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49 CFR Part 171 et al.

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

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

[Docket HM–223; Notice No. 96–15]

RIN 2137–AC68

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

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM); notice of meeting.

SUMMARY: This ANPRM announces three public meetings at which RSPA will seek ideas, proposals and recommendations regarding the applicability of the Hazardous Materials Regulations (HMR) to particular hazardous materials transportation activities. This information will help the agency to consolidate, clarify, revise and update existing agency interpretations, rulings and decisions regarding the applicability of the HMR and determine whether there is a need to amend the HMR. Clarifying the applicability of the HMR will facilitate compliance and will have the beneficial effect of clarifying the applicability of other Federal, State, local and Indian tribe hazardous materials requirements.

DATES: *Meetings.* (1) September 13, 1996 from 9:00 a.m. to 4:00 p.m. in Atlanta, Georgia—public meeting.

(2) September 25, 1996 from 9:00 a.m. to 4:00 p.m. in Sacramento, California—working-group session.

(3) October 30, 1996 from 9:00 a.m. to 4:00 p.m. in Philadelphia, Pennsylvania—working-group session.

Oral presentations—Atlanta. Any person wishing to present an oral statement at the Atlanta public meeting should notify Nancy E. Machado by telephone or in writing, on or before September 10, 1996. Five copies of written text of oral statements should be presented to RSPA staff immediately prior to the oral presentation.

Written comments; working-group sessions in Sacramento and Philadelphia. Written comments must be received on or before November 30, 1996. Any person wishing to participate in the Sacramento working-group session should notify Nancy E. Machado by telephone or in writing on or before September 18, 1996. Any person wishing to participate in the Philadelphia working-group session should notify Nancy E. Machado by telephone or in writing on or before October 23, 1996.

ADDRESSES: *Meetings.* (1) The Omni Hotel, 100 CNN Center, Atlanta, GA 30335.

(2) Department of Social Services Auditorium, 744 P Street, Sacramento, CA 95184.

(3) Penn Tower Hotel, Civic Center Boulevard at 34th St., Philadelphia, PA 19104.

Comments. Address comments to Dockets Unit (DHM–30), Office of Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, Washington, D.C. 20590–0001. Comments should identify the docket and notice number and be submitted, when possible, in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed, stamped postcard. The Dockets Unit is located in Room 8421 of the Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590–0001. Office Hours are 8:30 a.m. to 5:00 p.m., Monday through Friday, except on public holidays when the office will be closed.

FOR FURTHER INFORMATION CONTACT: Nancy E. Machado, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington D.C. 20590–0001, telephone 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Temporary Closure of Docket Room

In an effort to improve the indoor air quality in the Nassif Building, 400 Seventh Street, SW, Washington, DC 20590, the U.S. Department of Transportation and the building's owner have initiated a major cleaning project. This project entails a thorough cleaning of the building on a floor-by-floor basis. During the cleaning of each floor, the floor will be closed to employees and visitors. It is estimated that the cleaning of each floor will take approximately three weeks. During this three-week period, the offices on each floor will be closed and the affected employees will be relocated to another building. Once the cleaning of a floor is complete, employees and visitors may return to that floor. RSPA's Dockets Unit is located on the eighth floor. Cleaning of the eighth floor is scheduled to begin on Monday, August 12, 1996 and last until September 3, 1996. As a result, RSPA's Dockets Unit is scheduled to close for approximately three weeks.

Because of the volume of materials in the Dockets Unit, it cannot be relocated during the cleaning and will be closed. However, since the comment period of this ANPRM is open until November 30,1996 Docket HM–223 will be relocated and made available for review in Room 5414A of the Nassif Building, telephone (202) 366–4900. The public may view this docket between the hours of 8:30 a.m. and 5:30 p.m., Monday through Friday, except Federal holidays.

Following completion of cleaning, Docket HM–223 will be returned to the Dockets Unit in Room 8421 of the Nassif Building, 400 Seventh Street, SW, Washington, DC, 20590–0001, telephone (202) 366–5046.

II. Background

The HMR, 49 CFR Parts 171–180, are promulgated in accordance with the direction in 49 U.S.C. 5103(b) that the Secretary of Transportation ''prescribe regulations for the safe transportation of hazardous material in intrastate, interstate and foreign commerce.'' ''Transportation'' is defined as ''the movement of property, and any loading, unloading, or storage incidental to the movement.'' 49 U.S.C. 5102(12). ''Commerce'' is defined as ''trade or transportation in the jurisdiction of the United States—(A) between a place in a State and a place outside of the State; or (B) that affects trade or transportation between a place in a State and a place outside of the State.'' 49 U.S.C. 5102(1).

In recent years, RSPA has issued a number of interpretations, inconsistency rulings and preemption determinations in response to public requests for clarification regarding the meaning of the term ''transportation in commerce'' and whether particular activities fall under that term and, therefore, are subject to the HMR. Although these documents are publicly available, the regulated industry, Federal agencies, States, local governments, and Indian tribes have not been consistently aware of their existence and availability. Furthermore, some of the interpretations and decisions in these documents need to be revised in light of changes in DOT's, and other Federal agencies', statutory authority. The purpose of this rulemaking is to consolidate, clarify, and revise, as necessary, these interpretations, rulings and decisions, and make them part of the HMR.

Clarifying the applicability of the HMR would also have the beneficial effect of clarifying the applicability of the Environmental Protection Agency's (EPA's) and the Occupation Safety and Health Administration's (OSHA's) regulations concerning materials covered under the HMR. For example, EPA regulates hazardous materials to ensure that they are not unintentionally

or unlawfully released into the environment (*see, e.g.,* SARA Title III, 42 U.S.C. 11001, *et seq.*), and OSHA regulates hazardous materials in the work-place to ensure worker safety and health *see, e.g.,* the Occupational Safety and Health Act of 1970 (OSHAct), 29 U.S.C. 651 *et seq.*). To the extent that DOT does not regulate in a particular area, both EPA and OSHA are free to regulate to the full extent of their statutory authority. However, where DOT does regulate in a particular area, both have limited authority to regulate in that same area. For example, in its hazardous material emergency programs, EPA has exempted by regulation, or is required to exempt by statute, certain transportation activities that are subject to the HMR. *See* 42 U.S.C. 11047 (transportation and storage incident to such transportation are exempt from most SARA Title III requirements); 40 CFR 68.3 (certain transportation-related activities are exempt from the definition of ''stationary source'' in EPA's Chemical Accident Prevention regulations). OSHA faces similar limitations. *See* 29 U.S.C. 653(b)(1) (''Nothing in [the Occupational Safety and Health Act of 1970] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.'').

Clarifying the applicability of the HMR would have the beneficial effect of clarifying where States, local governments and Indian tribes may regulate without being preempted under Federal hazardous materials transportation law (Federal hazmat law), 49 U.S.C. 5101–5127. When it last substantively amended Federal hazmat law in 1990, Congress stated that uniform regulations promote safety in the transportation of hazardous materials. *See* Public Law (Pub. L) 101–615, § 2, 104 Stat. 3244 (1990). In order to promote consistency in laws and regulations governing the transportation of hazardous materials, to achieve greater uniformity among those laws, and to promote the public health, welfare, and safety at all levels, Congress gave DOT the authority to preempt a requirement of a State, political subdivision of a State or Indian tribe where:

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law] is not possible;

(2) the requirement of the State, political subdivision, or tribe, as applied and enforced, is an obstacle to accomplishing and carrying out [Federal hazmat law] or a regulation prescribed under [Federal hazmat law]; or

(3) a law, regulation, order or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects . . . is not substantively the same as a provision of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law]:

(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 in transportation of hazardous material.

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

49 U.S.C. 5125 (a) and (b).

Non-Federal requirements that are authorized by other Federal law are not preempted. *See* 49 U.S.C. 5125(b).

Petitions for Reconsideration of Administrative Determination of Preemption

On February 15, 1995, RSPA published its determinations in PD–8(R), PD–9(R), PD–10(R), and PD–11(R) (Docket Nos. PDA–9(R), PDA–7(R), PDA–10(R), and PDA–11(R), respectively) (60 FR 8774). RSPA did not preempt the two California statutory provisions or 34 of the 40 Los Angeles County regulations at issue. The State and local requirements related to permits; fees; on-site hazard communication; the definition, classification, transportation, storage, handling and unloading of hazardous materials at consignee facilities; and container design and construction. RSPA did, however, preempt six Los Angeles County regulations, finding that those regulations restricted tank car unloading and imposed fees, which were not used for hazardous materials transportation purposes, on consignee unloading activities.

Within the 20-day time period provided in 49 CFR 107.211(a), HASA, Inc., The Society of the Plastics Industry, Inc.; National Propane Gas Association; Pioneer Chlor Alkali Company, Inc.; National Tank Truck Carriers, Inc.; and Chlorine Institute, Inc. and Chemical Manufacturers' Association (Petitioners) filed petitions for reconsideration of RSPA's determinations. The petitioners raised numerous issues regarding the on-site handling and transportation of hazardous materials, and questioned whether certain transportation and unloading activities are regulated under the HMR.

This rulemaking will directly address the issues raised by the petitioners in PD–8(R), PD–9(R), PD–10(R), and PD–11(R). Consequently, RSPA will defer issuing a decision with respect to the petitions for reconsideration until this rulemaking is completed. RSPA is taking this action in order to avoid prejudging issues which are more appropriately handled through the notice-and-comment process under the Administrative Procedure Act, 5 U.S.C. 553. In conjunction with this ANPRM, RSPA has also published, in the Federal Register of July 24, 1996 (61 FR 38513), a ''Notice of Deferral of Decision on Petitions for Reconsideration of Administrative Determination of Preemption.''

III. Areas of Regulatory Concern

RSPA asks commenters to address the following questions and to identify other related issues RSPA should address in any further rulemaking under this docket:

Loading

Background

The HMR impose filling conditions and limitations for packaging hazardous materials, such as specifying the types of packagings which must be used and the filling limits for those packagings. 49 CFR Part 173. The HMR also specify requirements for marking and labeling hazardous materials shipments. 49 CFR 172.300–338 and 172.400–450, respectively. The HMR historically have addressed the offering of packages for transportation, holding the shipper, or offeror, responsible for compliance with applicable regulations at the time a package is offered for transportation. 49 CFR 171.1, 171.2. Concerning in-plant processes, the HMR address only the loading of highway cargo tanks. 49 CFR 177.834–844.

Issues

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

(2) (a) If the shipper is a private carrier, should any portion of

transportation, prior to movement onto a public road, be considered transportation in commerce?

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

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

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

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

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

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

(5) Are there others factors for determining whether loading of hazardous materials is ''incidental'' to transportation in commerce?

Unloading

Background

Generally, under the HMR, transportation in commerce is considered complete when hazardous materials are delivered to a consignee's location and the delivering carrier has physically tendered the materials to the consignee, such as by unloading a trailer or disconnecting a trailer for unloading by the consignee. *See* 49 CFR 177.834(i)(2). This applies to both bulk and non-bulk hazardous materials. A notable exception to the general rule is that the HMR regulate the unloading of tank cars by consignees, even though there is usually no carrier involvement in the process other than positioning the tank car at the unloading site. 49 CFR 174.67. OSHA has promulgated several worker health and safety standards, *e.g.*, Process Safety Management of Highly Hazardous Chemicals, 29 CFR 1910.119; Hazardous Waste Operations and Emergency Response, 29 CFR 1910.120, which provide more comprehensive protection for consignees' employees than RSPA's limited consignee unloading requirements.

Issues

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

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

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

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

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

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

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

(5) Are there other factors for determining whether unloading of hazardous materials is ''incidental'' to transportation in commerce?

Storage

Background

Storage that is incidental to transportation in commerce and, consequently, regulated under the HMR, includes storage by a carrier that occurs between the time a hazardous material is offered for transportation to the carrier and the time it reaches its intended destination and is delivered by the carrier and accepted by the consignee. *See* 49 CFR 174.204(a)(2) (requirements for tank car delivery, including storage, of gases). RSPA has expressed the view that storage of hazardous material on consignor or consignee property (including leased track) is not incidental to transportation in commerce and, thus, not regulated under the HMR. *See* Inconsistency Ruling 28, *City of San Jose, California; Restrictions on Storage of Hazardous Materials*, 55 FR 8884 (Mar. 8, 1990). Similarly, when a shipment is consigned by the offerer to a storage or transfer facility which is the destination of the shipment, rather than to an end user, RSPA believes the shipment is out of transportation in commerce once received and then unloaded, or stored loaded, at the storage or transfer facility.

Issues

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

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

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

(4) Are there others factors for determining whether storage of hazardous materials is ''incidental'' to transportation in commerce?

Handling

Background

Based on their respective statutory authorities, both DOT and OSHA regulate hazardous materials. Nevertheless, prior to 1990, where DOT exercised its authority, under the former Hazardous Materials Transportation Act (HMTA), 49 U.S.C.A. 1801 *et seq.*, to prescribe or enforce standards or regulations affecting occupational safety or health in a particular area, OSHA was precluded from regulating in that same area, without exception. *See* 29 U.S.C. 653(b)(1).

In 1990, Congress enacted the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Pub. L. 101–615. Among other things, HMTUSA amended the HMTA to limit the preemptive effect of DOT regulations on Federal OSHA regulations. *See* 49 U.S.C. App. 1805(b)(3) (1990).

In 1994, the HMTA was codified by Pub. L. 103–272. The purpose of Pub. L. 103–272 was to ''clean-up'' several related Federal transportation laws, ''restating'' them in a format and language intended to be easier to understand without changing substantive content. The language in 49 U.S.C. 5107(f)(2), where former HMTA § 1805(b)(3) is codified, reinforces Congress' intent to limit the preemptive effect of DOT regulations on Federal OSHA regulations. Section 5107(f)(2) clearly nullifies the HMR's preemptive effect on Federal OSHA regulations in several areas—(1) Hazmat employee training under 49 U.S.C. 5107 (a)–(d);

(2) handling under 49 U.S.C. 5106; (3) registration under 49 U.S.C. 5108; and (4) motor carrier safety permits under 49 U.S.C. 5109. Section 5125 of Federal hazmat law continues to define the preemptive effect of the HMR on State, local government and Indian tribe requirements.

Despite language in 49 U.S.C. 5106 authorizing DOT to regulate the handling of hazardous materials, language in 49 U.S.C. 5125 authorizing DOT to preempt non-Federal handling requirements that are not substantively the same as those under Federal hazmat law or the HMR, and language in 49 U.S.C. 5107(f)(2) limiting the preemptive effect of DOT's handling regulations, nowhere does Federal hazmat law define the term ''handling.'' In interpreting the applicability of the HMR, RSPA has held that the term ''handling'' includes, among other activities, the unloading of hazardous materials incidental to transportation in commerce. *See* PD–9 (February 15, 1995; 60 FR 8774).

Issues

(1) Which transportation-related activities should be included under the term ''handling''? Why?

(2) Which transportation-related activities, if any, should be excluded from the list of activities that constitute ''handling''? Why?

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

IV. Participation/Conduct of Meetings

The public meetings will be informal. Representatives from DOT will be in attendance. RSPA has invited representatives from OSHA and EPA to attend because of the interest those agencies share with DOT in regulating hazardous materials. RSPA invites all interested parties, including States, local governments and Indian tribes, to participate in these meetings.

Participation in the Atlanta meeting will be in the form of oral statements. Speakers will be limited to ten minutes. The Atlanta meeting may conclude early if all participants have been heard.

The Sacramento and Philadelphia meetings also will be informal. RSPA proposes to begin the Sacramento and Philadelphia meetings by giving meeting participants an overview of the major issues of concern identified by commenters during the Atlanta meeting. Meeting participants then will form working groups to discuss those issues and to generate ideas, proposals and recommendations for use by the agency when it begins preparing a notice of proposed rulemaking in this docket. A DOT employee will be assigned to each working group as a facilitator. At the conclusion of the working-group discussions, a representative from each working group will present each group's ideas, proposals and recommendations to all of the meeting participants for further discussion.

If it appears that there is insufficient public interest in a break-out group format, RSPA may decide to hold traditional public meetings in Sacramento or Philadelphia.

Issued in Washington, DC on July 23, 1996, under authority delegated in 49 CFR Part 106.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 96–19114 Filed 7–26–96; 8:45 am]

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