parts 170–189 of this subchapter shall be so construed as to nullify or supersede regulations established and published under authority of State statute or municipal ordinance regarding the kind, character, or quantity of any hazardous material permitted by such regulations to be transported through any urban vehicular tunnel used for mass transportation.

[Amdt. 177-52, 46 FR 5316, Jan. 19, 1981, as amended by Amdt. 177-78, 55 FR 52710, Dec. 21, 1990; 62 FR 51561, Oct. 1, 1997]

§ 177.816 Driver training.

(a) In addition to the training requirements of § 177.800, no carrier may transport, or cause to be transported, a hazardous material unless each hazmat employee who will operate a motor vehicle has been trained in the applicable requirements of 49 CFR parts 390 through 397 and the procedures necessary for the safe operation of that motor vehicle. Driver training shall include the following subjects:

(1) Pre-trip safety inspection;

(2) Use of vehicle controls and equipment, including operation of emergency equipment;

(3) Operation of vehicle, including turning, backing, braking, parking, handling, and vehicle characteristics including those that affect vehicle stability, such as effects of braking and curves, effects of speed on vehicle control, dangers associated with maneuvering through curves, dangers associated with weather or road conditions that a driver may experience (e.g., blizzards, mountainous terrain, high winds), and high center of gravity;

(4) Procedures for maneuvering tunnels, bridges, and railroad crossings;

(5) Requirements pertaining to attendance of vehicles, parking, smoking, routing, and incident reporting; and

(6) Loading and unloading of materials, including—

(i) Compatibility and segregation of cargo in a mixed load;

(ii) Package handling methods; and

(iii) Load securement.

(b) *Specialized requirements for cargo tanks and portable tanks.* In addition to the training requirement of paragraph (a) of this section, each person who operates a cargo tank or a vehicle with a portable tank with a capacity of 1,000 gallons or more must receive training applicable to the requirements of this subchapter and have the appropriate State-issued commercial driver's license required by 49 CFR part 383. Specialized training shall include the following:

(1) Operation of emergency control features of the cargo tank or portable tank;

(2) Special vehicle handling characteristics, including: high center of gravity, fluid-load subject to surge, effects of fluid-load surge on braking, characteristic differences in stability among baffled, unbaffled, and multi-compartmented tanks; and effects of partial loads on vehicle stability;

(3) Loading and unloading procedures;

(4) The properties and hazards of the material transported; and

(5) Retest and inspection requirements for cargo tanks.

(c) The training required by paragraphs (a) and (b) of this section may be satisfied by compliance with the current requirements for a Commercial Driver's License (CDL) with a tank vehicle or hazardous materials endorsement.

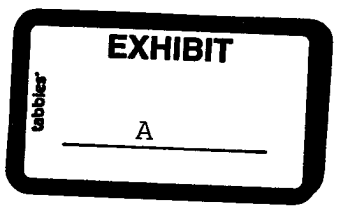
(d) Training required by paragraph (b) of this section must conform to the requirements of § 172.704 of this subchapter with respect to frequency and recordkeeping.

[Amdt. 177-79, 57 FR 20954, May 15, 1992, as amended by Amdt. 177-79, 58 FR 5852, Jan. 22, 1993]

§ 177.817 Shipping papers.

(a) *General requirements.* A person may not accept a hazardous material for transportation or transport a hazardous material by highway unless that person has received a shipping paper prepared in accordance with part 172 of this subchapter or the material is excepted from shipping paper requirements under this subchapter. A subsequent carrier may not transport a hazardous material unless it is accompanied by a shipping paper prepared in accordance with part 172 of this subchapter, except for § 172.204, which is not required.

(b) *Shipper certification.* An initial carrier may not accept a hazardous



Radioactive materials. See §173.403 of this subchapter for definitions relating to radioactive materials.

Rail car means a car designed to carry freight or non-passenger personnel by rail, and includes a box car, flat car, gondola car, hopper car, tank car, and occupied caboose.

Railroad means a person engaged in transportation by rail.

Receptacle means a containment vessel for receiving and holding materials, including any means of closing.

U.N. Recommendations means the U.N. Recommendations on the Transport of Dangerous Goods, Model Regulations (IBR, *see* §171.7 of this subchapter).

Reconditioned packaging. See §173.28 of this subchapter.

Registered Inspector means a person registered with the Department in accordance with subpart F of part 107 of this chapter who has the knowledge and ability to determine whether a cargo tank conforms to the applicable DOT specification. A *Registered Inspector* meets the knowledge and ability requirements of this section by meeting any one of the following requirements:

(1) Has an engineering degree and one year of work experience relating to the testing and inspection of cargo tanks;

(2) Has an associate degree in engineering and two years of work experience relating to the testing and inspection of cargo tanks;

(3) Has a high school diploma (or General Equivalency Diploma) and three years of work experience relating to the testing and inspection of cargo tanks; or

(4) Has at least three years' experience performing the duties of a Registered Inspector prior to September 1, 1991.

Regulated medical waste. See §173.134 of this subchapter.

Remanufactured packagings. See §173.28 of this subchapter.

Reportable quantity (RQ) for the purposes of this subchapter means the quantity specified in column 2 of the appendix to §172.101 for any material identified in column 1 of the appendix.

Research means investigation or experimentation aimed at the discovery of new theories or laws and the discovery and interpretation of facts or revision of accepted theories or laws in the light of new facts. Research does not include the application of existing technology to industrial endeavors.

Residue means the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors.

Reused packaging. See §173.28 of this subchapter.

SADT means self-accelerated decomposition temperature. See §173.21(f) of this subchapter.

Salvage packaging means a special packaging conforming to §173.3 of this subchapter into which damaged, defective, leaking, or non-conforming hazardous materials packages, or hazardous materials that have spilled or leaked, are placed for purposes of transport for recovery or disposal.

SCF (standard cubic foot) means one cubic foot of gas measured at 60 °F. and 14.7 psia.

Secretary means the Secretary of Transportation.

Self-defense spray means an aerosol or non-pressurized device that:

(1) Is intended to have an irritating or incapacitating effect on a person or animal; and

(2) Meets no hazard criteria other than for Class 9 (for example, a pepper spray; see §173.140(a) of this subchapter) and, for an aerosol, Division 2.1 or 2.2 (see §173.115 of this subchapter), except that it may contain not more than two percent by mass of a tear gas substance (e.g., chloroacetophenone (CN) or 0-chlorobenzylmalonitrile (CS); see §173.132(a)(2) of this subchapter.)

Settled pressure means the pressure exerted by the contents of a UN pressure receptacle in thermal and diffusive equilibrium.

Sharps. See §173.134 of this subchapter.

Shipping paper means a shipping order, bill of lading, manifest or other shipping document serving a similar purpose and prepared in accordance with subpart C of part 172 of this chapter.

or contribute to the combustion of other material more than air does.

Oxidizing gas means a gas that may, generally by providing oxygen, cause or contribute to the combustion of other material more than air does. Specifically, this means a pure gas or gas mixture with an oxidizing power greater than 23.5% as determined by a method specified in ISO 10156: or 10156–2: (IBR, *see* §171.7 of this subchapter) (*see also* §173.115(k)).

Oxygen generator (chemical) means a device containing chemicals that upon activation release oxygen as a product of chemical reaction.

Package or *Outside Package* means a packaging plus its contents. For radioactive materials, see §173.403 of this subchapter.

Packaging means a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter. For radioactive materials packaging, see §173.403 of this subchapter.

Packing group means a grouping according to the degree of danger presented by hazardous materials. Packing Group I indicates great danger; Packing Group II, medium danger; Packing Group III, minor danger. See §172.101(f) of this subchapter.

Passenger (With respect to vessels and for the purposes of part 176 only) means a person being carried on a vessel other than:

(1) The owner or his representative;

(2) The operator;

(3) A bona fide member of the crew engaged in the business of the vessel who has contributed no consideration for his carriage and who is paid for his services; or

(4) A guest who has not contributed any consideration directly or indirectly for his carriage.

Passenger-carrying aircraft means an aircraft that carries any person other than a crewmember, company employee, an authorized representative of the United States, or a person accompanying the shipment.

Passenger vessel means—

(1) A vessel subject to any of the requirements of the International Convention for the Safety of Life at Sea, 1974, which carries more than 12 passengers;

(2) A cargo vessel documented under the laws of the United States and not subject to that Convention, which carries more than 16 passengers;

(3) A cargo vessel of any foreign nation that extends reciprocal privileges and is not subject to that Convention and which carries more than 16 passengers; and

(4) A vessel engaged in a ferry operation and which carries passengers.

Person means an individual, corporation, company, association, firm, partnership, society, joint stock company; or a government, Indian Tribe, or authority of a government or Tribe, that offers a hazardous material for transportation in commerce, transports a hazardous material to support a commercial enterprise, or designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce. This term does not include the United States Postal Service or, for purposes of 49 U.S.C. 5123 and 5124, a Department, agency, or instrumentality of the government.

Person who offers or *offeror* means:

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

(i) Performs, or is responsible for performing, any pre-transportation function required under this subchapter for transportation of the hazardous material in commerce.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier is not an offeror when it performs a function required by this subchapter as a condition of acceptance of a hazardous material for transportation in commerce (*e.g.*, reviewing shipping papers, examining packages to ensure that they are in conformance with this subchapter, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function.

accordance with the applicable requirements of this subchapter.

TP36 For material assigned this portable tank special provision, portable tanks used to transport such material may be equipped with fusible elements in the vapor space of the portable

TP37 IM portable tanks are only authorized for the shipment of hydrogen peroxide solutions in water containing 72% or less hydrogen peroxide by weight. Pressure relief devices shall be designed to prevent the entry of foreign matter, the leakage of liquid and the development of any dangerous excess pressure. In addition, the portable tank must be designed so that internal surfaces may be effectively cleaned and passivated. Each tank must be equipped with pressure relief devices conforming to the following requirements:

Concentration of hydrogen per peroxide solution	Total[1]
52% or less	11
Over 52%, but not greater than 60%	22
Over 60%, but not greater than 72%	32

[1] Total venting capacity in standard cubic feet hour (S.C.F.H.) per pound of hydrogen peroxide solution.

TP38 Each portable tank must be insulated with an insulating material so that the overall thermal conductance at 15.5 °C (60 °F) is no more than 1.5333 kilojoules per hour per square meter per degree Celsius (0.075 Btu per hour per square foot per degree Fahrenheit) temperature differential. Insulating materials may not promote corrosion to steel when wet.

TP44 Each portable tank must be made of stainless steel, except that steel other than stainless steel may be used in accordance with the provisions of §173.24b(b) of this subchapter. Thickness of stainless steel for tank shell and heads must be the greater of 7.62 mm (0.300 inch) or the thickness required for a portable tank with a design pressure at least equal to 1.5 times the vapor pressure of the hazardous material at 46 °C (115 °F).

TP45 Each portable tank must be made of stainless steel, except that steel other than stainless steel may be used in accordance with the provisions of 173.24b(b) of this subchapter. Thickness of stainless steel for portable tank shells and heads must be the greater of 6.35 mm (0.250 inch) or the thickness required for a portable tank with a design pressure at least equal to 1.3 times the vapor pressure of the hazardous material at 46 °C (115 °F).

TP46 Portable tanks in sodium metal service are not required to be hydrostatically retested.

(9) *"W" codes.* These provisions apply only to transportation by water:

Code/Special Provisions

W1 This substance in a non friable prill or granule form is not subject to the requirements of this subchapter when tested in accordance with the UN Manual of Test and Criteria (IBR, *see* §171.7 of this subchapter) and is found to not meet the definition or criteria for inclusion in Division 5.1.

W7 Vessel stowage category for uranyl nitrate hexahydrate solution is "D" as defined in §172.101(k)(4).

W8 Vessel stowage category for pyrophoric thorium metal or pyrophoric uranium metal is "D" as defined in §172.101(k)(4).

W9 When offered for transportation by water, the following Specification packagings are not authorized unless approved by the Associate Administrator: woven plastic bags, plastic film bags, textile bags, paper bags, IBCs and bulk packagings.

W41 When offered for transportation by water, this material must be packaged in bales and be securely and tightly bound with rope, wire or similar means.

[Amdt. 172–123, 55 FR 52582, Dec. 21, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §172.102, see the List of CFR Sections Affected which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

Subpart C—Shipping Papers

§172.200 Applicability.

(a) *Description of hazardous materials required.* Except as otherwise provided in this subpart, each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

(b) This subpart does not apply to any material, other than a hazardous substance, hazardous waste or marine pollutant, that is—

(1) Identified by the letter "A" in column 1 of the §172.101 table, except when the material is offered or intended for transportation by air; or

(2) Identified by the letter "W" in column 1 of the §172.101 table, except when the material is offered or intended for transportation by water; or

(3) A limited quantity package unless the material is offered or intended for transportation by air or vessel and, until December 31, 2013, a package of ORM–D material authorized by this subchapter in effect on October 1, 2010

(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 the Federal hazardous material transportation law, an order issued under Federal hazardous material transportation law, subchapter A of this chapter, or a special permit or approval issued under subchapter A or C of this chapter is liable for a civil penalty of not more than $55,000 and not less than $250 for each violation, except the maximum civil penalty is $110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum $495 civil penalty applies to a violation relating to training. When a violation is a continuing one and involves transporting of hazardous material or causing them to be transported, each day of the violation is a separate offense. Each person who knowingly violates §171.2(l) or willfully or recklessly violates a provision of the Federal hazardous material transportation law, an order issued under Federal hazardous material transportation law, subchapter A of this chapter, or a special permit or approval issued under subchapter A or C of this chapter, shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which a violation involves the release of a hazardous material which results in death or bodily injury to any person.

[68 FR 61937, Oct. 30, 2003; 70 FR 20031, Apr. 15, 2005, as amended at 70 FR 73162, Dec. 9, 2005; 71 FR 8488, Feb. 17, 2006; 71 FR 44931, Aug. 8, 2006; 74 FR 68702, Dec. 29, 2009; 75 FR 53596, Sept. 1, 2010]

§ 171.2 General requirements.

(a) Each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.

(b) Each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter A of this chapter. There may be more than one offeror of a shipment of hazardous materials. Each offeror is responsible for complying with the requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter, with respect to any pre-transportation function that it performs or is required to perform; however, each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform, and each offeror may rely on information provided by another offeror, unless that offeror knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the other offeror is incorrect.

(c) Each person who performs a function covered by or having an effect on a specification or activity prescribed in part 178, 179, or 180 of this subchapter, an approval issued under this subchapter, or an exemption or special permit issued under subchapter A of this chapter, must perform the function in accordance with that specification, approval, an exemption or special permit, as appropriate.

(d) No person may offer or accept a hazardous material for transportation in commerce or transport a hazardous material in commerce unless that person is registered in conformance with

subpart G of part 107 of this chapter, if applicable.

(e) No person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter.

(f) No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

(g) No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter governing its use in the transportation of a hazardous material in commerce unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of this subchapter. No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of an exemption, a special permit, approval, or registration issued under this subchapter or subchapter A of this chapter unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of the exemption, special permit, approval, or registration issued under this subchapter or subchapter A of this chapter. The requirements of this paragraph apply whether or not the packaging or container is used or to be used for the transportation of a hazardous material.

(h) The representations, markings, and certifications subject to the prohibitions of paragraph (g) of this section include:

(1) Specification identifications that include the letters "ICC", "DOT", "CTC", "MC", or "UN";

(2) Exemption, special permit, approval, and registration numbers that include the letters "DOT", "EX", "M", or "R"; and

(3) Test dates associated with specification, registration, approval, retest, exemption, or special permit markings indicating compliance with a test or retest requirement of the HMR, or an exemption, special permit, approval, or registration issued under the HMR or under subchapter A of this chapter.

(i) No person may certify that a hazardous material is offered for transportation in commerce in accordance with the requirements of this subchapter unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter. Each person who offers a package containing a hazardous material for transportation in commerce in accordance with the requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter, must assure that the package remains in condition for shipment until it is in the possession of the carrier.

(j) No person may, by marking or otherwise, represent that a container or package for transportation of a hazardous material is safe, certified, or in compliance with the requirements of this chapter unless it meets the requirements of all applicable regulations issued under Federal hazardous material transportation law.

(k) No person may, by marking or otherwise, represent that a hazardous material is present in a package, container, motor vehicle, rail car, aircraft, or vessel if the hazardous material is not present.

U.S. Department
of Transportation

Pipeline and Hazardous Materials Safety Administration

1200 New Jersey Ave, S.E.,
Room E26-326
Washington, D.C. 20590-0001
Phone: (202) 366-4400
Fax: (202) 366-7041

Office of
Chief Counsel

Hazardous Materials Safety Law Division

SEP 1 2007

Ref. No.: 06-0085

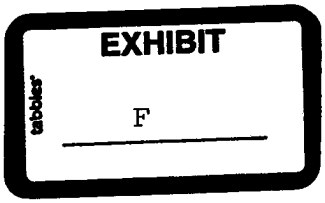
Ms. Nancy Kasza-Scott
Owner
The UPS Store
4962 Hononegah Road
Roscoe, Illinois 61073

Dear Ms. Kasza-Scott:

This responds to your April 24, 2006 letter regarding the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to certain acceptance functions performed at your place of business. Specifically, you ask about the circumstances under which a UPS Store could be found to be in violation of the HMR for accepting undeclared shipments or non-compliant packages for transportation. I apologize for the delay in responding and any inconvenience it may have caused.

It is our understanding that UPS Stores, which are owned and operated by independent franchisees, do not accept hazardous materials shipments on behalf of UPS. The one exception to this policy is the acceptance of ORM-D materials offered for carriage by ground transportation at some UPS Store locations.

For a UPS Store that does not accept hazardous materials shipments, the HMR generally do not apply to that store's operations. However, for purposes of the HMR, a UPS Store is considered to be an agent of UPS because it accepts packages for transportation on behalf of UPS. The HMR permit a carrier or the carrier's agent to rely on information provided by the person offering a package for transportation unless the carrier or agent knows or a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided is incorrect (see § 171.2(f)). Thus, a UPS Store could be found to be in violation of the HMR if it accepts an undeclared hazardous materials shipment for transportation when it knows that the shipment contains a hazardous material, or a reasonable person, acting in the circumstances and exercising reasonable care, would know that the shipment contains a hazardous material. Some possible indicators of hazardous materials include a hazard label or



caution statement on the package with no accompanying shipping documentation, or a notation such as "flammable paint" without proper shipping declarations or labels or markings. We strongly recommend that UPS Store employees receive training in how to recognize a possible undeclared hazardous materials shipment.

We note that an offeror who fails to properly declare (and prepare) a shipment of hazardous materials bears the primary responsibility for a hidden shipment. Indeed, whenever hazardous materials have not been shipped in accordance with the HMR, DOT generally will attempt to identify and bring an enforcement proceeding against the person who first caused the transportation of a non-complying shipment.

UPS Store personnel accepting ORM-D materials offered for ground transportation on behalf of UPS must ensure that the shipment conforms to all applicable HMR requirements prior to accepting the shipment. Again, the UPS Store may rely on information provided by the person offering the package for transportation unless it knows, or a reasonable person acting in the circumstances and exercising reasonable care, would have knowledge that the information provided is incorrect. Employees of the UPS Store who accept packages must be trained in accordance with Subpart H of Part 172 of the HMR.

You should also be aware that the Federal Aviation Administration has issued regulations governing air carriers that do not accept or transport hazardous materials, and these regulations may apply to some aspects of your operation. You may wish to contact the Director, Office of Hazardous Materials, ADG-1, Federal Aviation Administration, 800 Independence Ave. SW, Room 300 East, Washington, DC 20591, 202-267-9864, for additional information.

Sincerely,

Joseph Solomey
Assistant Chief Counsel

PHMSA Interpretation #13-0195

Regulation References

Dec 23, 2013

PDF Version

49 CFR 177.834

- More Interpretations on this topic
- Read the Regulation

PHMSA Response Letter

December 23, 2013

Mr. Tom Forbes
Public Utilities Commission of Ohio
Transportation Department
180 E Broad Street, 4th Floor
Columbus, OH 43215

Ref. No 13-0195

Dear Mr. Forbes:

This responds to your October 15, 2013 email regarding enforcement of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). In your email, you describe a scenario where a shipper loads a van trailer with hazardous materials (hazmat) packages and then seals the trailer noting that the carrier is not present during loading. The shipper then instructs the carrier not to break the seal and provides a shipping paper. During the course of transportation, the carrier is stopped by a State enforcement agent and the trailer is inspected whereupon the agent discovers the hazmat packages are not secured. With respect to this situation, you request clarification of the person in violation of the package securement requirements of § 177.834(a) of the HMR.

It is the opinion of this Office that, and barring additional information pertinent to the scenario you describe, the person performing the loading of the hazmat packages in the motor vehicle is in violation of the package securement requirements of § 177.834(a); in this case the shipper. Regarding carrier responsibility, as specified in § 171.2(f), no person may transport hazmat unless it is transported in accordance with the HMR. The carrier may rely on information provided by the offeror (the shipper) of the hazmat unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror is incorrect. See § 171.8 for the HMR definition of person who offers or offeror. Note that in general, whenever hazmat has not been shipped in compliance with the HMR, DOT will attempt to identify and bring an enforcement proceeding against the person who first caused the transportation of the noncomplying shipment. See the formal interpretation of carrier responsibility when accepting hazmat for transportation in commerce (June 4, 1998 63 FR 30411).

In the absence of participating in the loading operation or having access to the loaded trailer, it is assumed that the carrier would be relying on the shipping paper and the accompanying certification that the packages are in proper condition for transportation, i.e., properly secured.

Unless the carrier has actual or constructive knowledge that the packages are not properly secured, we see no reason not to accept the shipment. However, the carrier may not ignore readily apparent information that would indicate the packages are not properly secured.

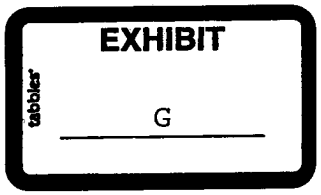
I hope this information is helpful. If you have further questions, please contact this office.

Sincerely,

Robert Benedict
Chief, Standards Development Branch
Standards and Rulemaking Division

177.834

DMS ID# 13-0195



the criteria for a significant regulatory action under Executive Order 12866. Thus, it was not subject to OMB review.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities.

Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

This regulation imposes no reporting/recordkeeping requirements necessitating clearance by OMB.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social security.

Dated: May 27, 1998.

Kenneth S. Apfel,

Commissioner of Social Security.

For the reasons set forth in the preamble, part 404, subpart P, chapter III of title 20 of the Code of Federal Regulations is amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart P—[Amended]

1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

2. Appendix 1 to subpart P of part 404 is amended by revising items 1, 3, 11, 12, and 15 of the introductory text before Part A to read as follows:

Appendix 1 to Subpart P—Listing of Impairments

* * * * *

1. Growth Impairment (100.00): July 1, 1999.

* * * * *

3. Special Senses and Speech (2.00 and 102.00): July 1, 1999.

* * * * *

11. Multiple Body Systems (110.00): July 1, 1999.

12. Neurological (11.00 and 111.00): July 1, 1999.

* * * * *

15. Immune System (14.00 and 114.00): July 1, 1999.

* * * * *

[FR Doc. 98–14599 Filed 6–3–98; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 107, 171, 172, 173, 174, 175, 176, 177

[Notice No. 98–6]

Hazardous Materials: Formal Interpretation of Regulations

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

ACTION: Formal interpretation of regulations.

SUMMARY: This document publishes a formal interpretation of the Hazardous Materials Regulations (HMR) concerning the responsibilities of a carrier when accepting hazardous materials for transportation in commerce. This interpretation is being published in order to facilitate better public understanding and awareness of the HMR.

EFFECTIVE DATE: June 4, 1998.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590–00001; telephone 202–366–4400.

SUPPLEMENTARY INFORMATION: As part of its implementation of the Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, RSPA issues the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180. From time to time, RSPA's Chief Counsel issues formal interpretations of the HMR. These interpretations generally involve multimodal issues and are coordinated with the other DOT agencies which, together with RSPA, enforce the HMR: Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, and United States Coast Guard. This document publishes a Chief Counsel's interpretation concerning the responsibilities of a carrier when accepting hazardous materials for transportation in commerce. This interpretation addresses issues raised in a letter by Mr. E.A. Altemos, of HMT Associates, and is consistent with an August 19, 1997 written response to Mr. Altemos by RSPA's Associate Administrator for Hazardous Materials Safety.

In addition to these infrequent formal interpretations by RSPA's Chief Counsel, RSPA's Office of Hazardous Materials Standards provides information and informal clarifications of the HMR on an ongoing basis, through (1) a telephonic information center (1–800–467–4922) to answer oral questions and (2) informal written interpretations or clarifications in response to written inquiries. RSPA's formal interpretations and informal letter clarifications (and additional information concerning the HMR) are also available through the Hazmat Safety Homepage at "http://hazmat.dot.gov." In addition, some of RSPA's interpretations and clarifications may be reproduced or summarized in selected trade publications.

Further information concerning the availability of informal guidance and interpretations of the HMR is set forth in 49 CFR 107.14. RSPA believes that publication of its interpretations should promote a better understanding of the HMR and improve compliance with the HMR.

Issued in Washington, DC, on May 28, 1998.

Judith S. Kaleta,

Chief Counsel.

[Int. No. 98–1]

Background

Mr. E.A. Altemos, HMT Associates, requested clarification of requirements in the HMR concerning an air carrier's acceptance of packages containing hazardous materials. This inquiry concerned only the carrier's responsibilities relating to hazardous materials offered by another person, and not a carrier's transportation of its own materials or products. (For information on an air carrier's transportation of its own company materials, or "COMAT," *see* "COMAT FACTS" in RSPA's January 1998 Safety Alert, available on the Hazmat Safety Homepage.)

Although Mr. Altemos's question was posed in the context of air transportation, the HMR requirements discussed in RSPA's interpretation apply to carriers by all modes of transportation.

Interpretation

Basic requirements in the HMR set forth in 49 CFR 171.2(a) and (b), and applicable to carriers in all modes of transportation, are that no person may

accept a hazardous material for transportation in commerce unless * * * the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or

authorized by applicable requirements of [the HMR], or an exemption, approval, or registration issued under [the HMR] * * * [or]

transport a hazardous material in commerce unless * * * the hazardous material is handled and transported in accordance with applicable requirements of [the HMR], or an exemption, approval, or registration issued under [the HMR] * * *

A carrier's acceptance and transportation of hazardous materials can involve several different situations, including the following two ends of the spectrum:

1. the shipment is declared by the offeror, in one manner or another, to contain hazardous materials and complies (in whole or in part) with requirements in the HMR; or

2. whether intentionally or unintentionally, the shipment is not declared by the offeror to contain hazardous materials, and no attempt has been made to comply with the HMR (the "undeclared" or "hidden" shipment).

The Secretary of Transportation has delegated to agencies within the Department (Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, and Research and Special Programs Administration), the authority in 49 U.S.C. 5123 to assess a civil penalty against any person who "knowingly violates" any requirement in the HMR, including the provisions in § 171.2 (a) and (b) quoted above. Section 5123(a) provides that a person "acts knowingly" when

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

Accordingly, a carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material which has not been packaged, marked, labeled, and described on a shipping paper as required by the HMR. This means that a carrier may not ignore readily apparent facts that indicate that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact that it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.

The Department's October 4, 1977 interpretation concerning 49 CFR 175.30 (reproduced below) relates to the first situation in the above paragraph, *i.e.*, when an air carrier receives a shipment accompanied by a shipping paper containing a shipper's certification that hazardous materials within the shipment have been classed, packaged, marked, labeled and accurately described as required. *See* 49 CFR 172.204. Whenever, in the course of examining the shipping paper and performing the required visual inspection of the package, an air carrier has reason to know of discrepancies, the carrier may not simply rely on the shipper's certification.

In the case of an undeclared or hidden shipment, all relevant facts must be considered to determine whether or not a reasonable person acting in the circumstances and exercising reasonable care would realize the presence of hazardous materials. In an enforcement proceeding, this is always a question of fact, to be determined by the fact-finder. Because innumerable fact patterns may exist, it is not practicable to set forth a list of specific criteria to govern whether or not the carrier has sufficient constructive knowledge of the presence of hazardous materials within an undeclared or hidden shipment to find a knowing violation of the HMR.

Information concerning the contents of suspicious packages must be pursued to determine whether hazardous materials have been improperly offered. A carrier's employees who accept packages for transportation must be trained to recognize a "suspicious package," as part of their function—specific training as specified in 49 CFR 172.704(a)(2), because the legal standard remains the knowledge that a reasonable person acting in the circumstances and exercising reasonable care would have. Because this standard applies to all modes of transportation, a single training program and a uniform screening process can be developed for all of a company's employees involved in surface or air transportation.

At the same time, an offeror who fails to properly declare (and prepare) a shipment of hazardous materials bears the primary responsibility for a hidden shipment. Whenever hazardous materials have not been shipped in compliance with the HMR, DOT generally will attempt to identify and bring an enforcement proceeding against the person who first caused the transportation of a noncomplying shipment. The procedures applicable to DOT civil penalty enforcement cases procedures are set forth in 14 CFR 13.16 (FAA); 33 CFR part 1, subpart 1.07 (USCG); 49 CFR part 109, subpart B (FRA); 49 CFR part 107, subpart D (RSPA); and 49 CFR part 386 (FHWA).

To the extent that any carrier, regardless of the mode of transportation, is truly "innocent" in accepting an undeclared or hidden shipment of hazardous materials, it lacks the knowledge required for assessment of a civil penalty. However, when a carrier acts "knowingly," as defined in 49 U.S.C. 5123(a), it must be considered subject to civil penalties. RSPA rejects any suggestion that a carrier would be deemed to have "knowingly" accepted a hazardous material for transportation, and be subject to civil penalties under 49 U.S.C. 5123, only when the material is described as a hazardous material on a shipping paper or other commercial documentation, or the package is marked or labeled in a manner as prescribed by the HMR. That approach would improperly limit a carrier's responsibility to situations involving a "declared" shipment.

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

October 4, 1977.

Subj: Air Carrier's Responsibility for Inspection of Hazardous Materials Packages.

From: Assistant General Counsel for Materials Transportation Law.

To: Director, Transportation Safety Institute, TES-15

This is in response to your request of August 25, 1977, for our opinion as to whether an air carrier has a specific regulatory obligation to inspect hazardous materials packages prior to acceptance for air transportation to insure the shipper's compliance with specific regulatory requirements of parts 173 and 178. With the question, you have supplied your analysis and conclusion that except for the physical integrity inspection provided for in § 175.30(b) there is no duty on the air carrier to inspect hazardous materials packages prior to acceptance for transportation in order to determine compliance with the requirements of parts 173 and 178. Thus, it is your opinion that the air carrier may rely on the shipper's certification accompanying the shipment.

Section 175.30 prescribes the requirements that must be met before an air carrier accepts a shipment of hazardous materials for transportation. In achieving compliance with these requirements, the air carrier must, under paragraph (a), examine the shipment against the information supplied on the shipping paper, and must, under paragraph (b), make a visual inspection for leaks and damaged packaging. Consequently, I agree with your analysis and conclusion that the regulations permit the air carrier to rely on the information supplied on the shipping paper, unless, in complying with paragraphs (a) and (b), he has reason to know that there are discrepancies.

[FR Doc. 98-14561 Filed 6-3-98; 8:45 am]
BILLING CODE 4910-60-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961107312-7021-02; I.D. 052098B]

Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Rate Standards for the Second Half of 1998

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Pacific halibut and red king crab bycatch rate standards; request for comments.

SUMMARY: NMFS announces Pacific halibut and red king crab bycatch rate standards for the second half of 1998. Publication of these bycatch rate standards is required under regulations

PHMSA Interpretation #08-0301R

Dec 11, 2009

PDF Version

PHMSA Response Letter

December 11, 2009

Regulation References

49 CFR 172.203

- More interpretations on this topic
- Read the Regulation

49 CFR 171.12

- More interpretations on this topic
- Read the Regulation

Mr. Calvin Faulkner
D&H Specialist
APL Americas Region
1111 Broadway
Oakland, CA 94607-5500

Ref. No. 08-0301R

Dear Mr. Faulkner:

This letter replaces our February 10, 2009 response to your December 5, 2008 e-mail in which you raised several questions regarding the term "initial carrier" and a vessel operator's responsibilities under the Hazardous Materials Regulations (HMR, 49 CFR Parts 171-180). Please note that the answers to questions Q1, Q3 and Q5 are revised in response to questions that have arisen and our further review of this issue. Our answers to your questions are revised to read as follows:

Q1. Under § 171.22(f)(2), is the vessel operator considered the "initial U.S. carrier" for the purpose of maintaining the shipper's certification required by § 172.204 or is the term "initial U.S. carrier" used to describe the first carrier to transport a hazardous material shipment once importation occurs and it is within United States jurisdiction?

A1. The term "initial U.S. carrier" is not defined in the HMR. As used in § 171.22(f)(2), it refers to the first carrier to transport a hazardous material shipment within the United States. This role is met when a vessel enters the navigable waters of the United States as defined in 33 CFR 2.36. A vessel operator is required to receive a shipper¿s certification in accordance with § 176.27 for a hazardous material shipment, unless the material is excepted from the shipping paper requirements under the HMR.

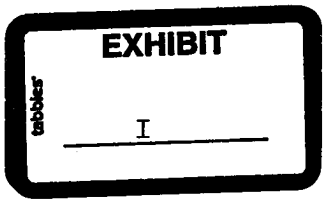
Q2. What is the obligation of a vessel operator if a hazardous material shipment arrives at a United States port without a prepared shipper¿s certification as required by § 172.204?

A2. Unless a hazardous material is excepted from the shipping paper requirements under the HMR, under §§ 176.24 and 176.27, a person (vessel operator) may not transport a hazardous material by vessel unless that person has received a shipping paper prepared in accordance with Part 172 of the HMR, including the shipper's certification prescribed in § 172.204. Thus, a vessel operator would be in violation of the HMR for accepting such a shipment without a shipper's certification. Additionally, the shipment could not be forwarded or offered for transportation and transported in commerce until such documentation was prepared.

Q3. If a vessel operator releases a container that contains a hazardous material shipment to a carrier and the accompanying shipping papers do not have a shipper's certification, is it a violation of the HMR?

A3. The answer is no. Because the vessel operator is the initial U.S. carrier, it is not required to provide a shipper's certification on the accompanying shipping papers, prepared in accordance with Part 172 of the HMR, to subsequent highway or rail carriers for onward transportation.

Q4. Under § 177.817(b), what is the obligation of a vessel operator to provide a prepared shipper's certification to a highway or rail carrier prior to the release of a containerized hazardous material shipment to the highway or rail carrier?



A4 The answer to your question is the same as the answer in A3 above

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Q5 Is it permissible for a vessel operator to transfer a hazardous material shipment to the initial U.S. carrier without a shipper's certification on the shipping paper? The vessel operator would indicate on the original shipping paper, prepared in accordance with the IMDG Code, "shipper's certification on file" and retain a copy of the documentation for one year as required by § 172 201(e).

A5 As stated in response A1, in your scenario the vessel carrier is the initial U.S. carrier. Therefore, if a vessel carrier accepts a hazardous material shipment from a shipper and transfers the shipment to a highway or rail carrier upon entering the United Sates, only the vessel carrier is required to receive a shipper's certification. The vessel operator must retain the shipping papers with a certification as required by §§ 171.22(f)(4), 172.201(e) and 176.24(b), but is not required to furnish the shipper's certification to any connecting intermodal carrier for subsequent highway or rail transportation. Hazardous material shipments imported into the United States by vessel that are transferred to a highway or rail carrier must be in conformance with the applicable requirements in §§ 171.22, 171.23 and 171.25, including those in § 171.22(c).

Q6 Is it permissible for a vessel operator to issue a shipper's certification based solely on the information provided in the original certification prepared by the shipper?

A6 The answer is yes. A carrier may rely on the original shipper's certification unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the certification provided by the offeror (shipper) is incorrect. However, a carrier who knowingly uses incorrect information (see § 171.2(e) and (f)), or a person who knowingly or willfully provides incorrect information, is in violation of the HMR.

I trust this satisfies your inquiry. Please accept my apology for any inconvenience caused by this revision of our original response.

Sincerely,

Edward T. Mazzullo
Director, Office of Hazardous Materials Standards

171.22(f)(2), 172.204, 176.27

DMS ID# 08-0301R

ROBERT BORGER, SR.; DERRICK J. ATKINSON, Plaintiffs-Appellants, v. CSX TRANSPORTATION, INC., Defendant-Appellee.

No. 08-3685

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

09a0236p.06; *571 F.3d 559*; *2009 U.S. App. LEXIS 14944*; *2009 FED App. 0236P (6th Cir.)*; *29 I.E.R. Cas. (BNA) 673*

May 1, 2009, Argued
July 8, 2009, Decided
July 8, 2009, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 06-00019--Sandra S. Beckwith, District Judge.
Borger v. CSX Transp., Inc., 2008 U.S. Dist. LEXIS 34199 (S.D. Ohio, Apr. 25, 2008)

COUNSEL: ARGUED: Martin J. Holmes, Jr., SHINDLER, NEFF, HOLMES, SCHLAGETER & MOHLER, Toledo, Ohio, for Appellants.

Dan Himmelfarb, MAYER BROWN LLP, Washington, D.C., for Appellee.

ON BRIEF: E.J. Leizerman, Michael Jay Leizerman, E.J. LEIZERMAN & ASSOCIATES, LLC, Toledo Ohio, for Appellants.

Dan Himmelfarb, Evan Mark Tager, MAYER BROWN LLP, Washington, D.C., James L. O'Connell, James F. Brockman, David E. Williamson, LINDHORST & DREIDAME, Cincinnati, Ohio, for Appellee.

JUDGES: Before: MARTIN, SUHRHEINRICH, and WHITE, Circuit Judges.

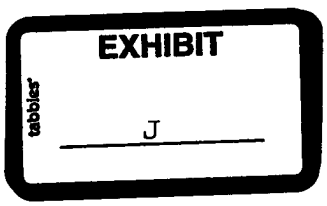
OPINION BY: BOYCE F. MARTIN, JR.

OPINION

[*562] [***1] BOYCE F. MARTIN, JR., Circuit Judge. Railworkers Robert Borger and Derrick Atkinson sued CSX Transportation under the Federal Employers Liability Act, alleging injuries from exposure to hydrochloric acid fumes. For the reasons described below, we AFFIRM the district court's entry of summary judgment in CSX's favor.

[***2] I.

On June 21, 2004, Robert Borger, Sr. and Derrick J. Atkinson worked together as engineer and conductor on a CSX train heading south from Troy, Ohio to Cincinnati. A northbound CSX train from Cincinnati [**2] needed to pass on the same track, so Borger stopped his train in a siding--a section of track parallel to the main track. As the other train passed, Borger remained onboard, while Atkinson stepped off. Borger says that while the northbound train was passing, he smelled an "immediate sharp, strong smell . . . like somebody taking a fire extinguisher and blasting it in [his] face." From where he stood, Atkinson also smelled a "very, very strong smell." Borger's eyes were irritated and he experienced a "strong acidy taste going down [his] throat" as well as headaches and coughing. Atkinson experienced similar symptoms; both men received medical treatment.



Before the northbound train left Cincinnati earlier that evening, a two-man CSX crew had conducted a brake inspection which included a visual inspection of the train's cars. The crew reported no leaks or unusual smells. Three crew members aboard the northbound train said in affidavits that, before they passed Borger and Atkinson, they were "not aware of any odor coming from our train" and "had no knowledge . . . that there was any leak or emission or discharge from any of the cars." One of the crew stated that he had "briefly noticed [**3] a skunk-like odor . . . which he did not believe came from any of the cars of our train." Another crew member had smelled an "unusual odor, but did not believe that it was coming from our train," and the third crew member "smelled an usual odor, but believed that it had come from the Miller Brewery, not our train."

After the train passed, Borger reported the odor to a dispatcher and the northbound train stopped for the crew to inspect it. The crew did not detect any leaks or unsecured valves or hatches, but they did smell a faint odor coming from one of the tank cars that was carrying hydrochloric acid. Later that night, the trainmaster inspected the northbound train and also did not discover any leaks. And at a later stop in Walbridge, Ohio, yet another CSX worker inspected the train and, again, found no leaks.

Borger and Atkinson filed separate lawsuits against CSX under the Federal Employers Liability Act, *45 U.S.C. § 51*, for [*563] injuries that allegedly resulted from exposure to hydrochloric acid vapors emanating from the northbound train. The district court [***3] consolidated their cases and granted CSX's motion for summary judgment, determining that no genuine issue of material fact existed [**4] as to whether CSX violated federal safety regulations and that the release of hydrochloric acid vapor was not foreseeable and thus was not the result of CSX's negligence. The plaintiffs appeal.

II.

This Court reviews de novo a district court's grant of summary judgment. *Mohnkern v. Prof'l Ins. Co., 542 F.3d 157, 160 (6th Cir. 2008)*, and makes all reasonable inferences in the nonmoving party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

III.

The Federal Employers Liability Act provides a federal cause of action against a railroad company for employees injured as a result of their employer's negligence:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51. Congress enacted the Act in "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 807 (6th Cir. 1996)* [**5] (citation omitted), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. The Act requires a railroad company to provide its workers with a "reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under the circumstances." *Aparicio, 84 F.3d at 810* (quoting *Urie v. Thompson, 337 U.S. 163, 174, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)*).

A plaintiff may demonstrate liability as a matter of law if he proves that a railroad company violated a safety statute that establishes an absolute duty on the railroad company. *See Crane v. Cedar Rapids & Iowa City Ry. Co., 395 U.S. 164, 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969)*; *Kernan v. Am. Dredging Co., 355 U.S. 426, 443, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958)*; *Urie, 337 U.S. at 163*. If a plaintiff cannot point [***4] to a specific safety statute that the railroad violated, he can still prevail by proving the "traditional common law elements of negligence: duty, breach, foreseeability, and causation." *Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990)*.

A.

The plaintiffs argue that CSX violated three federal regulations issued under the Hazardous Materials Transportation Act, *49 U.S.C. § 5101-5128*: [**6] 49 C.F.R. §§ 173, *173.31*, and *174.9*. We assume, without

deciding, that the Hazardous Materials Transportation Act is among those safety statutes that establishes an absolute duty under the FELA.

1) Section 173.31

First, Borger and Atkinson say that CSX violated *49 C.F.R. § 173.31*:

> d) Examination before shipping.
>
> (1) No person may *offer for transportation* a tank car containing a hazardous [*564] material or a residue of a hazardous material unless that person determines that the tank car is in proper condition and safe for transportation.

(emphasis added). *Section 173.31* describes a ten-point inspection process, including for example, examination of the "tank shell and heads for abrasion, corrosion, cracks, dents, distortion, defects in welds, or any other condition that makes the tank car unsafe for transportation." *49 C.F.R. § 173.31(d)(1)(i)-(x)*. But CSX's failure to perform such an inspection does not violate *Section 173.31* because the regulation is not directed at carriers, like CSX, but at those who "offer for transportation a tank car." Here, the company that offered the car that contained hydrochloric acid to CSX for transportation was Bayer Corporation. Thus, under *Section 173.31(d)*, it [**7] was Bayer's duty, not CSX's, to perform these inspections "before shipping" and CSX's failure to perform them is irrelevant under *Section 173.31(d)*--a regulation that applies to shippers.

2) Section 174.9

The plaintiffs also maintain that CSX violated *49 C.F.R. § 174.9*, which addresses the inspection duties for carriers:

> [***5] At each location where a hazardous material is accepted for transportation or placed in a train, the carrier shall inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures and leakage. This inspection may be performed in conjunction with inspections required under parts 215 and 232 of this title.

49 C.F.R. § 174.9. Parts 215 and 232 describe the required pre-departure and brake system inspections.

John Hamm, a CSX car inspector who was on duty the night of the incident, testified about the scope of his inspection of the northbound train. The district court concluded that it satisfied *Section 174.9*'s requirements because "in the course of performing the ground level Class 1 brake inspection of [the northbound train] before departure[,] [Hamm] also looked for signs of leaks on each of the cars [**8] and found none." We agree that this was sufficient. Hamm testified in his deposition that he visually observed the valves, ports, discharge pipes, hatches, latches, and other equipment on the tank cars in the course of completing his brake inspection. He also explained that, had he seen anything out of the ordinary, he would have reported it to the lead man and noted it in the Car Inspectors Work Report. The Work Report contains no indication that Hamm observed anything out of the ordinary.

The plaintiffs counter that "Hamm did not properly inspect the tank car on the northbound train prior to it leaving Cincinnati," but they do not explain how Hamm's visual inspection fell short of *Section 174.9*'s requirements. They do not contend that *Section 174.9* requires more than a "ground level" inspection for "required markings, labels, placards, securement of closures and leakage," *49 C.F.R. § 174.9*. These duties are fewer and less burdensome than those imposed on shippers, *see 49 C.F.R. § 173.31(d)(1)(i)-(x)*. Although Hamm testified that he was not trained to inspect tank cars, Borger and Atkinson offer no evidence that a *Section 174.9* visual inspection requires special training, beyond the [**9] training Hamm completed to become a car inspector. Thus, the district court properly concluded that no facts in the record could support an inference that CSX failed to comply with *Section 174.9*.

3) Section 174.3

Borger and Atkinson also contend that CSX violated *49 C.F.R. § 174.3*:

> [*565] [***6] No person may accept for transportation or transport by rail any shipment of hazardous material that is not in conformance with the requirements of this subchapter.

The Department of Transportation has long interpreted this regulation to entitle carriers to rely on a shipper's certification that the material offered is in accordance with the Hazardous Material Regulations unless it has "reason to know of discrepancies." *Hazardous Materials, 63 Fed. Reg. 30,411* (Dep't of Transp. June 4, 1998) (formal interpretation). [1] The regulation therefore requires more than evidence that a person was injured by a shipment: the carrier must have had a reason to know of a problem. The plaintiffs did not, at summary judgment, point to facts supporting a conclusion that CSX violated *Section 174.3* because it knew of any discrepancies.

> 1 Since the incident, the regulations were amended to allow the carrier to "rely on information [**10] provided by the offeror," unless the carrier knows or has reason to know that the information provided by the offeror is incorrect. *49 C.F.R. § 171.2(f).*

B.

Finally, Borger and Atkinson contend that even if CSX complied with the Hazardous Materials Transportation Act's requirements, a reasonable fact-finder nevertheless could conclude that CSX was negligent. To support this argument, they point to CSX's decision not to investigate the source of an "unusual odor" that some of the crew members on the northbound train smelled and the nature of CSX's pre-departure inspection of the northbound train.

The district court did not decide if CSX's failure to respond to the "unusual" odors detected by crew members aboard the northbound train amounted to negligence because the plaintiffs never made that argument. Instead, they focused exclusively on the alleged inadequacy and unreasonableness of the pre-departure inspection of the northbound train. An argument not raised before the district court is waived on appeal to this Court. *Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552-53 (6th Cir. 2008).* But even if it had not been waived, the argument is unconvincing because none of the crew members [**11] who reported smelling an odor believed that the odor came from the train. [***7] CSX's decision not to investigate the source of those odors does not amount to negligence.

This leaves us with the plaintiffs' argument that, even if CSX complied with the Hazardous Material Transportation Act regulations, its inspection was nonetheless unreasonable under the circumstances. Liability under the Federal Employers Liability Act may arise "whether the fault is a violation of a statutory duty or the more general duty of acting with care." *Kernan, 355 U.S. at 438-39.* The duty is "measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances," *Green v. River Terminal Ry. Co., 763 F.2d 805, 809 (6th Cir. 1985),* and is breached if the railroad company knows or should have known that the "prevalent standards of conduct were inadequate to protect" employees. *Van Gorder v. Grand Trunk W. R.R., Inc., 509 F.3d 265, 269-70 (6th Cir. 2007).* To survive summary judgment, a plaintiff must present "little more than a scintilla" of evidence "given the Supreme Court's view that Congress has favored [the FELA] plaintiffs with a jury resolution of all [**12] colorable issues." *Aparicio, 84 F.3d at 810* (citing *Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)).*

[*566] Borger and Atkinson argue that CSX's compliance with the safety regulations is not necessarily conclusive evidence that it acted in a reasonably prudent manner. In support, they rely on *Southern Pacific Transportation Co. v. United States, 13 Cl. Ct. 402, 411 (Cl. Ct. 1987).* In *Southern Pacific* (not an FELA case), the court observed that "[c]ompliance with regulations intended to prevent the harm at issue may in some instances be conclusive evidence of reasonable care, but not where a party *has reason to suspect the existence of special dangers or hazards." Id. at 411* (emphasis added). The court in *Southern Pacific* concluded that the railroad company had notice of facts that "suggest[] some failure on the part of shippers to perform their . . . duties." *Id.* Here, by contrast, Borger and Atkinson did not offer evidence that CSX had notice of any special danger or hazard with respect to the northbound train--for example that CSX was aware of leaks in general, or that it had special information about the car that allegedly leaked hydrochloric acid vapors. Nor did it have any reason [**13] to believe that the [***8] shipper, Bayer Corporation, had not performed its inspection duties. Thus, here, CSX's compliance with the Hazardous Materials Regulations is conclusive evidence that CSX exercised due care by conducting a reasonable pre-departure inspection of the northbound train.

Although they deny relying on the doctrine of res

ipsa loquitur to prove their case, the plaintiffs' claim that CSX violated *Section 174.3* is essentially a *res ipsa* claim. It is based on this syllogism: properly prepared cars do not leak when they are being transported; something on the northbound CSX train was leaking as it passed them; thus, the shipment was "not in conformance" with the requirements of the Hazardous Materials Transportation Act.

This Court has applied *res ipsa* in FELA cases, *see Miller v. Cincinnati, N. O. & T. Pac. Ry. Co., 317 F.2d 693 (6th Cir. 1963)*, but we are not convinced that it applies in this case. First, assuming that a leak could be evidence of some person's negligence, it does not follow that it is evidence of CSX's negligence. That a leak might not necessarily result from negligence on the part of the carrier is evident from the structure of the Hazardous Materials Act [**14] and Regulations. They describe separate inspection duties for parties "offering" shipments of hazardous materials (shippers) and for parties transporting hazardous materials (carriers). As we described above, *Section 173.31(d)(1)(i)-(x)* imposes inspection duties on "each person offering a tank car for transportation," while *Section 174.9* describes how and when "the carrier must inspect each rail car." The plaintiffs' argument that a leak, no matter when it begins, proves the carrier's negligence ignores the division of regulatory inspection duties. Under the plaintiffs' theory, a carrier is strictly liable regardless of whether it complied with the *Section 174.9* inspection duties and performed a reasonably prudent pre-departure inspection.

Notably, Borger and Atkinson do not argue that a reasonably prudent pre-departure inspection required CSX to go beyond the regulations. Nor do they argue that CSX's pre-departure inspection in this case fell below the railroad industry standard. Borger and Atkinson's expert, Joel Robertson, a "Railway Safety Specialist," stated that [***9] CSX "failed to perform an adequate or effective inspection of the tank car each time the tank cars were placed in a train, [**15] resulting in the acceptance and transporting of a defective tank car." Even if we assume that the odor plaintiffs smelled came from the tank car carrying hydrochloric acid where CSX workers later detected an odor, we have little information [*567] about the odor's possible causes. No one observed leaks or unsecured hatches or latches on the car. As the district court observed:

> The most plausible explanation for the apparent venting of hydrochloric acid vapor, advanced by Plaintiffs' expert, is that [the car] was loaded with insufficient outage, or air space between the top level of the liquid and the top of the tank, for expansion. The outside temperature and hydraulic motion of the train in motion caused the pressure to build inside of the tank car to the point that vapor was vented through the pressure release valve. Alternatively the pressure relief valve was defective to begin with and released vapor into the air at a lower pressure than it should have.

*Borger v. CSX Transp., Inc., 2008 U.S. Dist. LEXIS 34199, 2008 WL 1886170, *2 (S.D. Ohio Apr. 25, 2008).*

Robertson's report is silent, however, on what type of inspection, in addition to the visual inspection required under *Section 174.9*, would have been "adequate" or [**16] would have revealed the unknown defect in the car that allegedly leaked hydrochloric acid. According to Robertson, the regulations only require the valves on tank cars to be inspected every five years, and it is impossible to inspect the valves without removing them from the tank car. Hamm, who examined the train before it departed Cincinnati, testified that he would have reported any unusual odors, and the absence of any indication of an unusual smell on the pre-departure report is evidence that Hamm did not smell anything coming from the cars. And the plaintiffs offered no evidence that the vapors could not have been released absent a visible leak in the tank of the car. Viewing the facts in Borger and Atkinson's favor, a reasonable fact-finder could not find that CSX's inspection fell below the prevalent standard for railroad companies.

Accepting the plaintiffs' argument that an injury was foreseeable in this case would require future carriers to anticipate an injury every time a train carries hazardous materials--even without notice of a shipment's deficiency or the presence of an unusual odor before a train departs. It would effectively replace the FELA's negligence standard [***10] with [**17] strict liability on all carriers of hazardous materials. Even under the "little more than a scintilla" quantum of evidence, no reasonable jury could conclude, based on nothing more than a report of an odor detected on the post-incident inspection, that a reasonably prudent railroad company could have foreseen

that the tank car would leak. There is no evidence that the two suspected causes of the alleged leak--insufficient outage or a defective pressure relief valve--could have been detected by a visual inspection. Nor is there evidence that CSX's pre-departure visual inspection of the northbound train fell below the standard of a reasonably prudent railroad inspection or that prescribed by the Hazardous Materials Transportation Act.

IV.

We conclude that CSX did not violate the Hazardous Materials Transportation Act, and that the evidence is not sufficient for a fact-finder to determine that CSX's negligence caused injuries to Borger or Atkinson. We thus AFFIRM the district court's entry of summary judgment.

U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

FEB - 6 2009

Ms. Lisa K. Winter
National Motor Freight Traffic Association, Inc.
1001 North Fairfax Street, Suite 600
Alexandria, VA 22314

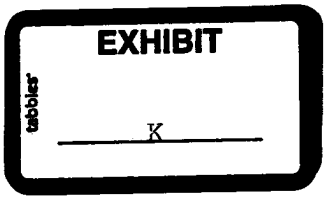
Ref. No. 08-0137

Dear Ms. Winter:

This responds to your request for clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) and its applicability to a scenario involving a motor carrier accepting a shipment that contains hazardous materials packages and non-hazardous materials packages in one handling unit, such as a pallet. The shipment is received with instructions from the shipper (offeror) to keep the unit intact. You state that there are incidences when the motor carrier accepts a unit that weighs more than indicated on the received shipping documents and you are concerned that the weight discrepancy may alter applicable requirements, such as those for placarding. Specifically, you ask how this problem should be rectified.

A carrier with knowledge of incorrect information may not continue to use that information (see § 171.2(e) and (f)) and must resolve any discrepancies pertaining to the shipment before it is accepted for transportation. A carrier who knowingly continues to use inaccurate information, as well as a person who knowingly or willfully provides incorrect information to a carrier, is in violation of the HMR. As specified in § 172.202(a)(5), the total quantity of hazardous materials covered by the shipping description must be indicated (by mass or volume) on the shipping papers. Discrepancies in the weight of the hazardous materials may impact compliance with other HMR requirements. For example, whether a carrier may take advantage of the placard exceptions provided in § 172.504 for certain non-bulk packaging shipments of less than 1,001 lbs.

Communication between the applicable parties is essential in cases where discrepancies and confusion exist regarding a shipment. Implementing procedures with the offeror to solve



problems before accepting a shipment, particularly when previous problems with the offeror have occurred, should also be considered.

I hope this information is helpful. Please contact this office should you have additional questions.

Sincerely,

Hattie L. Mitchell, Chief
Regulatory Review and Reinvention
Office of Hazardous Materials Standards

PHMSA Interpretation #10-0192

Oct 5, 2010

PDF Version

PHMSA Response Letter

October 5, 2010

Mr. Timothy Wiseman
Scopelitis, Garvin, Light, Hanson & Feary
10 W. Market Street, Suite 1500
Indianapolis, IN 46204

Ref. No. 10-0192

Dear Mr. Wiseman:

This responds to your August 31, 2010 letter requesting clarification of the Hazardous Materials Regulations (HMR, 49 CFR Parts 171-180). Specifically, you request clarification of the shipping paper requirements in § 172.204 and § 177.817. Your questions are paraphrased and answered as follows:

Q1) May a carrier correct a shipping paper after it has been certified by the shipper by crossing out the entry for a hazardous material which was not accepted by the motor carrier because it did not comply with the packaging requirements in the HMR?

A1) Yes. A carrier with knowledge of incorrect information may not continue to use that information (see § 171.2(e) and (f)) and must resolve any discrepancies pertaining to the shipment before it is accepted for transportation.

Q2) By correcting a shipping paper after it has been certified by the shipper, does the motor carrier become the offeror of the hazardous material?

A2) No. A carrier is not an offeror when it performs a function required by the HMR as a condition of acceptance of a hazardous material for transportation in commerce (e.g., reviewing shipping papers, examining packages to ensure that they are in conformance with the HMR, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function (see § 171.8, definition of person who offers or offeror).

I trust this satisfies your inquiry. Please contact us if we can be of further assistance.
Sincerely,

Ben Supko
Acting Chief, Standards Development
Office of Hazardous Materials Standards

172.204, 177.817, 171.1, 171.8

DMS ID# 10-0192

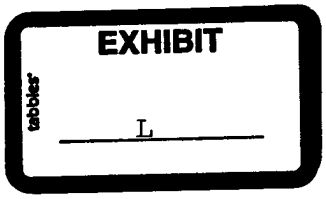
Regulation References

49 CFR 171.2
- More Interpretations on this topic
- Read the Regulation

49 CFR 177.817
- More Interpretations on this topic
- Read the Regulation

49 CFR 172.204
- More Interpretations on this topic
- Read the Regulation

49 CFR 171.8
- More Interpretations on this topic
- Read the Regulation



PHMSA Interpretation #08-0301R

Dec 11, 2009

PDF Version

PHMSA Response Letter

December 11, 2009

Mr. Calvin Faulkner
D&H Specialist
APL Americas Region
1111 Broadway
Oakland, CA 94607-5500

Ref. No. 08-0301R

Dear Mr. Faulkner:

This letter replaces our February 10, 2009 response to your December 5, 2008 e-mail in which you raised several questions regarding the term "initial carrier" and a vessel operator's responsibilities under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Please note that the answers to questions Q1, Q3 and Q5 are revised in response to questions that have arisen and our further review of this issue. Our answers to your questions are revised to read as follows.

Q1. Under § 171.22(f)(2), is the vessel operator considered the "initial U.S. carrier" for the purpose of maintaining the shipper's certification required by § 172.204 or is the term "initial U.S. carrier" used to describe the first carrier to transport a hazardous material shipment once importation occurs and it is within United States jurisdiction?

A1. The term "initial U.S. carrier" is not defined in the HMR. As used in § 171.22(f)(2), it refers to the first carrier to transport a hazardous material shipment within the United States. This role is met when a vessel enters the navigable waters of the United States as defined in 33 CFR 2.36. A vessel operator is required to receive a shipper¿s certification in accordance with § 176.27 for a hazardous material shipment, unless the material is excepted from the shipping paper requirements under the HMR.

Q2. What is the obligation of a vessel operator if a hazardous material shipment arrives at a United States port without a prepared shipper¿s certification as required by § 172.204?

A2. Unless a hazardous material is excepted from the shipping paper requirements under the HMR, under §§ 176.24 and 176.27, a person (vessel operator) may not transport a hazardous material by vessel unless that person has received a shipping paper prepared in accordance with Part 172 of the HMR, including the shipper's certification prescribed in § 172.204. Thus, a vessel operator would be in violation of the HMR for accepting such a shipment without a shipper's certification. Additionally, the shipment could not be forwarded or offered for transportation and transported in commerce until such documentation was prepared.

Q3. If a vessel operator releases a container that contains a hazardous material shipment to a carrier and the accompanying shipping papers do not have a shipper's certification, is it a violation of the HMR?

A3. The answer is no. Because the vessel operator is the initial U.S. carrier, it is not required to provide a shipper's certification on the accompanying shipping papers, prepared in accordance with Part 172 of the HMR, to subsequent highway or rail carriers for onward transportation.

Q4. Under § 177.817(b), what is the obligation of a vessel operator to provide a prepared shipper's certification to a highway or rail carrier prior to the release of a containerized hazardous material shipment to the highway or rail carrier?

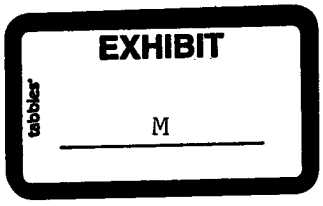
Regulation References

49 CFR 172.204

- More Interpretations on this topic
- Read the Regulation

49 CFR 171.12

- More Interpretations on this topic
- Read the Regulation



A4. The answer to your question is the same as the answer in A3 above.

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Q5 Is it permissible for a vessel operator to transfer a hazardous material shipment to the initial U.S. carrier without a shipper's certification on the shipping paper? The vessel operator would indicate on the original shipping paper, prepared in accordance with the IMDG Code, "shipper's certification on file" and retain a copy of the documentation for one year as required by § 172 201(e)

A5 As stated in response A1, in your scenario the vessel carrier is the initial U.S. carrier Therefore, if a vessel carrier accepts a hazardous material shipment from a shipper and transfers the shipment to a highway or rail carrier upon entering the United Sates, only the vessel carrier is required to receive a shipper's certification. The vessel operator must retain the shipping papers with a certification as required by §§ 171.22(f)(4), 172 201(e) and 176.24(b), but is not required to furnish the shipper's certification to any connecting intermodal carrier for subsequent highway or rail transportation. Hazardous material shipments imported into the United States by vessel that are transferred to a highway or rail carrier must be in conformance with the applicable requirements in §§ 171.22. 171.23 and 171.25, including those in § 171.22(c).

Q6 Is it permissible for a vessel operator to issue a shipper's certification based solely on the information provided in the original certification prepared by the shipper?

A6. The answer is yes. A carrier may rely on the original shipper's certification unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the certification provided by the offeror (shipper) is incorrect. However, a carrier who knowingly uses incorrect information (see § 171.2(e) and (f)), or a person who knowingly or willfully provides incorrect information, is in violation of the HMR.

I trust this satisfies your inquiry. Please accept my apology for any inconvenience caused by this revision of our original response.

Sincerely,

Edward T. Mazzullo
Director, Office of Hazardous Materials Standards

171.22(f)(2), 172.204, 176.27

DMS ID# 08-0301R

46°09'00" N, 123°57'42" W following the shoreline to 46°10'24" N 124°07'06" W then south to 46°02'54" N 124°07'06" W following the shoreline to 46°06'30" N 123°56'36" W then back to the point of origin.

(b) *Regulations.* (1) In accordance with the general regulations in Section 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain of the Port or his designated representatives.

(2) A Coast Guard vessel will be on scene to ensure that the public is aware that the firing exercises are in progress and that the firing area is clear of traffic before firing commences.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port or his/her designated on-scene U.S. Coast Guard representative. On-scene Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels.

(c) *Effective period.* This rule is effective from 6 a.m. July 25, 2005 through 9 p.m. July 29, 2005.

(d) *Enforcement period.* This rule will be enforced from 6 a.m. to 9 p.m. daily from July 25 through July 29, 2005.

(e) The Captain of the Port will notify the public of changes in the status of this safety zone by Marine Safety Radio Broadcast on VHF Marine Band Radio Channel 22 (157.1 MHz) and **Federal Register** Notice.

Dated: July 19, 2005.

Paul D. Jewell,

Captain, U.S. Coast Guard, Captain of the Port, Portland, OR.

[FR Doc. 05–14970 Filed 7–25–05; 3:49 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 171

[Docket No. PHMSA–04–19173 (HM–223A)]

RIN 2137–AE04

Applicability of the Hazardous Materials Regulations to a "Person Who Offers" a Hazardous Material for Transportation in Commerce

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

ACTION: Final rule.

SUMMARY: PHMSA is amending the Hazardous Materials Regulations to add a definition for "person who offers or offeror." The definition adopted in this final rule codifies long-standing interpretations and administrative determinations on the applicability of those regulations.

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

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

On September 24, 2004, the Research and Special Programs Administration—the predecessor agency to the Pipeline and Hazardous Materials Safety Administration (PHMSA)—published a notice of proposed rulemaking (NPRM; 69 FR 57245) proposing to add a definition for "person who offers or offeror" to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). Consistent with previously issued administrative determinations, as discussed in the NPRM (69 FR 57247–48) and placed in the docket for this rulemaking, we proposed to define "person who offers or offeror" to mean "[a]ny person who does either or both of the following: (i) Performs, or is responsible for performing, any pre-transportation function required under [the HMR] for transportation of the hazardous material [or] (ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce." The proposed definition specifically excluded a carrier that transfers, interlines, or interchanges hazardous materials to another carrier for continued transportation when the carrier does not perform any pre-transportation functions associated with the shipment. We further proposed to clarify that an offeror or a carrier may rely on information provided by a prior offeror or carrier unless the offeror or carrier "knows, or in the exercise of reasonable care, should know" that the information provided is incorrect.

II. Summary of Final Rule

In this final rule, we are making the following revisions to the HMR:

- We are defining "person who offers or offeror" to mean any person who performs or is responsible for performing any pre-transportation function required by the HMR or who tenders or makes the hazardous material available to a carrier for transportation in commerce. A carrier is not an offeror when it performs a function as a condition of accepting a hazardous material for transportation in commerce or when it transfers a hazardous material to another carrier for continued transportation without performing a pre-transportation function.
- We are clarifying that there may be more than one offeror of a hazardous material and that each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform.
- We are clarifying that each offeror or carrier may rely on information provided by a previous offeror or carrier unless the offeror or carrier knows or, a reasonable person acting in the circumstances and exercising reasonable care, would have knowledge that the information provided is incorrect.

III. Comments to the NPRM

We received 16 comments to the NPRM from industry associations and individual shippers and carriers. Most commenters are supportive of the goals of this rulemaking, but raise concerns related to the specific definition proposed and its impact on both offerors and carriers. These comments are discussed in detail below.

Several commenters raise issues that are beyond the scope of this rulemaking. For example, United Air Lines, and the Air Transport Association reiterate their objections to a formal interpretation, published February 23, 2003, that clarified the timing of "offer" and "acceptance" of passenger baggage; they request a comprehensive rulemaking on this subject. Because that issue is beyond the scope of this rulemaking, it is not addressed in this final rule.

A. Reasonable Reliance and Liability

As noted above, the NPRM proposed to clarify in § 171.2 that an offeror or carrier of a hazardous material may rely on information provided by a previous offeror or carrier in the absence of knowledge that the information is incorrect. Several commenters suggest that the language proposed in the NPRM is ambiguous and should be clarified. "The 'should know' standard should be interpreted as meaning that a carrier cannot rely on information given to the carrier when the carrier actually has credible information that the information provided by the offeror is incorrect." (Association of American Railroads) Several commenters object to the use of the phrase "should know" in the NPRM, noting that a "carrier must be permitted to rely upon [the shipper's certification] and conclude that pre-transportation functions have been performed in accordance with all hazardous materials regulations." (American Trucking Associations) These commenters suggest that we should more closely follow the statutory

language in Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*). Section 5123(a)(1) of Federal hazmat law provides that:

> A person acts knowingly when—
> (A) The person has actual knowledge of the facts giving rise to the violation; or
> (B) A reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

We agree with commenters that the language proposed in § 171.2 should reflect the standard for "knowingly" established in Federal hazmat law. Therefore, in this final rule, we are revising paragraphs (b) and (f) of § 171.2 (proposed as paragraphs (a) and (b) of § 171.2 in the NPRM) for consistency with Federal hazmat law.

Note that a carrier that knows that information accompanying a hazardous materials shipment is incorrect may not accept the shipment for transportation unless and until the information has been corrected and any discrepancies involving this shipment have been resolved. Indeed, a carrier that knows that a hazardous materials shipment does not comply with the HMR in any respect (*e.g.*, packaging, markings, labels, shipping paper) may not accept the shipment for transportation unless and until the problems are corrected and any discrepancies resolved.

B. Person Who Offers and Pre-Transportation Functions

A number of commenters express concern about the definition for "person who offers or offeror" proposed in the NPRM as it applies to carriers who may perform pre-transportation functions. These commenters support the specific language clarifying that a carrier that interlines a hazardous materials shipment is not an offeror when it performs no pre-transportation functions, but suggest that this provision of the NRPM does not "deliver the intended certainty." (International Vessel Operators Hazardous Materials Association (VOHMA) and World Shipping Council (WSC)) They assert that the determination of "when a carrier might become an 'offeror' * * * is further confused by the statement in [HM–223] that suggests that *who* performs a certain function (not what that function is) may determine whether that function is a 'transportation' function or a 'pre-transportation' function." Referring to statements in the preamble to the HM–223 final rule that "fill[ing] and clos[ing] a bulk or non-bulk packaging" may be a "pre-transportation function" when performed by a shipper or a "transportation" function when performed by a carrier, VOHMA and WSC state that "a carrier can never be an 'offeror' by virtue of performing a pre-transportation function, because such a function performed by a carrier is deemed to be a transportation function" and "the proposed language at 171.8(2) has no meaning." These commenters state that, because

> certain functions (such as verifying and creating documentation) are or may be performed at multiple states in the transportation chain by both shippers and carriers[,] * * * allocating responsibility for those functions on the basis of whether they are performed by a carrier or a shipper, or on the basis of whether they are performed before or after the initial carrier takes possession of the cargo, might simply provide no guidance at all with respect to certain functions.

Similarly, several commenters express concern that a carrier would be determined to be an "offeror" when performing pre-transportation functions. These commenters note that many pre-transportation functions are essential components of the transportation services carriers provide their customers, such as preparing shipping papers, providing and maintaining emergency response information, and reviewing shipping papers to verify compliance with the HMR. "When railroads perform these functions as a transporter (excluding the situation where a railroad is preparing its own hazardous materials for transportation), the hazardous materials are already in transportation. It is nonsensical to consider a carrier as performing pre-transportation functions after the hazardous materials are in transportation." (Association of American Railroads (AAR)) AAR suggests modifying the second paragraph of the proposed definition of "person who offers or offeror" to provide that a carrier is not an offeror whenever it performs "a task integral to the transportation of hazardous material that would otherwise be classified as a pre-transportation function."

Another commenter notes that reviewing shipping papers to verify their compliance with the HMR or their international equivalents, which is defined as a pre-transportation function, may be performed by a carrier as a "mandated function of 'acceptance' for transportation of hazardous materials." (Currie Associates) This commenter suggests that we add specific language to § 171.2 to indicate that the performance of a function required as a condition of acceptance of hazardous materials offered for transportation does not make a carrier an offeror if it performs no other pre-transportation functions.

These comments illustrate the difficulty of defining the status of a "person who offers or offeror" based solely on the performance of a specific function, as opposed to the proper focus of whether the function is part of "preparing" a shipment of hazardous material for transportation in commerce—including the functions performed by a carrier or freight forwarder preparing the shipment for continued transportation by a succeeding carrier. As explained in the preamble to the HM–223 final rule and recognized in comments to the NPRM, certain activities "may be considered both pre-transportation and transportation functions" and may be performed by a person who prepares a shipment for transportation or a person who accepts and transports the shipment. 68 FR at 61909. For example, "blocking and bracing and segregation of packages in a transport vehicle are functions frequently performed by carrier personnel. However, shipper personnel may also perform such functions, particularly when loading hazardous materials into freight containers. These are regulated functions under the HMR, whether performed by shipper or carrier personnel." *Id.* These functions are "pre-transportation functions" whenever they are performed in the course of preparing the shipment for transportation, by an original offeror who transports the shipment itself (as a private carrier) or who tenders the shipment to a common or private carrier for transportation—or by a carrier or freight forwarder who loads a freight container and then tenders the loaded container to another carrier for transportation. An initial carrier who loads a freight container is a "person who offers or offeror" when it tenders the loaded container to a succeeding carrier and, if the hazardous materials in the container are not properly blocked, braced, and segregated, the initial carrier has violated the requirement to "offer" hazardous materials in accordance with the HMR.

In a similar manner, a carrier or freight forwarder who prepares hazardous material shipping documentation that is transmitted to a succeeding carrier, in association with the hazardous material shipment, is a "person who offers or offeror" because it performed a pre-transportation function in the course of preparing the shipment for transportation by the succeeding carrier. In doing so, the carrier or freight forwarder may rely on the information it received from the

original offeror (or a prior carrier), unless it "knows or, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect." 49 CFR 171.2(b), (f).

From their comments, it appears that carriers are concerned, at least in part, with the responsibility for the shipment that is conferred by application of the term "person who offers or offeror." For example, MHF Logistical Solutions (MHF) states that the requirement for a "person who offers a hazardous material for transportation" to "comply with all applicable requirements of this subchapter" (§ 171.2(b)) should be clarified to make it "clear that an offeror is responsible only for correct performance of the function he performs or is contracted to perform. * * * [T]he responsibility of each offeror should not extend to functions for which he has no direct responsibility." MHF adds that an intermediate party such as a "transportation logistics provider * * * has limited direct knowledge of the material in the load, and accepts the manifest from the owner for delivery to the railroad without accepting any contractual obligation to verify the correctness of the manifest." Similarly, the Institute of Makers of Explosives (IME) recommends "a more simplified approach," suggesting that "DOT should expressly authorize those in the transportation stream receiving and transferring hazardous materials shipments to rely on the information certified and provided on shipping papers by the original offeror."

We are sympathetic to commenters' concerns that they not be held responsible for the performance of pre-transportation functions over which they have no control or direct responsibility. We are adopting in § 171.2 the language proposed in the NPRM to clarify that each offeror is responsible only for the specific pre-transportation functions it performs or is required to perform. At the same time, the "simplified approach" suggested by IME is not appropriate, as that would absolve everyone in the "transportation stream" who may receive and transfer hazardous materials shipments from the responsibility to make sure that the shipment conforms to all applicable HMR requirements. As noted above and discussed in detail in the preamble to the NPRM, offerors and carriers may rely on information provided by previous offerors or carriers, but that reliance is not absolute. An offeror or carrier that knows or should have known that the information is incorrect violates Federal hazmat law.

We agree with commenters that a carrier that performs functions as part of the process of accepting a hazardous material for transportation in commerce—functions that would, in other contexts, be considered pre-transportation functions—should not be considered a "person who offers or offeror" for purposes of the HMR. For example, a carrier who reviews a shipping paper accompanying a shipment of hazardous material that was tendered by an offeror before accepting that shipment for transportation in commerce, or who transfers without change information from a shipping paper to a shipping document for its own use, is not a "person who offers or offeror". Therefore, in this final rule, we are adding a sentence in the definition of "person who offers or offeror" in § 171.8 to indicate that a carrier that performs a function required by the HMR as a condition of acceptance of hazardous materials offered for transportation in commerce (*e.g.*, reviewing shipping papers, examining packages to identify any discrepancies or problems, or preparing shipping documents for its own use) is not an offeror when it performs no other pre-transportation functions. Of course, in performing its carrier functions, the carrier must also exercise reasonable care.

C. Joint and Several Liability

The Radiopharmaceutical Shippers and Carriers Conference asks us to "reject" that part of a formal interpretation published by RSPA in 1988 (55 FR 6761) that stated that, in the situation where more than one person is responsible for performing offeror functions, "each such person may be held jointly and severally liable for all or some of the 'offeror' responsibilities under the HMR." We note with respect to this comment that the concept of "joint and several liability" does not strictly apply to violations of the HMR when there are multiple persons; rather, each person is liable for its own violations that may involve noncompliance in: (1) Preparing a shipment of hazardous material for transportation (*i.e.*, improperly performing or failing to perform a pre-transportation function); (2) accepting for transportation a shipment of hazardous material that does not conform to the requirements in the HMR; or (3) failing to handle or transport a shipment of hazardous material in the manner required by the HMR. Thus, each person who knowingly violates an "offeror" requirement in the HMR may be assessed a civil penalty, and payment of a penalty by one violator does not satisfy a penalty assessed against another violator (unlike "joint and several liability," where payment by one party satisfies the obligations of all liable parties).

Further, we explicitly reject any notion, advanced by some commenters, that Federal agencies that enforce the HMR attempt to hold one party liable for another party's violation of the HMR. In other words, when a carrier accepts and transports a shipment of hazardous material that is not properly prepared for transportation in commerce, with actual or constructive knowledge of the noncompliance, the carrier's liability is based on its own improper acceptance and transportation of that shipment—not the violation of the person who improperly prepared the shipment. The application of "constructive knowledge"—when "a reasonable person acting in the circumstances and exercising reasonable care would have * * * actual knowledge of the facts giving rise to the violation" of the law or the HMR—is set forth in RSPA's prior interpretation published in the **Federal Register**, 63 FR 30411, 30412 (June 4, 1998), where we stated that:

> [A] carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material which has not been packaged, marked, labeled, or described on a shipping paper as required by the HMR. This means that a carrier may not ignore readily apparent facts that indicate that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact that it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.
>
> * * * * *
>
> At the same time, an offeror who fails to properly declare (and prepare) a shipment of hazardous materials bears the primary responsibility for a hidden shipment. Whenever hazardous materials have not been shipped in compliance with the HMR, DOT generally will attempt to identify and bring an enforcement action against the person who first caused the transportation of a noncomplying shipment * * *.
>
> To the extent that any carrier, regardless of the mode of transportation, is truly "innocent" in accepting an undeclared or hidden shipment of hazardous materials, it lacks the knowledge required for assessment of a civil penalty.

The separate proceeding in Docket No. OST–01–10380 will consider the appropriateness of providing further discussion or examples of when a

carrier may be found to have sufficient knowledge for civil liability.

D. Definition of the Term "Shipper"

Several persons ask about our use of the word "shipper" in the HMR and letter interpretations. FPL Group states that RSPA has also used the term "shipper" in interpretation letters and that word is "printed on common straight bills of lading that can be purchased at truck stops and from hazmat supply companies." FPL concludes that "a 'shipper' and an 'offeror' are the same", and it recommends that the term "shipper" either be defined or added to the definition of "offeror" in order to avoid confusion. IME indicates that it assumes that we mean "offeror" when we use the word "shipper." The National Automobile Dealers Associate (NADA) states that the proposed definition of "person who offers or offeror" does not "clarify its relationship to the term 'shipper,' also currently undefined." NADA also states that there should be "only one 'person who offers or offeror' for any given shipment of hazardous materials, and that such person is the one who 'tenders or makes a hazardous material available to a carrier for transportation in commerce, notwithstanding the extent to which such person actually performs applicable pre-transportation functions.'"

Currie Associates complains that the practice of a railroad listing a prior (or successor) ocean carrier as the "shipper" on a train consist (because the railroads' "computerized systems are designed to list the 'billable party' as the shipper") has caused "unfounded charges being filed against the steamship line as the intermodal 'offeror'" when it carries forward "the emergency response telephone number" listed on the shipping papers prepared by the original shipper (offeror). VOHMA and WSC also state that "ocean carriers are placed in the impossible situation of having to choose between being cited for a violation of the HMR when they pass along the original emergency response telephone contact number to a connecting rail carrier on the one hand, or, on the other hand, providing their own telephone number—a number that will be essentially useless to a first responder," and they proposed that the "exclusion" language in subparagraph (2) of the proposed definition of "person who offers or offeror" be revised as follows:

> Notwithstanding anything to the contrary in subsection (1), no carrier shall be deemed to be an offeror by virtue of the fact that such carrier transfers, interlines, or interchanges (either between or within transportation modes) hazardous material to another carrier for transportation. No description of such a carrier in any commercial document as a "shipper," "customer," "tenderer," "offeror," or other similar description shall change the operation of the rule set forth in the immediately preceding sentence. Without limiting the generality of the foregoing, no transferring, interlining, or interchanging carrier shall be deemed to be the offeror of a hazardous material for transportation for the purposes of section 172.604 of this title (emergency response telephone number) or any successor section thereto.

Current Federal hazardous material transportation law has a history of almost 100 years, and the current HMR evolved over that period of time. When the word "shipper" is used, such as in the title of Part 173—"Shippers-General Requirements for Shipments and Packagings"—that word refers to a person who prepares a shipment for transportation. As already discussed, that person may also be a carrier, when it prepares the shipment for its own transportation (as a private carrier) or for transportation by a succeeding carrier. The word "shipper" is not used in the HMR in a commercial or contractual sense that denotes the economic arrangements of a shipment. We understand that, in certain circumstances, the consignee or recipient of a shipment may be listed as the "shipper" on a bill of lading, despite the fact that this person had nothing to do with preparing the shipment for transportation or the transportation itself. However, the designation of a person as a "shipper" on a bill of lading or other documents associated with a shipment of hazardous material is not determinative of whether that person is a "person who offers or offeror" for purposes of the HMR.

At this time, we do not believe it is necessary to modify the HMR to clarify the meaning of the term "shipper." Moreover, any such modification would be beyond the scope of this rulemaking. However, as we continue to assess the effectiveness of the revisions adopted in this final rule, we may decide to clarify the term "shipper" in a future rulemaking.

E. Emergency Response Telephone Number

As noted above, VOHMA and WSC express concern about enforcement issues associated with transferring an emergency response telephone number provided by the original offeror of a shipment to shipping documents prepared by a subsequent offeror or carrier to facilitate the continued movement of a hazardous material. In addition, IME asks DOT to clarify whether a freight forwarder or other carrier may legitimately transfer an emergency response telephone number "from that origin offeror's shipping paper to other shipping documents made necessary by intermodal transportation." IME states that "[e]mergency response telephone numbers and other essential information, such as the description of the hazardous material, from origin offeror's shipping papers are routinely transferred by entities in the transportation chain to forwarding shipping documents." Further, the American Chemistry Council commented that, in order for an organization such as CHEMTREC, which provides emergency response services, including a 24-hour telephone answering service, under contract to hazardous materials shippers and carriers, to be able to provide detailed emergency response information,

> the offeror identified on the shipping paper must in fact be registered. In other words, either the "preceding offeror" should be shown on the shipping paper, or the party that has taken on offeror functions (such as a freight forwarder) should itself be registered. The Council therefore requests that RSPA make clear to the regulated community the importance of retaining the linkage between an offeror and the organization that provides the offeror with emergency response telephone service.

As stated in the NPRM, a carrier or freight forwarder that prepares a new shipping paper must comply with all applicable requirements, but it may rely on information provided by the original offeror in preparing the new shipping paper. A carrier "may not accept for transportation or transport a shipment of hazardous material when the carrier is aware (or should be aware) of facts indicating that the emergency response telephone number is not operative and does not meet the requirements of [49 CFR] 172.604(b)." RSPA's February 10, 2004 letter to Hyundai America Shipping Agency, Inc. and June 27, 1996 letter to "K" Line America, Inc. in the docket. This principle was restated in the preamble to the NPRM, which reads:

> [A] carrier or freight forwarder may not rely on an emergency response telephone number provided by a preceding offeror when it is aware (or should be aware) of facts indicating the emergency response telephone number is not operative and does not meet the requirements of [49 CFR] 172.604(b).

69 FR at 57248 (internal quotations and citations omitted).

PHMSA agrees with the commenters that the original offeror is likely to have the most detailed information concerning the specific material and its

hazards and therefore is best situated "to provide specific information relative to the hazards of the materials being transported and provide immediate initial emergency response guidance until further specific information can be obtained* * *relative to long term mitigation actions." 54 FR 27138, 27142 (1989). Thus, a carrier or subsequent entity in the transportation chain may transfer the emergency response number provided on the original shipping paper by the original offeror to subsequent shipping documentation unless he or she knows (or should have known) that the number is not operative or does not meet the requirements in § 172.604 of the HMR.

The comments cited above and separate proceedings have made us aware of the potential problems that may arise when the original offeror contracts with an agency or organization that accepts responsibility for providing detailed emergency response information pursuant to § 172.604(b), but the identity of the original offeror is not set forth on the shipping paper in the possession of the carrier at the time of an incident during transportation. We plan to address this issue in greater detail in a separate rulemaking. In the meantime, the issue of the linkage between a third-party emergency response services provider, such as CHEMTREC, and the person who arranges to use such services to comply with § 172.604(b) of the HMR should be handled through the contract that governs the relationship. Thus, a person who arranges with a third-party to provide emergency response services required by the HMR should ensure that the shipping documentation that accompanies the shipment includes the information necessary to enable the third-party provider to identify the person who has contracted for emergency response services. This may necessitate special arrangements with subsequent offerors or carriers that will transfer the information provided by the original offeror to subsequent shipping documentation.

F. Transferring, Interlining, or Interchanging Hazardous Materials Shipments

In this final rule, we include in the definition of the term "person who offers or offeror" a provision that a carrier that transfers a hazardous material to another carrier for continued transportation is not an offeror when it performs no pre-transportation functions. We recognize that the terms "interline," and "interchange" have specific meanings within the context of the functions performed and that these meanings may not, in fact, be applicable to all modes of transportation. Therefore, in this final rule, we are revising the language proposed in the NPRM to indicate that a carrier who transfers a hazardous material to another carrier for continued transportation is not an offeror when it performs no pre-transportation functions. In this context, the term "transfer" means the shipment is physically passed or conveyed from one carrier to another for continued transportation in commerce.

We are aware that there also may be uncertainty over the use of the term "tender" in the definition for "person who offers or offeror" adopted in this final rule. The term "tender" is used to mean that the person who offers the hazardous material for transportation makes the hazardous material physically available to the originating carrier to begin its transportation in commerce.

G. Miscellaneous Issue

In response to a question from a commenter, we confirm that a "data entry person" who prepares a "carrier masterbill" is a hazmat employee who must be trained and tested in accordance with the requirements in 49 CFR 172.704—even if the shipment and its accompanying documentation are subsequently checked by a trained individual.

IV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of 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. As set forth in 49 U.S.C. 5103(b)(1)(A), the regulations are to apply to, among others, a person transporting a hazardous material in commerce or causing hazardous material to be transported in commerce. In this final rule, we are codifying in the HMR longstanding interpretations concerning the applicability of the HMR to persons who offer hazardous materials for transportation. The terms "offer" or "person who offers" are used throughout the HMR to describe the process of causing a hazardous materials to be transported in commerce. Codifying the applicability of the HMR to persons who offer hazardous materials for transportation will help the regulated community understand and comply with regulatory requirements applicable to specific situations and operations.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. The rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). No further regulatory evaluation is necessary because the definition of "person who offers or offeror" simply restates and codifies long-standing interpretations on the applicability of the HMR without making any substantive change and, thus, does not increase or decrease either the number of persons who must comply with the HMR or the costs of compliance with the HMR by those persons. No person who submitted comments on the NPRM provided any information to show that this final rule increases or decreases the costs of compliance with the HMR.

C. Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This rule makes no change in the applicability of the HMR or, to the extent that the HMR have been adopted by a State and are being enforced as State requirements, the applicability of those State requirements. For this reason, PHMSA believes that nothing in this rule will preempt any State law or regulation or have any substantial direct effect or sufficient federalism implications that limit the policymaking discretion of the States. PHMSA did not receive any comment from a State or other interested party on whether it believed any State requirement is affected by the adoption of this rule.

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 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. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to

have a significant economic impact on a substantial number of small entities.

Need and legal basis for the rule. This final restates and codifies prior interpretations on the applicability of the HMR to persons who offer a hazardous material for transportation in commerce. This rule is issued under the requirement in 49 U.S.C. 5103(b)(1)(A) for DOT to issue regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce that apply to a person causing hazardous material to be transported in commerce.

Identification of potentially affected small entities. Unless alternative definitions have been established by an agency in consultation with the Small Business Administration (SBA), the definition of "small business" has the same meaning under the Small Business Act. Because no special definition has been established, PHMSA employs the thresholds published by SBA for industries subject to the HMR. Based on data for 1997 compiled by the U.S. Census Bureau, it appears that upwards of 95 percent of firms who are subject to the HMR are small businesses. These entities will incur no new costs to comply with the HMR, because this final rule makes no change in the applicability of the HMR.

Related Federal rules and regulations. The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor issues regulations related to safe operations, including containment and transfer operations, involving hazardous materials in the workplace. These regulations are codified at 29 CFR part 1910 and include requirements for process safety management of highly hazardous chemicals and for operations involving specific hazardous materials, such as compressed gases, flammable and combustible liquids, explosives and blasting agents, liquefied petroleum gases, and anhydrous ammonia. OSHA regulations also address hazard communication requirements at fixed facilities, including container labeling and other forms of warning, material safety data sheets, and employee training.

The U.S. Environmental Protection Agency (EPA) issues regulations on the management of hazardous wastes, including the tracking of hazardous wastes transported from a generator to a treatment, storage, or disposal facility. These regulations are codified at 40 CFR parts 260–265. As provided by Section 3003(b) of the Resource Conservation and Recovery Act (42 U.S.C. 6923(b)), EPA's regulations applicable to transporters of hazardous waste are consistent with requirements in the HMR.

EPA also issues regulations designed to prevent accidental release into the environment of hazardous materials at fixed facilities, codified at 40 CFR part 68. These regulations include requirements for risk management plans that must include a hazard assessment, a program for preventing accidental releases, and an emergency response program to mitigate the consequences of accidental releases. EPA regulations on hazardous materials at fixed facilities also address community right-to-know requirements, hazardous waste generation, storage, disposal and treatment, and requirements to prevent the discharge of oil into or onto the navigable waters of the United States or adjoining shorelines.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) of the U.S. Department of Justice issues regulations on licensing, permitting and safe handling (including storage) of explosives, codified at 27 CFR part 555. These regulations do not apply to "any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." 18 U.S.C. 845(a)(1).

The Nuclear Regulatory Commission issues regulations, codified in 10 CFR, governing its licensees who acquire, receive, possess, use, and transfer certain radioactive materials, including requirements on packagings used in transporting these materials and the physical protection of these materials at fixed facilities and during transportation.

Conclusion. This final rule makes no change in the applicability of the HMR and imposes no new costs of compliance with the HMR requirements. I hereby certify that the rule does not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act of 1995

This final rule does not impose any mandate and thus does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

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

H. Environmental Assessment

There are no environmental impacts associated with this final rule.

I. 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 may be used to cross-reference this action with the Unified Agenda.

J. Privacy Act

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 (Volume 65, Number 70, pages 19477–78), or at *http://dms.dot.gov.*

List of Subjects in 49 CFR Part 171

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

■ In consideration of the foregoing, 49 CFR, subtitle B, chapter I is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS AND DEFINITIONS

■ 1. The authority citation for part 171 continues 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. In § 171.2, revise paragraphs (b) and (f), to read as follows:

§ 171.2 General requirements.

* * * * *

(b) Each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or under subchapter A of this chapter. There may be more than one offeror of a shipment of hazardous materials. Each offeror is responsible for complying with the requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter, with respect to any pre-transportation function that it performs or is required to perform; however, each offeror is responsible only for the specific pre-transportation functions

that it performs or is required to perform, and each offeror may rely on information provided by another offeror, unless that offeror knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the other offeror is incorrect.

* * * * *

(f) No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

* * * * *

■ 3. In § 171.8, add a definition for "person who offers or offeror" in appropriate alphabetical order, to read as follows:

§ 171.8 Definitions and abbreviations.

Person who offers or *offeror* means:

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

(i) Performs, or is responsible for performing, any pre-transportation function required under this subchapter for transportation of the hazardous material in commerce.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier is not an offeror when it performs a function required by this subchapter as a condition of acceptance of a hazardous material for transportation in commerce (*e.g.*, reviewing shipping papers, examining packages to ensure that they are in conformance with this subchapter, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function.

* * * * *

Issued in Washington, DC on July 21, 2005, under authority delegated in 49 CFR part 1.

Brigham A. McCown,

Deputy Administrator.

[FR Doc. 05–14912 Filed 7–27–05; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 072105A]

Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; apportionment of reserves; request for comments.

SUMMARY: NMFS apportions amounts of the non-specified reserve of groundfish to the yellowfin sole initial total allowable catch (ITAC) in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the fishery to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI.

DATES: Effective July 28, 2005, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2005. Comments must be received at the following address no later than 4:30 p.m., A.l.t., August 9, 2005.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- Mail to: P.O. Box 21668, Juneau, AK 99802;
- Hand delivery to the Federal Building, 709 West 9th Street, Room 420A, Juneau, AK;
- Fax to 907–586–7557;
- E-mail to *bsairelys@noaa.gov* and include in the subject line of the e-mail comment the document identifier: bsairelys; or
- Webform at the Federal eRulemaking Portal: *www.regulations.gov*. Follow the Instructions at that site for submitting comments.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2005 ITAC of yellowfin sole in the BSAI was established as 77,083 metric tons by the 2005 and 2006 final harvest specifications for groundfish in the BSAI (70 FR 8979, February 24, 2005). The Administrator, Alaska Region, NMFS, has determined that the ITAC for yellowfin sole in the BSAI needs to be supplemented from the non-specified reserve in order to continue operations.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions 6,800 metric tons from the non-specified reserve of groundfish to the yellowfin sole ITAC in the BSAI. This apportionment is consistent with § 679.20(b)(1)(ii) and does not result in overfishing of a target species because the revised ITAC is equal to or less than the specification of the acceptable biological catch (70 FR 8979, February 24, 2005).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the yellowfin sole fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 9, 2005.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until August 9, 2005.

This action is required by 50 CFR 679.20 and is exempt from review under Executive Order 12866.