading occurs should not dictate whether the operation is regulated as a transportation function and are modifying the definition in this final rule.

Therefore, the Akzo, AAR, DuPont, IME, and Norfolk Southern appeals related to the definition of transloading as a transportation function are granted. In this final rule, we are amending the following provisions of the October 30, 2003 final rule:

1. In § 171.1, we are deleting paragraph (b)(4), which defined ''transloading'' as a pre-transportation function. We agree with appellants that transloading is a transportation function.

2. In § 171.1, we are revising paragraph (c)(4) to indicate that ''storage incidental to movement'' includes storage at the destination indicated on a shipping document if the original shipping document includes information that the shipment is a through-shipment to an identified final destination. For example, a shipping paper prepared by the person offering a hazardous material for transportation in commerce may show the shipment destination as a transloading facility; provided that the shipping paper or other documentation includes information that the shipment is a through-shipment and identifies the final destination or destinations of the hazardous material, storage at the facility is ''storage incidental to movement'' and subject to regulation under the HMR. Note that such storage must be of the hazardous material in its original packaging (i.e., the rail tank car) or its transloaded packaging (i.e., a cargo tank motor vehicle) in order to be considered ''storage incidental to movement.'' Note also that storage of a hazardous material after delivery to its final destination is not ''storage

incidental to movement'' and not subject to regulation under the HMR.

3. In § 171.8, we are revising the definition of ''pre-transportation function'' to remove transloading operations. We are also revising the definition of ''storage incidental to movement'' to include storage of packaged hazardous materials at intermediate destinations provided the shipping documentation indicates that the shipment is a through-shipment and includes the final destination or destinations of the hazardous material.

4. In § 171.8, we are revising the definition of ''transloading'' by removing the phrase ''at an intermodal transfer facility'' to clarify that transloading is regulated under the HMR irrespective of the location at which the operation occurs. We are also clarifying in the revised definition that transloading when performed by any person is regulated under the HMR.

Concerning the definition of ''transloading,'' as indicated above, the October 30, 2003 final rule defined ''transloading'' to mean the transfer of a hazardous material from one bulk packaging to another for the purpose of continuing the movement of the hazardous material in commerce. Appellants suggest that ''[PHMSA should] expand coverage of transloading from bulk-to-bulk to include also non-bulk-to-bulk and *vice versa*. There are times when the transfer from bulk to non-bulk or *vice versa* occurs during the logic proposed in HM–223.'' We agree that there may be situations when a hazardous material is transferred directly from a non-bulk to a bulk packaging or *vice versa* for the purpose of continuing the movement of the hazardous material in commerce. If it can be demonstrated that the shipment is a through shipment to an identified final destination, then such operations meet the definition of ''transloading'' and are subject to regulation under the HMR. Note that, as indicated above, a shipping paper or other document created at the time the shipment originates must indicate that the shipment is a through shipment to a known final destination. We are revising the definition of ''transloading'' to include transfers of hazardous materials from bulk to non-bulk packagings and from non-bulk to bulk packagings.

B. Unloading Incidental to Movement

The October 30, 2003 final rule defines ''unloading incidental to movement'' of a hazardous material to mean removing a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel, or, for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee and prior to the delivering carrier's departure from the consignee's facility or premises. Dow suggests that we include a definition for ''facility'' to clarify this provision.

We agree that the definition in the final rule should be clarified. There will be instances where a carrier has delivered a hazardous material to the consignee, and the carrier's responsibility for the hazardous material ceases even though the carrier may not have left the consignee's facility. For example, the carrier may drop a trailer loaded with hazardous material at one location in the facility and go to another location in the same facility to pick up a new trailer for transportation. In this case, the carrier's responsibility for the delivered shipment has ended even though the carrier has not departed from the facility. Therefore, the Dow appeal related to the definition of ''unloading incidental to movement'' adopted in the October 30, 2003 final rule is granted. In this final rule, we are modifying the definition for ''unloading incidental to movement'' to indicate that unloading incidental to movement occurs after the hazardous material has been delivered to the consignee's facility when the unloading operation is performed by carrier personnel or in the presence of carrier personnel. This is consistent with the definition adopted in the October 30, 2003 final rule for ''loading incidental to movement'' of a hazardous material. Note that, for purposes of this rulemaking, the reference to carrier personnel means the crew of the train that delivered the rail tank car to the facility.

C. Security

One appellant notes that ''Federal HazMat Law provides authority for DOT to regulate the 'safe transportation, *including security*, of hazardous materials * * * in commerce. * * * DOT's authority over hazardous materials security is no less important than its safety authority. DOT's authority in this area should be clearly stated in the rule.' '' (IME; emphasis in the original) We agree; indeed, as we noted in the notice we published extending the comment period for the NPRM (66 FR 59220), this rulemaking has a particular importance for hazardous materials transportation security. In light of continuing terrorist threats and the critical need to assure the security of hazardous materials at facilities and in transportation, a rule that specifies the applicability of the HMR to specific functions and activities and clarifies the relationship of the HMR to programs and regulations administered by ATF, EPA, and OSHA is more important than ever.

We note in this regard that § 1711 of the Homeland Security Act of 2002 (Pub. L. 107–296) amended Federal hazmat law to authorize the Secretary of Transportation to ''prescribe regulations for the safe transportation, *including security*, of hazardous material in intrastate, interstate, and foreign commerce'' and that the HMR ''shall govern safety aspects, *including security*, of the transportation of hazardous material the Secretary considers appropriate.'' (Emphasis added.) As a result, the Department of Homeland Security (DHS) and DOT share responsibility for hazardous materials transportation security. We consult and coordinate with DHS concerning security-related hazardous materials transportation regulations to assure that hazardous materials transportation security requirements are consistent with the overall security policy goals and objectives established by DHS and that the regulated industry is not confronted with differing and, perhaps, inconsistent security regulations promulgated by multiple agencies.

In consideration of the foregoing, we are granting the IME appeal concerning DOT's authority to regulate hazardous materials transportation security. In this final rule, we are revising § 171.1 in several places to reflect DOT's responsibility for hazardous materials transportation security.

IV. Appeals Denied

A. Consistency of HM–223 With Federal Hazmat Law

DGAC, Dow, and DuPont assert that the October 30, 2003 final rule is inconsistent with Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), particularly with respect to the final rule provisions about the beginning and end points of transportation. ''Nowhere does [Federal hazmat law] even suggest that a carrier's possession of hazardous materials is the point at which DOT regulatory authority attaches. To the contrary, the HMR currently and correctly place great emphasis on the functional responsibilities and actions of hazmat employers and employees. Therefore, we petition [PHMSA] to reconsider the language and content of Section 171.8 * * * '' (DGAC)

We disagree. First, reference to carrier possession or presence at loading and unloading operations provides the most accurate, simple, and clear method for

establishing the starting and ending points of transportation in commerce. Second, DOT has gone beyond those basic definitions to regulate activities that affect safe transportation in commerce irrespective of who performs them. Contrary to appellants' claim, this approach is both functional and fully consistent with Federal hazmat law.

Congress instructed the Secretary to ''prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.'' 5 U.S.C. 5103(b). It authorized the Secretary to regulate those ''transporting hazardous material in commerce'' as well as those ''causing hazardous material to be transported in commerce.'' *Id.* It defined transportation to mean the ''movement of property and loading, unloading, or storage incidental to the movement.'' 5 U.S.C. 5102(12). As we explained in the HM–223 rulemaking, these particular terms are not defined. 68 FR 61906.

That regulatory mandate places upon DOT the responsibility to determine when transportation in commerce begins, *i.e.*, what loading, unloading, and storage is incidental to the movement of hazardous materials, and what other activities impact the safe transportation in commerce. We did this in two ways.

First, we defined loading and unloading incidental to movement to be keyed to the possession or presence of the carrier. A carrier is any person that transports property in commerce (*see* § 171.8 (definition of carrier)). We defined storage incidental to movement to mean storage of the hazardous material by any person between the time the carrier takes physical possession of the material for the purpose of transporting it until the material is delivered to the destination indicated on a shipping document, package marking, or other medium. Thus, the carrier's responsibility for the hazardous material provides the most reliable method to distinguish between loading, unloading, and storage that is incidental to the movement of property in commerce and loading, unloading, and storage that is being performed for some other purpose unrelated to the movement of property in commerce. The definitions also provide clarity to regulated persons. More specifically, loading by the carrier or in the carrier's presence best represents loading that is incidental to the property's movement. Unloading by the carrier or in the carrier's presence best represents unloading that is incidental to the property's movement. And storage by any person after the carrier has taken possession of the property but before the property has been physically delivered to the destination best represents storage that is incidental to the property's movement. Put another way, because anyone who transports property in commerce is a carrier, when no carrier is present, loading or unloading of property is not associated with that property's transportation in commerce. Similarly, storage of property prior to a carrier taking possession of the property or subsequent to the carrier relinquishing possession of the property at its destination is not associated with that property's transportation in commerce. In all these circumstances, the definitions also make it plain when regulatory authority begins and ends.

This line must be drawn distinguishing loading, storage, and unloading incidental to movement from other types of loading, storage, and unloading to avoid DOT regulation of activities that do not impact safe transportation in commerce. For example, the preamble to the October 30, 2003 final rule explains that a broader definition of storage would result in DOT regulation of long-term storage operations at shipper and consignee facilities. 68 FR 61915, 61919–20. Similarly, a broader definition of unloading would result in DOT regulation of unloading that is performed after transportation has ended, such as when a rail tank car is unloaded directly into a manufacturing process by a consignee, often after being stored for a substantial period of time after delivery by a carrier. *See* 68 FR 61917. Outcomes like these would be contrary to the intent of Congress in directing DOT to promulgate regulations governing safe *transportation* of hazardous materials, while giving other agencies, such as OSHA, EPA, and ATF, regulatory authority over fixed facilities.

Second, when functions that might be performed by entities other than a carrier or outside of the carrier's presence affect the safety of the transportation of materials in commerce, they are regulated in a functional approach irrespective of who performs them. There are many areas where this approach applies, but two primary ones. First, pre-transportation functions are functions that are required to assure the safe transportation of a hazardous material in commerce, irrespective of who is performing the function. One key pre-transportation function is loading when performed by a shipper or other person in advance of a carrier taking possession of the material to transport it. Accordingly, as we explained in the rulemaking, when any person ''performs a loading function prior to the carrier's arrival * * * that function is a pre-transportation function and is subject to all applicable regulatory requirements.'' 68 FR 61909. (On the other hand, there is no similar regulation of unloading activities after transportation has ended—so-called ''post-transportation functions''—because once transportation of the property has been completed, unloading will not affect the safety of transportation in commerce.) Second, the HMR apply to packaging manufacturers and requalifiers and to packagings authorized for the transportation of hazardous materials in commerce; the packaging requirements apply to the packaging at any point, including prior to a carrier taking possession of the package for purposes of transporting it. Accordingly, contrary to the claim of the appeal, as with current law, the new rulemaking is fully consistent with Federal hazmat law and places strong emphasis on functional responsibilities.

DGAC suggests that the October 30, 2003 final rule's discussion of the relationship of the HMR to regulations promulgated by other Federal agencies such as OSHA and EPA ''completely ignores Congress' intent to ensure uniformity in regulations that impact the transportation of hazardous materials. * * * [PHMSA]'s interpretation in the preamble of HM–223 gives preeminence to OSHA and EPA regulations at the expense of hazardous materials regulatory uniformity as required under the Federal Hazardous Materials Law.'' Again, we disagree. The preamble to the October 30, 2003 final rule does not give preeminence to OSHA and EPA regulations at the expense of hazardous materials regulatory uniformity. Rather, the preamble recognizes that, in order to determine the extent to which each agency's regulations apply to specific situations, we must determine Congressional intent as expressed in all of the statutes that provide for Federal and non-Federal jurisdiction over activities related to the life cycle of a hazardous material. The Occupational Safety and Health Act (OSH Act), which provides the statutory authority for regulatory programs administered by OSHA, the authorizing statutes for the regulatory programs administered by EPA, and the Organized Crime Control Act of 1970, which provides the statutory basis for ATF programs applicable to the safety and security of explosives, express different statutory purposes and establish different Federal-state-local government relationships. While appellants are correct that Federal hazmat law

provides for nationally uniform regulations applicable to the transportation of hazardous materials, the authorizing statutes for other agency programs for the regulation of hazardous materials may not provide for such national uniformity of regulations. Indeed, in the case of OSHA and EPA, Congressional intent is clear that non-Federal entities should be permitted to establish more stringent regulations than those promulgated by OSHA and EPA for worker and environmental protection. Taken together, the various statutes establishing hazardous materials regulatory programs in DOT, OSHA, EPA, and ATF provide for complementary regulatory programs that encompass differing, but not necessarily contradictory, Federal-state-local relationships. The provisions adopted in the October 30, 2003 final rule provide for nationally uniform regulations for the transportation of hazardous material in commerce that are consistent with Federal hazmat law and with the statutes authorizing the hazardous materials regulatory programs administered by OSHA, EPA, and ATF.

DGAC raises a concern about transport vehicles that are DOT-authorized packagings for the transportation of hazardous materials. ''Transport vehicles bearing DOT specification identification markings are instruments of commerce and should remain under the regulatory supervision of DOT at all times they are marked to indicate they meet the DOT specification requirements. Section 5104 of [Federal hazmat law] addresses representation and tampering and we are certain it applies to loading, unloading, and storage without regard to whom is physically in possession of such vehicles.'' (DGAC)

DGAC is correct that § 5104 of Federal hazmat law addresses representation and tampering. This section prohibits a person from representing that a container or package is safe, certified, or complies with the HMR unless the container or package meets all applicable HMR requirements. This section further prohibits a person from representing that a hazardous material is present in a package or on a transport conveyance unless the material is actually present. In addition, this section prohibits a person from altering, removing, or tampering with a marking, label, placard, or shipping paper description or with a package or transport conveyance used to transport hazardous material.

We do not agree that the provisions adopted in the October 30, 2003 final rule are inconsistent with § 5104 of Federal hazmat law. DGAC is correct that the prohibitions in § 5104 apply without regard to who is physically in possession of the hazardous materials package or transport conveyance at any given time. As we have stated previously, however, the definition of ''transportation in commerce'' adopted in the October 30, 2003 final rule does not mean that the provisions of Federal hazmat law or the HMR apply only when a hazardous material is actually being transported in commerce. Regulated pre-transportation functions generally occur prior to the actual transportation in commerce of a hazardous material; similarly, specification packaging requirements apply at all times a packaging is marked to indicate conformance with a packaging specification even if the packaging is not in transportation in commerce. Thus, the representation and tampering prohibitions specifically addressing hazardous materials packages or transportation conveyances in § 5104 of Federal hazmat law apply whether or not the package or transportation conveyance is in transportation in commerce at the time that tampering occurs.

For the reasons outlined above, the Dow and DGAC appeals that assert that the October 30, 2003 final rule is not consistent with Federal hazmat law are denied.

DuPont asserts that ''[PHMSA] has created new terminology with references to pre and post transportation functions that do not appear in the statute. * * * This concept is not supported by statute and represents a departure by [PHMSA] from current practices and legislative history.'' DuPont is correct that the term ''pre-transportation'' does not appear in Federal hazmat law. We disagree, however, that the concept is not supported by statute and represents a departure from current practices. The HMR currently apply to a number of activities performed before a hazardous material is transported in commerce. The October 30, 2003 final rule defines ''pre-transportation functions'' to mean activities performed prior to the transportation of a hazardous material that affect the safe transportation of the hazardous material. These activities are currently regulated under the HMR, so the definition does not represent a departure from current practices. Moreover, the definition is consistent with Federal hazmat law, which clearly recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce. Indeed, Federal hazmat law recognizes the importance of national uniformity in these areas with a specific preemption provision applicable to state, local, and Indian tribe requirements on, among other functions: (1) The designation, description, and classification of hazardous material; (2) the packing, repacking, handling, labeling, marking, and placarding of hazardous materials; and (3) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of these documents. 49 U.S.C. 5125(b).

SPCMA appeals the definitions for ''loading incidental to movement'' and ''unloading incidental to movement'' adopted in the October 30, 2003 final rule, asserting that the definitions are inconsistent with § 5101(12) of Federal hazmat law, which defines ''transportation'' as ''the movement of property and loading, unloading, and storage incidental to the movement.'' 49 U.S.C. 5102(12). ''DOT infers that the descriptor phrase 'incidental to movement' applies to 'movement,' 'loading,' and 'unloading.' We believe that the descriptor phrase 'incidental to movement' applies only to 'storage.' '' (SPCMA) This issue was discussed in detail in the preamble to the October 30, 2003 final rule (68 FR 61914). SPCMA offers no new information to support its view beyond its stated belief; therefore, the appeal is denied.

B. Relationship of HMR to OSHA, EPA, and ATF Requirements

Several appellants raise concerns about the explanations offered in the preamble to the October 30, 2003 final rule concerning the relationship of the HMR to requirements applicable to hazardous materials promulgated by OSHA, EPA, and ATF. The October 30, 2003 final rule indicated that persons who perform regulated functions under the HMR and facilities at which such functions are performed may be subject to applicable standards and regulations of other Federal agencies, such as OSHA regulations applicable to physical structures, EPA regulations for risk management and community right-to-know, and ATF regulations concerning the handling of explosives.

DGAC suggests that ''the way to give effect to all of the enabling statutes (EPA, OSHA, and DOT) is to recognize, for example, that state OSHA regulations apply to workers in many different industries, many of which are unrelated to transportation. These regulations may be more stringent in any given state; however, where they apply to transportation functions they

must remain consistent with the hazardous materials regulations. Under this statutory construction scheme, OSHA's regulations applicable to construction workers may vary from state-to-state; however, those regulations as applied to transportation workers must be uniform and not conflict with the hazardous materials regulations.'' (DGAC) We agree that non-Federal requirements applicable to hazardous materials pre-transportation or transportation functions must be consistent with the HMR. Indeed, as we stated several times in the preamble to the October 30, 2003 final rule, a non-Federal requirement governing pre-transportation or transportation functions or a non-Federal requirement applicable to the design, construction, maintenance, repair, and requalification of packagings used to transport hazardous materials in commerce may be preempted if the requirement fails the preemption criteria in Federal hazmat law. We also note that, separate from the preemption criteria in 49 U.S.C. 5125, a non-Federal requirement affecting transportation, including the transportation of hazardous materials, may also be preempted under the commerce clause of the United States Constitution or other statutes, such as 49 U.S.C. 20106, 31141. For example, section 20106 provides that:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters, prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

We disagree with the appellant, however, that Federal hazmat law precludes other Federal agencies or their state counterparts from regulating transportation workers who may perform functions regulated under the HMR. As discussed in detail in the preamble to the October 30, 2003 final rule, the HMR may regulate the performance of a pre-transportation or transportation function under the HMR; however, OSHA standards may address the protective measures that must be in place to ensure the safety of the person performing the pre-transportation or transportation function (68 FR 61924–31). Both DOT and OSHA are regulating functions or activities as specified in each agency's respective authorizing statutes. Federal hazmat law requires that regulations governing the performance of pre-transportation functions regulated by DOT must be consistent across jurisdictional lines; the OHSA Act permits states or localities to impose more stringent requirements for worker protection than are specified in OSHA standards.

It is important to note that we have well-established relationships with EPA, OSHA, and ATF and consult frequently about jurisdictional issues. The discussions of these relationships in the October 30, 2003 final rule reflect determinations made over a number of years as to the extent of each agency's authority over hazardous materials at facilities. The October 30, 2003 final rule does not break new ground in this area nor does it change these long-standing determinations; rather it explains each agency's regulatory authority and provides guidance for the regulated industry on each agency's jurisdiction and areas of overlapping jurisdiction.

In its appeal, IME asks us to make a specific determination as to the preeminence of the HMR over long-standing OSHA standards applicable to transportation functions that appear to conflict with the HMR. IME cites OSHA regulations for materials classification, placarding, labeling, and incident reporting. As we noted in the preamble to the October 30, 2003 final rule, it is not appropriate for DOT to attempt to clarify the applicability of other Federal agencies' statutes or regulations to particular functions or activities. OSHA frequently consults with us as to the applicability of the HMR to specific functions and generally defers to DOT on questions related to the transportation of hazardous materials. However, questions as to the applicability of EPA, OSHA, or ATF standards and regulations and suggestions for revising or updating EPA, OSHA, or ATF standards and regulations should be directed to the appropriate EPA, OSHA, or ATF office.

For the reasons outlined above, the DGAC, IME, SPCMA, and USWAG appeals of the October 30, 2003 final rule concerning the relationship of the HMR to standards and regulations promulgated by EPA, OSHA, and ATF are denied.

C. Preemption of State/Local Laws and Regulations

A number of appellants express concern that the October 30, 2003 final rule permits non-Federal jurisdictions to impose non-uniform, inconsistent, and contradictory requirements on hazardous materials transportation. For example, one appellant asserts that, under the October 30, 2003 final rule, ''[t]he [HMR] will apply when the tank cars are loaded and during transportation, but the proposed rules would allow states or localities to assume regulatory jurisdiction—perhaps even to the point of banning shipments—once they are placed on industry tracks. * * * [T]he same tank car on the same industry track could be subject to DOT jurisdiction one day and local jurisdiction the next. * * * [Subjecting rail tank cars to regulation by multiple jurisdictions] can lead to nothing but confusion, operational difficulty, and extra cost.'' (AGP)

Another appellant is similarly concerned about the potential for non-uniform regulatory requirements. ''The final rule would seem to say a [rail car] is DOT-covered when filled, but not before. It also would seem to say [a rail car] stops being DOT-covered after being filled, but before a shipping document is created, and yet comes back into the sphere of DOT preemption when that paperwork is generated. This seems illogical to us, and we are not certain that this is what the agency actually intended. * * * When DOT withdraws from the regulatory field, local or other Federal rules will click on; then when DOT's system reengages it apparently will preempt those rules.'' (Eastman)

Appellants appear to have misunderstood the October 30, 2003 final rule. First, it is important to note that DOT specification packagings, such as rail tank cars, cargo tank motor vehicles, and cylinders, are subject to DOT regulation at all times that the packaging is marked to indicate that it conforms to the applicable specification requirements. Thus, each DOT specification rail tank car must be designed and constructed in accordance with applicable requirements and must be maintained and repaired in accordance with applicable requirements. These requirements apply at all times that the rail tank car is marked to indicate that it complies with DOT specification requirements, whether the car is empty or loaded with hazardous materials and whether the car is awaiting pickup by a carrier, in the carrier's possession, or delivered to a consignee. Under the Federal hazmat law, a non-Federal entity may impose

requirements on DOT specification packagings only if those requirements are substantively the same as the DOT requirements. 49 U.S.C. 5125(b)(1)(E). Thus, a rail tank car is ''DOT-covered'' for purposes of conformance with DOT specification requirements.

Second, the October 30, 2003 final rule codifies in the HMR long-standing, well-established administrative determinations as to the applicability of the HMR to specific functions and activities. Thus, under the October 30, 2003 final rule, the HMR apply, as they do now, to pre-transportation functions such as filling a rail tank car and preparing shipping papers. Further, under the October 30, 2003 final rule, the HMR apply, as they do now, to transportation functions, which are defined as loading incidental to movement, unloading incidental to movement, and storage incidental to movement. It is not correct that a rail car is ''DOT-covered'' when filled; rather, as is currently the case, the filling or loading operation is subject to any applicable HMR requirements and is subject to the preemption provisions of Federal hazmat law. It is not correct that a rail car ''stops being DOT-covered'' after being filled; rather, as is currently the case, storage of a filled or loaded rail car prior to its pick-up by a rail carrier is not storage incidental to movement and so is not subject to HMR requirements applicable to such storage. It is not correct that a rail car ''comes back into the sphere of DOT preemption when [a shipping paper] is created''; rather, as is currently the case, the creation of a shipping paper is a regulated function that must be performed in accordance with the HMR and is subject to the preemption provisions of § 5125 of Federal hazmat law. Moreover, as already noted, a non-Federal safety law or regulation affecting the transportation of hazardous materials may be preempted under 49 U.S.C. 20106. *CSX Transp. Inc.* v. *Public Util. Comm'n of Ohio,* 901 F. 2d 497 (6th Cir. 1990) cert. denied, 498 U.S. 1066 (1991).

A more accurate description of the regulations that apply to a rail tank car used to transport hazardous materials follows:

1. The rail tank car is designed, constructed, maintained, and repaired in accordance with all applicable DOT specification requirements and is marked to indicate that it conforms to these requirements. As is currently the case, the specification requirements apply at all times that the marking is in place, including when the car is empty, during any loading or unloading operations, and while the car is in storage whether or not such storage meets the definition of ''storage incidental to movement.'' PHMSA cannot envision any circumstance where the broad preemptive scope of 49 U.S.C. 20106 would allow a non-Federal entity to regulate the design, construction, maintenance, or repair of a DOT specification rail tank car in any manner.

2. As is currently the case, functions performed to prepare a rail tank car for transportation in commerce must be performed in accordance with applicable DOT specification requirements. Such functions include, but are not limited to, classifying the hazardous material, filling the rail tank car, securing closures on the rail tank car, placing placards on the rail tank car, and preparing shipping papers for the shipment. These pre-transportation functions are regulated under the HMR irrespective of the entity performing the function. In the absence of a local safety or security hazard, 49 U.S.C. 20106 preempts any non-Federal regulation of these pre-transportation functions and, even if such a local safety or security hazard exists, 49 U.S.C. 5125 provides that (unless there is a waiver of preemption) a non-Federal entity may not impose requirements for pre-transportation functions that are not substantively the same as the DOT requirements. Persons performing pre-transportation functions and facilities at which pre-transportation functions are performed may be subject to Federal requirements applicable to worker or environmental protection; non-Federal entities may impose more stringent worker or environmental protection requirements so long as those requirements do not interfere or conflict with the performance of the pre-transportation function that is regulated under the HMR or with the specification requirements applicable to the packaging that will be used for the shipment. Persons performing pre-transportation functions and facilities at which pre-transportation functions are performed may also be subject to Federal requirements applicable to the handling and storage of explosives at fixed facilities.

3. As is currently the case, storage of a filled rail tank car at the consignor's facility while awaiting pick-up by a rail carrier is not subject to HMR requirements applicable to such storage. Note, however, that specification requirements applicable to the rail tank car continue to apply during such storage. Note as well that, as discussed in the October 30, 2003 final rule, for purposes of enforcement of the HMR, we would expect the person offering the rail tank car for transportation to be able to demonstrate compliance with all applicable pre-transportation requirements at the time the hazardous material is staged for pick-up by a carrier and the consignor or his agent signs the shipping paper. Even in the absence of a signed shipping paper, the offeror may be responsible for assuring compliance with specific pre-transportation requirements if other factors indicate that a particular pre-transportation activity has been completed. (See discussion at 68 FR 61911–61912. For a more complete discussion of offeror responsibilities under the HMR, see the NPRM published September 24, 2004, 69 FR 57245.) Non-Federal entities may impose more stringent worker or environmental protection requirements applicable to such storage so long as those requirements do not interfere with the performance of pre-transportation functions regulated under the HMR or affect the DOT specification packaging requirements that apply to the rail tank car.

4. As is currently the case, once a rail tank car is picked up by a rail carrier for transportation, all applicable HMR requirements apply to such transportation, including while the rail tank car is temporarily stored after its pick-up by the rail carrier and prior to its delivery to the consignee. Non-Federal entities may not impose requirements on the transportation in commerce of a rail tank car that are preempted under the criteria in 49 U.S.C. 5125 and 20106.

5. As is currently the case, once the rail tank car is delivered to the consignee, storage of the car on private track or private siding is not subject to regulation under the HMR. Note, however, that specification requirements applicable to the rail tank car continue to apply during such storage. Non-Federal entities may impose more stringent worker or environmental protection requirements applicable to such storage so long as those requirements do not affect the DOT specification packaging requirements that apply to the rail tank car.

6. Consignee-conducted rail tank car unloading operations are not subject to regulation under the HMR. Non-Federal entities may impose more stringent worker protection or environmental protection requirements applicable to such unloading operations so long as those requirements do not affect the DOT specification packaging requirements that apply to the rail tank car.

7. As is currently the case, for consignees who ship empty rail tank cars that contain a residue of a hazardous material, storage of such tank cars on private track is not subject to regulation under the HMR. Non-Federal entities may impose more stringent worker protection or environmental protection requirements applicable to such storage so long as those requirements do not affect the DOT specification packaging requirements that apply to the rail tank car.

8. As is currently the case, for residue shipments in rail tank cars, functions performed to prepare the rail tank car for transportation in commerce must be performed in accordance with applicable DOT specification requirements. Such functions include classifying the hazardous material, securing closures on the rail tank car, placing placards on the rail tank car, and preparing shipping papers for the shipment. These pre-transportation functions are regulated under the HMR irrespective of the entity performing the function. In the absence of a local safety or security hazard, 49 U.S.C. 20106 preempts any non-Federal regulation of these pre-transportation functions and, even if such a local safety or security hazard exists, 49 U.S.C. 5125 provides that (unless there is a waiver of preemption) a non-Federal entity may not impose requirements for pre-transportation functions that are not substantively the same as the DOT requirements. Persons performing pre-transportation functions and facilities at which pre-transportation functions are performed may be subject to Federal requirements applicable to worker or environmental protection; non-Federal entities may impose more stringent worker or environmental protection requirements so long as those requirements do not interfere with the performance of the pre-transportation function that is regulated under the HMR.

Appellants ''acknowledge that there are Federal, state, and local laws and regulations in force that may affect the transportation of hazardous materials. We are concerned that * * * statements in the final rule * * * may be read as encouraging the promulgation of hundreds of constraints and conflicting requirements contrary to the precept that our nation cannot function effectively without a national system of transportation regulation.'' (DGAC) We do not agree that the October 30, 2003 final rule will encourage non-Federal entities to enact ''hundreds of constraints and conflicting requirements'' applicable to the transportation of hazardous materials in commerce. The October 30, 2003 final rule does not impose new preemption standards; rather, it restates the current preemption standards in the Federal hazmat law and clarifies their applicability to certain functions and operations. PHMSA will continue to apply the preemption standards in Federal hazmat law on a case-by-case basis, considering the effect of a non-Federal requirement on the transportation of hazardous materials in commerce as we make our determinations. While PHMSA's determinations under 49 U.S.C. 5125(d) consider only the preemption criteria in Federal hazmat law, non-Federal requirements that fail the preemption criteria in any Federal law are preempted.

DGAC notes that ''[PHMSA] failed to provide a list of past [preemption] findings under the obstacle test'' and asks us to include such a list in the preemption paragraph of § 171.8. We do not agree that this is necessary. PHMSA's Office of the Chief Counsel has included on its Web site at *http://rspa-atty.dot.gov/* a detailed index to preemption of state and local laws and regulations under Federal hazmat law with links to individual preemption determinations as published in the **Federal Register.**

For the reasons outlined above, the AGP, ADM, DGAC, DuPont, Eastman, IME, SPCMA, and USWAG appeals related to preemption of non-Federal requirements are denied. In deference to appellants' concerns, however, in this final rule, we are revising § 171.1(f) to place the preemption standards first in the section and to add a clarification that non-Federal entities may impose regulations on functions that are not covered by the HMR or Federal hazmat law, except where PHMSA has specifically determined that the regulation of the hazardous materials-related function is not necessary. Appellants correctly note that PHMSA has in some cases determined that safety or security regulations may not apply to all hazardous materials or to specific types of shipments. For example, PHMSA has determined that escorts are required for certain types of radioactive materials shipments, but that escorts are not required for other types of hazardous materials shipments. Thus, non-Federal escort requirements applicable to materials for which PHMSA has determined that escorts are not necessary are preempted (see Preemption Determination 20, 66 FR 29867, June 1, 2001). Generally, non-Federal requirements may be subject to preemption when PHMSA determines that no such regulations may be imposed at all.

D. Storage Incidental to Movement

Consistent with long-standing interpretations and administrative determinations issued by the agency, the October 30, 2003 final rule defined ''storage incidental to movement'' for purposes of applicability of the HMR to mean storage by any person of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, such as a shipping paper, bill of lading, waybill, or similar document (see discussion at 68 FR 61919). Storage of hazardous materials at an offeror's facility prior to a carrier taking physical possession of the shipment is not subject to regulation under the HMR nor is storage at a consignee facility after the shipment has been delivered.

In its appeal letter, IME notes that ''DOT does not describe what it regulates when packages are stored incidental to movement * * * DOT should correct this oversight. For example, does DOT's regulatory authority control the number of vehicles or the separation distance that must be maintained between these transport vehicles? Does DOT's regulatory authority control the amount or kind of hazardous materials that may be in storage at the same location at the same time? Does DOT regulatory authority control the physical security of packages stored incidental to transportation? * * * A clear statement of DOT 'storage authority' will not 'preempt' other Federal agency jurisdictions, but it will, with one exception, trigger provisions of statutes implemented by these agencies * * * that exclude 'transportation' where DOT has exercised its authority from the applicability of their rules.''

The HMR apply to hazardous materials stored incidental to movement. Such storage is a transportation function as that term is defined in the final rule. Hazardous materials stored incidental to movement are subject to specific HMR requirements applicable to such storage. For example, such hazardous materials must be accompanied at all times by appropriate shipping documentation, including emergency response information and an emergency response telephone number in accordance with Subparts C and G of Part 172. Further, package markings, labels, and placards

required under Subparts D, E, and F of Part 172 must remain on the packages or transport vehicles throughout the time that they are stored incidental to movement. In addition, hazardous materials stored incidental to movement are subject to the requirements for security plans in Subpart I of Part 172. The security plan must include an assessment of possible transportation security risks and appropriate measures to address the assessed risks. At a minimum, a security plan that covers hazardous materials stored incidental to movement must include elements related to personnel security and unauthorized access. The HMR specify segregation and stowage requirements for hazardous materials in or on a transport vehicle, but do not currently address the amounts or types of hazardous materials that may be stored at one time in one location at a transportation facility. However, as noted below, we are initiating a rulemaking to determine whether more specific requirements applicable to materials stored incidental to movement are necessary.

Two appellants ask us to include in the definition of ''storage incidental to movement'' shipments that are awaiting pick-up by a carrier. ''At what point after [loading] does [PHMSA] anticipate storage * * * to begin? Having a filled packaging with the intent to ship should remain under HMR instead of being subject to different regulations pending the unpredictable arrival of a carrier.'' (DuPont) Similarly, ''DOT needs to clarify the point at which 'loading' ends and storage not incidental to transportation begins. * * * Current industry practice with regard to these activities are dictated by time and space and can result in situations where the regulations of the vehicle and its partially loaded contents could shift between regulatory agencies and requirements. For example, if during the course of loading a vehicle, loading is stopped for a meal break, for a rest break, for a fire drill, has the vehicle transitioned into non-transportation storage? If a vehicle is left partially or fully loaded with explosives overnight on the shipper's property pending the arrival of the carrier, as long as the vehicle is in conformance with 49 CFR 397.5(b), is this storage beyond DOT purview? * * * Or do DOT's rules contemplate a transitional period during which hazardous materials are 'staged' for loading?'' (IME)

As defined in the final rule, ''storage incidental to movement'' does not include hazardous materials stored at a shipper's facility prior to a carrier taking possession of the shipment for purposes of transporting it. Thus, as a general rule, storage of a hazardous material after it is loaded into a freight container or transport vehicle and prior to a carrier taking possession of the material is not subject to HMR requirements applicable to storage incidental to movement. Clearly, under the scenario described by IME where the loading operation is interrupted for brief periods of time for a meal or rest break, the hazardous materials being loaded do not ''transition'' into non-transportation storage. However, loaded vehicles that are stored overnight or for a period of days awaiting pick-up by a carrier are not considered to be stored incidental to movement and, thus, are not subject to HMR requirements applicable to such storage. Note, however, that loaded vehicles for which applicable pre-transportation functions have been completed and that are awaiting pick-up by a carrier are subject to HMR regulations applicable to such pre-transportation functions. Hazardous materials loaded into such vehicles must conform to applicable segregation and blocking and bracing requirements. Further, such vehicles must be marked, labeled, and placarded in accordance with HMR requirements, and shipping documentation and emergency response information must conform to applicable HMR requirements. Such vehicles may be used by DOT enforcement personnel to identify violations of the HMR with respect to the performance of pre-transportation functions applicable to the shipment.

Note that, while shipments stored at a consignor's facility awaiting pick up by a carrier are not subject to HMR requirements applicable to such storage, non-Federal requirements applicable to such shipments may be limited. For example, a non-Federal requirement that imposed differing packaging, marking, or labeling regulations during the time that the shipment was staged for pick-up by a carrier would likely be preempted under Federal hazmat law.

We note concerning the IME scenarios described in its appeal letter that the regulations at 49 CFR 397.5 address a motor carrier's responsibility for attendance and surveillance of explosives and other types of hazardous materials during transportation. Generally, under 49 CFR 397.5, a motor vehicle that contains a Division 1.1, 1.2, or 1.3 explosive must be attended at all times by the driver of the motor vehicle or by the motor carrier's qualified representative. Paragraph (b) of 49 CFR 397.5 excepts motor vehicles from this attendance requirement under certain conditions. Because the requirements of 49 CFR 397.5 establish a motor carrier's responsibility for attendance and surveillance, they are not relevant to the situation described by IME where a shipper is preparing explosives for transportation and a carrier has not yet taken possession of the explosives shipment. Questions concerning the applicability of 49 CFR 397.5 to specific persons and operations should be directed to the Federal Motor Carrier Safety Administration.

Both DuPont and IME ask us to consider a modification to the definition of ''storage incidental to movement'' to accommodate shipments staged for pick-up by a carrier or hazardous materials staged for loading prior to pick-up by a carrier. Broadening the definition of ''storage incidental to movement'' in the manner requested is beyond the scope of this rulemaking; therefore, the DuPont and IME appeals concerning this issue are denied. As indicated above, however, while shipments stored at a consignor's facility awaiting pick up by a carrier are not subject to HMR requirements applicable to such storage, non-Federal requirements applicable to such shipments may be limited. For example, a non-Federal requirement that imposed differing packaging, marking, or labeling regulations during the time that the shipment was staged for pick-up by a carrier could be subject to preemption under Federal hazmat law under both the covered subject and dual compliance tests.

We note in this regard that we are initiating a rulemaking to address hazardous materials storage issues and, specifically, storage issues related to the transportation of explosives in commerce. We expect to address questions concerning aggregation and segregation of hazardous materials, facility safety and security requirements, attendance and surveillance, and similar issues.

E. Unloading Incidental to Movement

Several appellants ask us to reconsider our definition of ''unloading incidental to movement'' in the October 30, 2003 final rule. ''[PHMSA] should reconsider its definition of *unloading incidental to movement* for bulk. An individual's employer or occupation should not dictate whether the HMR apply to functions being performed. * * * [PHMSA should] apply consistent logic to unloading and make unloading performed by a shipper post-transportation. It is equally important to have nationally uniform regulations over both 'pre-transportation' and 'post-transportation' functions to ensure safety and the efficient transportation of hazardous materials.'' (Dow)

This issue was addressed in detail in the preamble to the October 30, 2003 final rule (see 68 FR 61916–61919). Appellants restate the points offered in their comments to the HM–223 NPRM, but offer no new information to support their position that PHMSA should regulate unloading operations conducted by consignees after a carrier has delivered a hazardous material shipment. As we stated in the preamble to the October 30, 2003 final rule, we have never promulgated regulations applicable to ''post transportation functions'' (except for rail tank car unloading operations); the HMR are promulgated under the mandate in Federal hazmat law that the Secretary ''prescribe regulations for the safe *transportation* of hazardous material in intrastate, interstate, and foreign commerce'' (49 U.S.C. 5103(b); emphasis added.) Congress recognized that post-transportation activities should be regulated by Federal agencies, such as OSHA, EPA, and ATF, that generally have authority to regulate non-transportation activities involving hazardous materials. Congress further recognized that non-transportation operations need not be governed by one set of nationally uniform regulations in both the OSH Act and the various statutes that authorize EPA's programs by explicitly permitting non-Federal entities to impose requirements for worker or environmental protection that are more stringent than Federal requirements.

An appellant suggests that an individual's ''employer or occupation'' is not relevant to the issue of whether the HMR should apply to a particular function or activity. Again, this issue was addressed in detail in the October 30, 2003 final rule (68 FR 61917–61918). The appellant restates comments made in response to the HM–223 NPRM, but offers no new information to support its opinion.

One appellant notes that ''[o]ver the years DOT has issued a number of exemptions from the requirements for disconnecting the loading lines of a tank car when unloading is disrupted under specific conditions. * * * The issuance of these exemptions is evidence that the intent of DOT has been to regulate the loading and unloading of [tank cars] whether on railroad tracks or private siding.'' (SPCMA) SPCMA is correct that until publication of the October 30, 2003 final rule, the HMR included detailed requirements for consignees conducting rail tank car unloading operations. As we explained in detail in the preamble to the October 30, 2003 final rule, however, the provisions in the final rule applicable to rail tank car unloading stem from changes in the way rail tank cars are used in manufacturing processes and are consistent with PHMSA's current regulation of cargo tank unloading operations (68 FR 61917–61918). The appellant offers no new information to support its view that the HMR should continue to apply to rail tank car unloading operations.

For the reasons outlined above, the Akzo, ADM, Dow, DuPont, Eastman, SPCMA, Sulphur Institute, and USWAG appeals related to the definition of ''loading incidental to movement,'' except as discussed earlier in this preamble under the ''Appeals Granted'' section, are denied.

With respect to unloading operations, Dow suggests that we define ''connected to a manufacturing process'' to mean ''a container used for the transportation of hazardous materials that is directly connected to a manufacturing process without intermediate storage.'' Because we do not use the phrase ''connected to a manufacturing process'' in the revised text of the regulations adopted in the October 30, 2003 final rule, a definition is not necessary. Therefore, this appeal is denied. However, interested persons should note that the definition suggested by Dow is, in fact, consistent with the discussion of rail tank car unloading operations in the preamble to the October 30, 2003 final rule (*see* 68 FR 61917) and was what we intended when we used the phrase ''unloading into a manufacturing process.''

F. Definition of ''Handling''

One appellant is concerned that the October 30, 2003 final rule does not include a definition for ''handling.'' ''Congress has provided DOT statutory authority over the 'handling' of hazardous materials in transportation, including incidental loading, unloading, and storage, at facilities and by hazmat employees. * * * It is unclear how DOT can completely explain the reach of its jurisdiction without the Department's interpretation of its handling authority. This oversight should be addressed.'' (IME) IME is correct that neither the NPRM published under this docket nor the October 30, 2003 final rule define the term ''handling.'' Because this issue was not previously addressed in either the NPRM or the final rule, IME's appeal with respect to the definition of ''handling'' is beyond the scope of this rulemaking and is, therefore, denied.

G. HMR Applicability to Facilities

Several appellants suggest that the October 30, 2003 final rule's discussion of the applicability of the HMR to facilities at which hazardous materials are prepared for transportation or stored incidental to movement in transportation is inconsistent with Federal hazmat law and with HMR requirements for security plans. ''At 49 U.S.C. 5106, Congress granted [DOT] statutory jurisdiction over ''facilities used in handling and transporting' hazardous material. * * * While DOT has made a point of not exercising its authority under § 5106, there can be no doubt that the Department's statutory jurisdiction extends to fixed facilities and hazmat employees without regard to who employs them.'' (IME) Similarly, ''[In HM–223, PHMSA] clearly rejected the arguments that [PHMSA]'s jurisdiction should extend to fixed facility operations, other than 'pre-transportation' and 'transportation functions.' This artificial limit to [PHMSA]'s jurisdiction, however, is inconsistent with the final rule under HM–232, which requires a 'security plan' for any facility that ships a placarded load. HM–232 contains many requirements applicable to facilities that do not fall under the definition of 'pre-transportation functions' or 'transportation functions.' * * * Consequently, there is an inherent conflict between HM–223 and the requirements of HM–232 and any other requirement in the HMR that cannot be labeled as a 'pre-transportation function' or a 'transportation function', of which there are many.'' (DGAC)

We do not suggest in the October 30, 2003 final rule that functions that fall outside the definitions of ''pre-transportation function'' or ''transportation function'' are not regulated under the HMR. DGAC correctly notes that there are a number of requirements in the HMR that are neither pre-transportation nor transportation functions ''the requirements applicable to specification packagings are one example; training requirements for hazmat employees are another. Nor do we suggest in the October 30, 2003 final rule that DOT does not have the authority to prescribe regulations applicable to facilities. Indeed, where we have found it to be necessary to improve hazardous materials transportation safety or security, we have adopted regulations specifically applicable to facilities at which hazardous materials are handled during transportation or in preparation for transportation, most notably, as DGAC again correctly notes, with respect to security plans. Rather, the October 30, 2003 final rule says that, insofar as worker protection, environmental protection, or the handling of explosives are concerned, OSHA, EPA, and ATF regulations may

apply to facilities at which functions regulated under the HMR are performed. This does not mean that neither Federal hazmat law nor the HMR apply to hazardous materials facilities, only that the regulated community should be aware that OSHA, EPA, and ATF regulations cover facilities at which functions regulated under the HMR are performed.

For the reasons stated above, the DGAC and IME appeals concerning the alleged inconsistency of the October 30, 2003 final rule with requirements in the HMR applicable to facilities or other than pre-transportation or transportation functions are denied.

Dow suggests that there is an apparent inconsistency in the way that the October 30, 2003 final rule discusses the applicability of the HMR to operations that occur solely within a facility where public access is restricted. Dow notes that the rule makes the general statement that rail and motor vehicle movements that take place solely within a contiguous facility boundary where public access is restricted are not subject to the HMR; however, the rule also imposes some minimal requirements on loading and unloading operations not otherwise subject to regulation under the HMR. Dow suggests that ''the new regulations create questions and inconsistencies that introduce the potential for other regulatory agencies to step in and create regulations that may conflict with those of the HMR.'' We disagree. The specific area where the HMR apply to operations at a facility is for loading and unloading of rail tank cars. The requirement, as adopted in the October 30, 2003 final rule, is for rail cars to be secured against movement or coupling. As explained in the preamble to the October 30, 2003 final rule, this requirement is necessary to protect train and engine crews operating within a shipper or consignee facility. The requirement is consistent with OSHA standards applicable to rail tank car loading and unloading. It is included in the HMR to assure that shippers and consignees are aware of their obligation to have procedures in place to protect train and engine crews operating at their facilities.

H. Training

Several appellants assert that the provisions of the October 30, 2003 final rule will result in significantly increased training costs for hazmat employers. ''[C]ompany trainers responsible for training employees are not always limited to just one locality/jurisdiction. Therefore, trainers will need a clear understanding a variety of requirements [sic] depending on the location of the fixed facility. This could increase costs since multiple training programs would have to be created and maintained * * *.'' (Dow) Similarly, ''there is the opportunity for the application of multiple sets of regulations, depending on the circumstances * * * that will cause great confusion and significant training difficulties. This will have an adverse impact on safety * * *.'' (DuPont)

Industry's concern about the potential for increased training costs appears to stem from a misunderstanding of the October 30, 2003 final rule. As explained a number of times in the preamble to that final rule, the provisions adopted for the most part merely restate and clarify long-standing administrative determinations as to the applicability of the HMR to certain functions and activities related to the transportation of hazardous materials in commerce. Under the October 30, 2003 final rule, the HMR apply, as they do now, to pre-transportation and transportation functions. OSHA, EPA, and ATF regulations apply, as they do now, to operations at fixed facilities and to the facilities themselves. Non-Federal governments, as they do now, may impose more stringent requirements than OSHA and EPA. Thus, the October 30, 2003 final rule will not result in increased training costs; company training programs should already include OSHA, EPA, ATF, and non-Federal government requirements applicable to individual facilities. Indeed, the October 30, 2003 final rule should result in decreased training costs since companies will no longer be required to train employees on rail tank car unloading requirements in both the HMR and OSHA standards. Therefore, the Dow and DuPont appeals related to increased training costs are denied.

I. Transloading Versus Repackaging

One appellant asks for clarification of HMR applicability to ''transloading'' and ''repackaging,'' noting that ''repackaging'' is not defined in the October 30, 2003 final rule. Two other appellants ask us to revise the definition of ''transloading'' adopted in the October 30, 2003 final rule to include transfers of hazardous materials from bulk to non-bulk packagings and *vice versa.*

As noted above, transloading is a transportation operation involving a transfer of a hazardous material from one packaging to another for the purpose of continuing the movement of the hazardous material in commerce. In order to meet the definition for ''transloading,'' the hazardous material must clearly be consigned to the facility at which the transloading operation is to occur for the sole purpose of transferring the hazardous material to or from a bulk packaging; in other words, the ultimate destination of the hazardous material must be known at the time that the material is delivered to the facility and that destination must be indicated on the shipping documentation accompanying the shipment.

The term ''repackaging'' refers broadly to the relatively common practice of removing a hazardous material from the package in which it is received at a consignee's facility and placing it into another type of packaging prior to reshipping the hazardous material. The ultimate destination of the hazardous material is not known when the material is first delivered to the consignee's facility. Typically, the consignee will repackage the hazardous material for resale. Repackaging is subject to HMR requirements as a pre-transportation function—thus, the packaging selected must conform to applicable HMR requirements, and labels and marks must be placed on the packaging in accordance with applicable HMR requirements. Unlike transloading, repackaging is not a transportation function—because the ultimate destination of the material is not known when the hazardous material is delivered to the facility at which the material will be repackaged, transportation in commerce ends with that delivery. Transportation begins when a carrier picks up the repackaged hazardous material for transportation to a subsequent consignee.

J. Miscellaneous Issues

Security. One appellant asks about the relationship of the provisions of the October 30, 2003 final rule to the applicability of security requirements in Subpart I of Part 172 of the HMR. ''One aspect of HM–223 is that when the DOT safety controls are deemed to stop, DOT's new security controls also stop. We have yet to decipher what that means in the context of HM–232, our written security plan, and our employee training related to that plan, with respect to both empty and filled hazmat cars on our property.'' (Eastman)

The security plan requirements in Subpart I of Part 172 apply to hazardous materials being prepared for transportation in commerce, in addition to the actual transportation of hazardous materials. Persons who offer certain hazardous materials for transportation in commerce must develop and implement security plans that cover personnel, unauthorized access, and en route security. (These requirements

apply to shipments of hazardous materials in amounts that require placarding, to hazardous materials in a bulk packaging with a capacity equal to or greater than 13,248 L (3,500 gal) for liquids or gases or greater than 13.24 cubic meters (468 cubic feet) for solids, and to select agents and toxins regulated by CDC.) The security plan requirements are performance standards and deliberately provide for a substantial degree of flexibility concerning specific measures that should be included in the plan. Generally, however, we would expect an offeror's security plan to address the security of covered hazardous materials during their preparation for transportation and after completion of such preparation prior to the shipment being picked up by a carrier. Similarly, we would expect that empty packagings or transport conveyances (such as rail tank cars) that are located at the offeror's facility and will be used for the transportation of hazardous materials covered by the security plan would also be covered by an offeror's security plan to minimize the possibility that someone could tamper with the packagings or transport conveyances in a way that could impair their security during transportation. A hazardous materials transportation security plan need not cover hazardous materials stored at a facility for use at the facility or prior to their preparation for transportation; similarly, a security plan need not cover hazardous materials delivered to a facility for use at the facility.

MOTS. One appellant is concerned about the effect of the definitions adopted in the October 30, 2003 final rule on the exception authorized for materials of trade (MOTS) under § 173.6. The final rule does not limit the scope or otherwise change the applicability of the HMR exception for MOTS.

Consistency with existing policy decisions and determinations. One appellant asserts that the October 30, 2003 final rule implied ''that there are some provisions of the final rule that are inconsistent with [PHMSA]'s prior decisions, but the regulated community is left on its own to determine which administrative policies and decisions have changed and which have not (with the exception of PHMSA acknowledgement of its reversal of policy on the unloading and storage of tank cars). This is not a practical, reasonable or proper manner in which to alter a prior agency decision and certainly is not in such a significant and controversial jurisdictional rule as HM–223.'' (USWAG) The appellant appears to have misunderstood the October 30, 2003 final rule. The preamble to that rule is quite detailed in explaining that, except for the applicability of the HMR to rail tank car unloading, the provisions of the final rule concerning the applicability of the HMR to specific functions and activities are consistent with previously published agency decisions and determinations. Moreover, the determinations on which the October 30, 2003 final rule is based are included in the docket for this rulemaking. Contrary to the appellant's assertion, the applicability of the HMR to rail tank car unloading is the only area where we have made a determination in the October 30, 2003 final rule that differs from previously published determinations. (The appellant's reference, quoted above, to tank car storage is not correct. The provisions of the October 30, 2003 final rule concerning the applicability of the HMR to the storage of rail tank cars are consistent with both previously published agency determinations and with the Federal Railroad Administration's regulation of railroad operations.)

Movement of rail tank cars. One appellant suggests that the provisions in the October 30, 2003 final rule applicable to the movement of rail tank cars are based on our misunderstanding of the way that tank cars containing chlorine move to and from their final destination. ''In general, railroad tank cars containing chlorine are located on private track at repackaging and manufacturing facilities. The lead car, i.e, the first car in the line, is unloaded first. In order to move another car into place for unloading, the entire line of loaded tank cars is moved back on railroad track from the private siding. The empty car is pushed forward on carrier track, uncoupled, and the remaining cars are moved back onto private siding. The empty car is returned to the chlorine manufacturer. This process may be repeated one or more times each day. * * * Under the final regulations ''the tank cars may be subject to repeated DOT and State and local jurisdiction, depending upon their location and movement from private siding to railroad track.'' (SPCMA)

The determination in the October 30, 2003 final rule concerning the applicability of the HMR to rail cars on private track relates to storage of such rail tank cars only. The movements described by SPCMA during which rail cars may be moved from private track to carrier track for short periods of time are subject to the HMR because the movements involve track that is part of the general railroad system of transportation. (See discussion at 68 FR 61920–22.) The key to the definition of ''private track'' and, therefore, to the applicability of the HMR to operations on private track, is the devotion of that track to the sole use of some person other than the railroad. Thus, storage of rail cars on private track and movements of rail cars that occur solely on private track are not subject to the HMR; however, storage of rail cars on other than private track and movements of rail cars that occur on other than private track are subject to applicable HMR requirements. Non-Federal jurisdictions may not regulate the storage and movement of rail cars on other than private track except to the extent that such regulation meets the covered subject, dual compliance, and obstacle tests established in Federal hazmat law.

V. Corrections

In this final rule we are making the following changes to the October 30, 2003 final rule to correct inconsistencies and inadvertent errors:

1. In § 171.1(c), we are revising the definition of ''transportation in commerce'' for consistency with definitions used elsewhere in the final rule.

2. In § 174.67, we are revising the introductory text to paragraph (a) to clarify that the entire section applies to transloading operations, not just paragraph (a). In paragraphs (a)(1), (k)(1), and (k)(2), we are revising references to ''reliable employees'' and ''designated employees'' in favor of ''hazmat employees'' for consistency with terminology used throughout the HMR. In addition, we are correcting an inadvertent error that resulted in the unintentional deletion of paragraphs (m) and (n) from this section.

VI. Regulatory Analyses and Notices

A. Statutory/Legal Authority for Rulemaking

This final rule is published under the statutory authority in 49 U.S.C. 5103(b), which authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. To this end, in October 2003, RSPA, the predecessor agency to PHMSA, published a final rule to clarify the applicability of the Hazardous Materials Regulations (HMR) to functions and activities related to the transportation of hazardous materials in commerce. This final rule responds to appeals submitted by persons affected by the final rule and it amends certain

requirements and makes minor editorial corrections.

Clarifying the applicability of the HMR helps to eliminate confusion on the part of the regulated public, thereby facilitating compliance and enhancing hazardous materials safety and security. Clarifying the applicability of the HMR also has the beneficial effect of reducing or eliminating confusion over the applicability of regulations promulgated by other Federal agencies, such as EPA, OHSA, and ATF, that are applicable to materials also covered by the HMR. Finally, clarifying the applicability of the HMR helps states, local governments, and tribal governments to determine areas when they may regulate without being subject to preemption under Federal hazardous materials transportation law.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of significant public interest. This final rule clarifies and corrects a final rule published under this docket on October 30, 2003. A regulatory evaluation for the October 30, 2003 final rule is in the public docket for this rulemaking. This final rule does not impose new requirements on the regulated industry; the clarifications and corrections made in this final rule do not affect the calculations of benefits and costs associated with the October 30, 2003 final rule or the conclusions about the overall impact of the final rule on the regulated community.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule preempts state law but will not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the consultation requirements of Executive Order 13132 do not apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(1) The designation, description, and classification of hazardous materials;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses covered subject items 1–5 above and preempts state, local, and Indian tribe requirements not meeting the ''substantively the same'' standard.

Federal hazardous materials transportation law provides at '' 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of Federal preemption will be 90 days from publication of this final rule in the **Federal Register**.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this final rule does not have tribal implications and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Paperwork Reduction Act

This final rule does not impose any new information collection requirements.

F. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This final rule imposes no mandates and thus does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995.

H. Environmental Assessment

We find that there are no significant environmental impacts associated with this final rule. An environmental assessment prepared for the October 30, 2003 final rule has been placed in the public docket for this rulemaking.

I. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, Railroad safety.

■ In consideration of the foregoing, we are making the following revisions and corrections to rule FR Doc. 03–27057, published on October 30, 2003 (68 FR 61906):

PART 171—[CORRECTED]

■ 1. On page 61937, in the middle column, correct the authority citation for Part 171 to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–134 section 31001.

■ 2. Beginning on page 61937, in the middle column, in § 171.1, make the following revisions:

■ a. Revise the introductory text;

■ b. Remove paragraph (b)(4);

■ c. Redesignate paragraphs (b)(5), (b)(6), (b)(7), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), and (b)(15) as (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), and (b)(14), respectively; and

■ d. Revise paragraphs (c), (f), and (g).

The revisions read as follows:

§ 171.1 Applicability of Hazardous Materials Regulations (HMR) to persons and functions.

Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) directs the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce, as the Secretary considers appropriate. The Secretary is authorized to apply these regulations to persons who transport hazardous materials in commerce. In addition, the law authorizes the Secretary to apply these regulations to persons who cause hazardous materials to be transported in commerce. The law also authorizes the Secretary to apply these regulations to persons who manufacture or maintain a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce. Federal hazardous material transportation law also applies to anyone who indicates by marking or other means that a hazardous material being transported in commerce is present in a package or transport conveyance when it is not, and to anyone who tampers with a package or transport conveyance used to transport hazardous materials in commerce or a required marking, label, placard, or shipping description. Regulations prescribed in accordance with Federal hazardous materials transportation law shall govern safety aspects, including security, of the transportation of hazardous materials that the Secretary considers appropriate. In 49 CFR 1.53, the Secretary delegated authority to issue regulations for the safe and secure transportation of hazardous materials in commerce to the Pipeline and Hazardous Materials Safety Administrator. The Administrator issues the Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through 180) under that delegated authority. This section addresses the applicability of the HMR to packagings represented as qualified for use in the transportation of hazardous materials in commerce and to pre-transportation and transportation functions.

* * * * *

(c) *Transportation functions.* Requirements in the HMR apply to transportation of a hazardous material in commerce and to each person who transports a hazardous material in commerce, including each person under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal government who transports a hazardous material in commerce. Transportation of a hazardous material in commerce begins when a carrier takes physical possession of the hazardous material for the purpose of transporting it and continues until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a rail car, until the car is delivered to a private track or siding. For a private motor carrier, transportation of a hazardous material in commerce begins when a motor vehicle driver takes possession of a hazardous material for the purpose of transporting it and continues until the driver relinquishes possession of the package containing the hazardous material at its destination and is no longer responsible for performing functions subject to the HMR with respect to that particular package. Transportation of a hazardous material in commerce includes the following:

(1) *Movement.* Movement of a hazardous material by rail car, aircraft, motor vehicle, or vessel (except as delegated by Department of Homeland Security Delegation No. 0170 at 2(103)).

(2) *Loading incidental to movement of a hazardous material.* Loading of packaged or containerized hazardous material onto a transport vehicle, aircraft, or vessel for the purpose of transporting it, including blocking and bracing a hazardous materials package in a freight container or transport vehicle, and segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo, when performed by carrier personnel or in the presence of carrier personnel. For a bulk packaging, loading incidental to movement is filling the packaging with a hazardous material for the purpose of transporting it when performed by carrier personnel or in the presence of carrier personnel (except as delegated by Department of Homeland Security Delegation No. 0170 at 2(103)), including transloading.

(3) *Unloading incidental to movement of a hazardous material.* Removing a package or containerized hazardous material from a transport vehicle, aircraft, or vessel; or for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee when performed by carrier personnel or in the presence of carrier personnel or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. (Emptying a hazardous material from a bulk packaging while the packaging is on board a vessel is subject to separate regulations as delegated by Department of Homeland Security Delegation No. 0170 at 2(103).) Unloading incidental to movement includes transloading.

(4) *Storage incidental to movement of a hazardous material.* Storage of a transport vehicle, freight container, or package containing a hazardous material by any person between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material has been delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a private motor carrier, between the time that a motor vehicle driver takes physical possession of the hazardous material for the purpose of transporting it until the driver relinquishes possession of the package at its destination and is no longer responsible for performing functions subject to the HMR with respect to that particular package.

(i) Storage incidental to movement includes—

(A) Storage at the destination shown on a shipping document, including storage at a transloading facility, provided the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material; and

(B) A rail car containing a hazardous material that is stored on track that does not meet the definition of ''private track or siding'' in § 171.8, even if the car has been delivered to the destination shown on the shipping document.

(ii) Storage incidental to movement does not include storage of a hazardous material at its final destination as shown on a shipping document.

* * * * *

(f) *Requirements of state and local government agencies.* (1) Under 49 U.S.C. 5125, a requirement of a state, political subdivision of a state, or an Indian tribe is preempted, unless otherwise authorized by another Federal statute or DOT issues a waiver of preemption, if—

(i) Complying with both the non-Federal requirement and Federal hazardous materials transportation law, the regulations issued under Federal hazardous material transportation law or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security is not possible;

(ii) The non-Federal requirement, as applied or enforced, is an obstacle to accomplishing and carrying out Federal hazardous materials transportation law, the regulations issued under Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security;

(iii) The non-Federal requirement is not substantively the same as a provision of Federal hazardous materials transportation law, the regulations issued under Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security with respect to—

(A) The designation, description, and classification of hazardous material;

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(C) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

(D) The written notification, recording, and reporting of the unintentional release of hazardous material; or

(E) The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(iv) A non-Federal designation, limitation or requirement on highway routes over which hazardous material may or may not be transported does not comply with the regulations in subparts C and D of part 397 of this title; or

(v) A fee related to the transportation of a hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

(2) Subject to the limitations in paragraph (f)(1) of this section, each facility at which functions regulated under the HMR are performed may be subject to applicable laws and regulations of state and local governments and Indian tribes.

(3) The procedures for DOT to make administrative determinations of preemption are set forth in subpart E of part 397 of this title with respect to non-Federal requirements on highway routing (paragraph (f)(1)(iv) of this section) and in subpart C of part 107 of this chapter with respect to all other non-Federal requirements.

(g) *Penalties for noncompliance.* Each person who knowingly violates a requirement of Federal hazardous material transportation law, an order issued under Federal hazardous material transportation law, subchapter A of this chapter, or an exemption or approval issued under subchapter A or C of this chapter is liable for a civil penalty of not more than $32,500 and not less than $275 for each violation. (For a violation that occurred after January 21, 1997, and before October 1, 2003, the maximum and minimum civil penalties are $27,500 and $250, respectively.) When a violation is a continuing one and involves transporting of hazardous materials or causing them to be transported or shipped, each day of the violation constitutes a separate offense. Federal hazardous material transportation law provides that each person who knowingly violates a requirement in § 171.2(l) of this subchapter or willfully violates a provision of Federal hazardous material transportation law or an order issued under Federal hazardous material transportation law shall be fined under Title 18, United States Code, or imprisoned for not more than 5 years, or both.

■ 3. Beginning on page 61940, in § 171.8, revise the definitions for ''pre-transportation function,'' ''storage incidental to movement,'' ''transloading,'' and ''unloading incidental to movement'' to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Pre-transportation function means a function specified in the HMR that is required to assure the safe transportation of a hazardous material in commerce, including—

(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) 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.

(5) Marking a package to indicate that it contains a hazardous material.

(6) Labeling a package to indicate that it contains a hazardous material.

(7) Preparing a shipping paper.

(8) Providing and maintaining emergency response information.

(9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.

(10) 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.

(11) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

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

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

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

* * * * *

Storage incidental to movement means storage of a transport vehicle, freight container, or package containing a hazardous material by any person between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it in commerce until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a private motor carrier, between the time that a motor vehicle driver takes physical possession of the hazardous material for the purpose of transporting it in commerce until the driver relinquishes possession of the package at its destination and is no longer responsible for performing functions subject to the HMR with respect to that particular package.

(1) *Storage incidental to movement* includes—

(i) Storage at the destination shown on a shipping document, including storage at a transloading facility, provided the shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material; and

(ii) Rail cars containing hazardous materials that are stored on track that does not meet the definition of ''private track or siding'' in § 171.8, even if those cars have been delivered to the destination shown on the shipping document.

(2) Storage incidental to movement does not include storage of a hazardous material at its final destination as shown on a shipping document.

* * * * *

Transloading means the transfer of a hazardous material by any person from

one bulk packaging to another bulk packaging, from a bulk packaging to a non-bulk packaging, or from a non-bulk packaging to a bulk packaging for the purpose of continuing the movement of the hazardous material in commerce.

* * * * *

Unloading incidental to movement means removing a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel, or for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee when performed by carrier personnel or in the presence of carrier personnel or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. (Emptying a hazardous material from a bulk packaging while the packaging is on board a vessel is subject to separate regulations as delegated by Department of Homeland Security Delegation No. 0170.1 at 2(103).) *Unloading incidental to movement* includes transloading.

* * * * *

PART 174—[CORRECTED]

■ 4. On page 61941, in the last column, revise amendatory instruction 13 to read as follows:

13. In § 174.67, paragraphs (a)(1) through (a)(3) are revised, paragraph (a)(4) is redesignated as paragraph (a)(6), new paragraphs (a)(4) and (a)(5) are added, paragraphs (i) and (j) are revised, paragraphs (k), (l), (m), and (n) are redesignated as paragraphs (l), (m), (n), and (o) respectively, and a new paragraph (k) is added, to read as follows:

■ 5. Beginning on page 61941, in the last column, in § 174.67, add introductory text, and revise paragraphs (a), (k)(1), and (k)(2) to read as follows:

§ 174.67 Tank car unloading.

For transloading operations, the following rules must be observed:

(a) *General requirements.* (1) Unloading operations must be performed by hazmat employees properly instructed in unloading hazardous materials and made responsible for compliance with this section.

(2) The unloader must apply the handbrake and block at least one wheel to prevent movement in any direction. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent movement in both directions.

(3) The unloader must secure access to the track to prevent entry by other rail equipment, including motorized service vehicles. This requirement may be satisfied by lining each switch providing access to the unloading area against movement and securing each switch with an effective locking device, or by using derails, portable bumper blocks, or other equipment that provides an equivalent level of safety.

(4) The unloader must place caution signs on the track or on the tank cars to warn persons approaching the cars from the open end of the track that a tank car is connected to unloading equipment. The caution signs must be of metal or other durable material, rectangular, at least 30 cm (12 inches) high by 38 cm (15 inches) wide, and bear the word ''STOP''. The word ''STOP'' must appear in letters at least 10 cm (3.9 inches) high. The letters must be white on a blue background. Additional wording, such as ''Tank Car Connected'' or ''Crew at Work'' may also appear.

(5) The transloading facility operator must maintain written safety procedures (such as those it may already be required to maintain pursuant to the Department of Labor's Occupational Safety and Health Administration requirements in 29 CFR 1910.119 and 1910.120) in a location where they are immediately available to hazmat employees responsible for the transloading operation.

* * * * *

(k) * * *

(1) The facility operator must designate a hazmat employee responsible for on-site monitoring of the transfer facility. The designated hazmat employee must be made familiar with the nature and properties of the product contained in the tank car; procedures to be followed in the event of an emergency; and, in the event of an emergency, have the ability and authority to take responsible actions.

(2) When a signaling system is used in accordance with paragraph (i) of this section, the system must be capable of alerting the designated hazmat employee in the event of an emergency and providing immediate notification of any monitoring system malfunction. If the monitoring system does not have self-monitoring capability, the designated hazmat employee must check the monitoring system hourly for proper operation.

* * * * *

Issued in Washington, DC, on April 7, 2005, under authority delegated in 49 CFR part 1.

Stacey L. Gerard,

Acting Assistant Administrator/Chief Safety Officer.

[FR Doc. 05–7394 Filed 4–14–05; 8:45 am]

BILLING CODE 4910–60–P