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# California Fire Chiefs Association

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January 9, 1997

OFFICE OF CHIEF COUNSEL  
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Nancy Machado  
Administrative Office of the Chief Counsel  
U.S. Department of Transportation  
400 7th Street, S.W., Room 8407  
Washington, D.C. 20590

RE: Docket HM-223

Dear Ms. Machado:

The California Fire Chiefs Association (CFCA) sends the attached comments to you to supplement our letter of 11-27-96 regarding Docket HM-223 and the Hazardous Materials Regulations which are currently under development. Since that time, we have researched and now comment upon each of the individual questions posed by DOT/RSPA in the July 29, 1996, Federal Register, as well as additional questions presented verbally at the public hearing held in Philadelphia on October 30, 1996. As you will see in our comments, we did find agreement with the alliance of chemical manufacturers and transporters on several issues. However, we went on to identify a definition of "transportation" for the purposes of the HMR, and believe this definition can be applied equitably and sensibly. We hope you will find these materials useful.

The attached materials are organized in the following order:

- A. Loading                      Pages 1 through 4
- B. Unloading                    Pages 4 through 7
- C. Storage                        Pages 7 through 8
- D. Handling                       Pages 8 through 10
- E. Other Issues                 Pages 10 through 11

Nancy Machado  
January 9, 1997  
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Thank you for consideration of these issues. We look forward to continuing our participation in this important rulemaking process.

Respectfully,

A handwritten signature in cursive script, appearing to read "Kurt Latipow".

Kurt Latipow  
California Fire Chiefs Association

KL/ss

encl.

cc: California Fire Chiefs Association Members  
International Association of Fire Chiefs  
California League of Cities



# California Fire Chiefs Association 1

. 825 M Street, Suite One . Rio Linda, CA 95673 . (916) 9914293

Date: January 8, 1997

**Issue Paper: Response to Questions from DOT, July 29, 1996, Federal Register.**

Reference: Docket HM-223.

## **A. LOADING**

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

Transportation is movement. Thoughts and intentions regarding movement are not of value in determining whether a particular product is in "transportation in commerce" at a particular time. It is the fact of movement itself which is of value in making this determination. We should focus on common terms and understandings, not a vague concept of intention which cannot be verified.

Once the carrier has received a shipment (physically tendered), and the shipment moves onto a public thoroughfare, the shipment is in "transportation in commerce," and once in that mode the DOT regulates. Even in this mode, other jurisdictional authorities must have some regulatory powers because they have regulatory and emergency responsibilities. For example, if a hazardous material in transportation in commerce should be accidentally released, all information relative to the release must be available immediately to local response agencies in order to optimize protection of emergency responders, the public, property, and the environment. There could be a value in defining in the HMR when shipping papers are considered "active," and using this definition to identify when a shipment is in "transportation in commerce." The status of active shipping papers should be conferred when the package moves onto or off of a public thoroughfare.

- 2.(a) If a shipper is a private carrier, should any portion of transportation, prior to movement onto a public road, be considered transportation in commerce?

**Whether** or not a shipper is a private carrier is not the issue. A hazard is a hazard no matter who is carrying the material. However, as noted in 1 above, movement on a private thoroughfare should not be considered "transportation in commerce" because that could lead to the incorrect conclusion that DOT intends to regulate activities which are not related to the HMTA (for example, a facility employee who hand-carries a DOT container containing hazardous materials from one location on a plant floor to another).

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

Again, whether a contract or common carrier is irrelevant. The issue is that private facilities should not in any way have their activities (which may be regulated by other authorities) be preempted by the HMTA or HMR. Transportation ceases once the material arrives at the plant boundaries. The fixed facility should continue to be regulated locally because the safety impacts are local.

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

Security is an issue, but not for DOT on an "in-plant" area. This question illustrates the inappropriate nature of the Federal DOT being tasked with ensuring health and safety at a fixed facility, when it is DOT's mission to regulate transportation. The definition of "transports" or "transportation" in the HMTA (Section 5102) ". . . means the movement of property and loading, unloading, or storage incidental to the movement." Movement is the key word. Movement is finished when the material is delivered to the boundary of a fixed facility.

Section 8001.9.2 of the Uniform Fire Code (1994) provides for security at fixed facilities: "The storage, dispensing, use and handling areas [for hazardous materials] shall be secured against unauthorized entry and safeguarded with such protective facilities as public safety requires." By the same token, OSHA has the authority to regulate security from the perspective of worker safety and training requirements.

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

The focus of DOT's attention should remain on transport issues. Insofar as DOT regulates issues such as filling densities, outage requirements, attendance, securement of the transport container against movement, transport safety requirements, and packaging selection and use, then DOT should continue regulating in these specific areas. However, the environment surrounding the loading activity, including spill control, drainage, fire water access, grounding and bonding, secondary containment, treatment systems, rated electrical, detection/monitoring systems, alarm systems, and related issues should remain in the purview of local safety agencies, along with OSHA and EPA. Otherwise, gaps in safety regulations or unwieldy requirements could be established and administered from Washington, which is ineffective and unwieldy in light of community safety priorities.

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

No distinction should be made between private, contract, and common carriers, as noted above in Loading #2(b).

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

No. This unquestionably is outside the scope of DOT authority, except insofar as DOT is already regulating issues such as filling densities and limits, packaging requirements, types of containers, and labeling. See also the response to Loading #2(c), above.

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

As noted in Loading #2(b) and 3(b) above, no distinction should be made between private, contract, or common carrier since that has no bearing on the nature of the hazards presented by the materials.

5. Are there other factors for determining whether loading of hazardous materials is "incidental" to transportation in commerce?

At the hearings in Sacramento and Philadelphia, considerable discussion centered on the concepts of "intent" and time as factors which could be taken into account to determine activities which are "incidental to transportation...". The CFCA's position is that subjective indicators, for example those related to "intent," are not helpful because subjective indicators are virtually impossible to verify and regulate. Time is a more useful factor, as it can be measured, documented, and can provide a reliable determination of whether a fixed facility has plant capacity for storage, or is simply using DOT regulations to circumvent health and safety requirements as administered by OSHA, EPA, and local safety organizations.

The EPA's RMP regulations acknowledge EPA's authority and interest in the loading and unloading issue. DOT is not the primary regulator for either worker safety nor process safety, both of which become the chief issues for loading and unloading (or filling and unfilling) packages and containers at fixed facilities. Clearly, DOT needs to continue to have joint authority insofar as packages and associated labeling requirements, etc., are concerned. However, that authority in no way should be preemptive of the primary agencies' authorities for health and safety.. Application of the "obstacle" test should be used extremely cautiously and conservatively when the health and safety of a community are involved. See also discussion below, under Unloading #1(a), 1(b) and 1(d).

## **B. UNLOADING**

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

As noted in Loading #5 above, both loading and unloading are areas requiring that DOT share regulatory authority with other agencies/jurisdictions. Any loading of something is an unloading of something else, and vice versa. Both a fixed facility and a vehicle or vehicle container are involved in any loading or unloading situation. DOT should focus primarily on the vehicle and vehicle container, while the facility and environment around the vehicle and container should continue to be the focus of other agencies (OSHA, EPA, local fire and building departments, etc.). Improper loading and unloading can result in overfilling and consequent accidents and/or corrective actions, and can seriously affect the safety at fixed facilities and the local community.

While the HMR might be improved by incorporating safety measures from other documents (such as the Uniform Fire Code

and its sister codes for mechanical, electrical, etc. in such subject areas as bonding and grounding), DOT needs to get away from considering preemptive actions relating to loading and unloading. A safety measure such as bonding and grounding cannot be considered an obstacle to transportation unless life safety is considered an obstacle to transportation. Fortunately, agencies other than DOT have access to new technologies and processes. Local agencies can react more swiftly to enact new laws and regulations in order to institute reasonable, progressive safety improvements.

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

Again, as noted in Loading #1(a) above, RSPA should share regulatory authority in an appropriate manner. Preemption is inappropriate due to the interface with fixed facilities in all loading and unloading activities.

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

OSHA should incorporate any RSPA or FRA regulations for worker safety so that there will be one uniform regulation for worker safety. That would also clarify that no preemptive authority should override safety issues. Furthermore, worker safety issues should be addressed in the same manner according to equivalent standards, whether inside a plant boundary, on public rights of way, public or private thoroughfares. Development and clarification of OSHA regulations in this manner would offer an excellent opportunity for DOT, OSHA, and EPA to work together toward common goals.

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

RSPA should continue to have a role in regulating at the container side of the unloading process (the rail tank car's design, labeling, aspects of connections) and should regulate the car while it is rolling on a public rail. As articulated in the CFCA position paper dated 10-7-96, RSPA should jointly regulate the rail car unloading for a period not to exceed seven days, after which the rail car should be considered on-site storage and regulated as part of a fixed storage

facility. While seven days is a somewhat arbitrary number (as any time limit would be), it is not arbitrary in that testing by the L.A. County Fire Department showed that tank cars can be unloaded safely and effectively in a matter of hours (less than 24 hours), not days. Seven days allows for reasonable delays in the unloading process. However, the seven-day rule should not be viewed as an obstacle to transportation since it is the capacity of the fixed facility to accommodate the product, not the transportation process itself, which could be causing an "obstacle." Further, many communities would find even the seven-day rule objectionable since it could still be viewed by facilities as a "loophole" to building and equipping fixed storage capacity that would provide a higher level of community safety. In some cases, even allowing a loaded tank car to sit on site for seven days would be an unacceptable level of risk to local populations.

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

Again, the issue of contract or common carrier is irrelevant. See also the responses to Loading #3(a), 4(a), and 4(b) above.

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

Yes, and the regulation should be local, which is consistent with the principle that local agencies are responsible for local safety issues. On a practical level, public access and safety can only be monitored and enforced by local safety agencies, and only local agencies can initiate an emergency response. Mutual aid and the FEMA (Federal Emergency Management Agency) emergency planning and response infrastructure enable Federal agencies to provide response assistance, but only on a delayed basis and possibly after the need has passed. See also the discussion of Loading #2(c) above.

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

When a container/vehicle arrives at the site boundary of the facility, it would be presumed that the container/vehicle is delivered and transportation ceases. The remainder of the operations are conducted on the fixed facility, which is regulated by local and other appropriate entities. The facts

of a carrier being private or otherwise, carrier or consignee, are irrelevant to the determination of how to make the operation safe for workers and the public.

5. Are there other factors for determining whether unloading of hazardous materials is "incidental,, to transportation in commerce?

As a general summary, fixed facilities require safety measures for workers, the public, property, and the environment. Those measures are appropriately determined by OSHA, EPA, and the other local agencies which currently regulate those facilities and the activities thereon. Interpretation of the HMTA to imply scope beyond that already identified in the existing HMR would impinge upon the ability of public agencies to oversee public health and safety. The CFCA still supports the "4 pack,, decision of DOT in its intent and final determinations,, in spite of some inconsistencies in how those determinations were arrived at.

### **C. STORAGE**

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

The CFCA believes that RSPA should not exercise authority over storage unless the "storage,, is during the movement of the material. Because of the fact that the rail car has ceased its movement, the material in "storage . . . on a leased track" should be considered to be stored. Safety agencies have problems with materials which may be stored on leased track in order for an owner to avoid regulations which would be applicable to a fixed facility.

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

**Yes,** the HMR should apply to those hazardous materials shipments that have left fixed sites and are being moved via publicly regulated modes of transportation, until the shipment reaches its intended destination.

Regarding mid-point transloading or storage situations, the HMR should apply to the transloading of materials from one DOT regulated transportation vehicle, rail car, or vessel to another. The HMR should also apply to storage of hazardous materials in an approved transportation vehicle at a fixed mid-point facility as long as the shipment is covered by

active shipping papers and does not remain at the mid-point facility longer than seven days. See also the responses to Unloading 1(d) and 3. The HMR should not apply to any storage situations where a hazardous materials shipment is physically unloaded from a DOT regulated mode of transportation at a mid-point storage facility.

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

See also the response to Loading #1 above. A clear definition of "active shipping papers" would be helpful in determining RSPA's regulatory authority. This criterion is certainly less arbitrary than the concept of "intent" on the part of a shipper or owner in identifying that which is "in transportation,, or not, and could be addressed by RSPA in the HMR. This approach is supported by EPA's adoption of this phrase in its regulations implementing the Clean Air Act Section 112(r). The status of shipping papers can be further defined to include the electronic equivalent to shipping papers or any means to indicate the transfer of the shipment (such as "switching ticket,,) from the fixed facility to the carrier (or vice versa). The purpose of shipping papers, which contain information on the hazardous materials for safety and control during emergencies, is to support the ability of authorities to deal with emergencies during the transportation process. Clearly, further definition of "active shipping papers,, could be beneficial in helping everyone understand RSPA's regulatory authority over movement of hazardous materials.

4. Are there other factors for determining whether storage of hazardous materials is "incidental" to transportation in commerce?

Once physical delivery has been accomplished, the shipping papers should immediately be considered "no longer active,,. See also the responses to Loading questions above.

#### **D. HANDLING**

1. Which transportation-related activities should be included under the term "handling"? Why?

DOT regulations should address the handling of hazardous materials as they are transported in or on public modes of transportation. DOT authority should primarily address the packages in which hazardous materials are shipped; the vehicles used for the shipping of hazardous materials; how packages and vehicles used for the transportation of

hazardous materials are labeled and placarded; how vehicles used for hazardous materials transportation are designed, loaded and unloaded; "handling," insofar as that term refers to switching cars on tracks; and design and construction requirements for all other equipment used for the actual transportation of hazardous materials when they are moved on public roads, publicly regulated rail lines, aircraft and ships.

Other Federal, state and local agencies should continue to regulate all other areas of hazardous materials handling including: land use; building design and construction; fire safety; worker safety; environmental protection; and the off-site consequences of accidental release, including emergency response and hazard mitigation. Specifically, the DOT regulation should support the authority of other Federal, state and local agencies to regulate the physical environment in which hazardous materials are handled at all fixed facilities. DOT must recognize the fact that no single agency has the expertise, experience and resources to address all the complex issues related to facilities that manufacture, package, store and ship or receive hazardous materials. A regulatory partnership among all agencies is the only way to insure protection of life, property and the environment. For DOT to exercise preemptive authority damages this partnership and could potentially expose a wider community to higher risk.

In comments to RSPA by the Swimming Pool Chemical Manufacturer's Association as far back as January of 1993, erroneous comparisons were made between a definition of "handling" which is applicable to the HMTA and a definition which appears in the California Health and Safety Code. In the view of the CFCA, it was then and continues to be inappropriate to use the definition in a California code and apply it to the term "handling" as used in the HMTA and HMR. Such a misappropriation can result in a completely inaccurate interpretation of the intent of the HMTA.

1. Which transportation-related activities, if any, should be excluded from the list of activities that constitute "handling"? Why?

Loading, unloading, and storage of hazardous materials at fixed facilities should be excluded from consideration as "handling" for purposes of DOT preemption, except that DOT should continue to regulate the proper preparation of containers for shipment (e.g., filling limits, packaging requirements, what constitutes an "empty" container, types of containers, proper labeling, shipping papers, etc.).

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

Switching of rail cars can be considered "handling" for HMR purposes.

**E. OTHER DOT QUESTIONS FROM THE PHILADELPHIA WORKSHOP**

1. Written comments should address whether DOT regulations should specify when and to what degree DOT should preempt.

A more specific definition by DOT regarding the degree to which DOT should preempt would assist everyone involved in implementing the HMR. However, CFCA believes that the HMTA intends that preemption should be construed conservatively, not broadly. Other Federal, state and local authorities must continue to exercise their appropriate responsibility to insure life and environmental safety.

2. To what extent should SARA reporting be preempted by DOT, or should SARA requirements be regulated by DOT (e.g., if an activity is "incidental to transportation")?

If the DOT container is in movement on public thoroughfares then DOT should preempt SARA relative to requirements for hazardous materials inventories, community right to know, and emergency plans. However, if a DOT container is on site at a fixed facility, then the SARA requirements should apply. CFCA does not believe that the intent of SARA included reporting of materials in movement across public thoroughfares by railroads, truckers, etc.

3. How should DOT define "transportation" and what should be DOT's preemptive effect?

In our 11-27-96 issue paper to the Docket (HM-223), the CFCA stated, "We do not need to differentiate activities which are "in transportation" to arrive at what can be preempted by DOT and what cannot." At that time, we were hopeful that discussions with the Chlorine Institute and other members of an alliance of chemical manufacturing and shipping associations (referred to as "the alliance" in their own 11-30-96 issue paper to the Docket) would be able to arrive at agreement on the substantive issues without arriving at a consensus of the meaning of "in transportation." Unfortunately, as "the alliance" made clear in its issue paper, we have concluded that a definition of "in transportation," while controversial, is essential.

As noted under the response to Storage #3, "intent" is not a helpful criterion in determining what is "in transportation." A specific time limit, while somewhat arbitrary, is beneficial because it is easy to verify and measure, and is an objective demonstration of "intent." A clear and useful definition of "transportation" is: **Movement across public thoroughfares.** DOT's preemptive effect should apply only to the movement across public thoroughfares and any regulations which conflict with or lessen requirements for transportation-related packaging, labeling and hazard classification.

4. What are the "gaps" in DOT regulations?

As noted above, defining "transportation, handling and active shipping papers" will close most of the gaps in DOT regulations, and this paper addresses the CFCA's views on each of these issues.

5. Should RMP and PSM be incorporated into the HMR? If so, what would DOT preemption standards do to EPA/OSHA regulations which enable local agencies to have more stringent regulations at the local level?

Incorporating RMP and PSM into the HMR will only serve to confuse the preemption issue, and could dilute both worker safety and environmental protection. Local agencies nationwide traditionally place a high value on their ability to exercise local control without undue interference from the federal level, which could be seen as an increase in red tape and bureaucracy.

6. Should the DOT specify which aspects of EPA and OSHA regulations and codes are recognized by the HMR? Should DOT specify the preemptive effect it should have on each?

CFCA's position is that DOT should recognize all EPA, OSHA, state and local regulations at a fixed facility if such regulations do not conflict with the HMTA. When DOT actually issues a preemption ruling, then it should specify the preemptive effect of that ruling.