



CHEMICAL MANUFACTURERS ASSOCIATION

December 4, 1996

TO: Paul Bomgardner, American Trucking Associations
Bill Butterbaugh, National Propane Gas Association
Don Casey, The Fertilizer Institute, Inc.
Paul Donovan, Representing The Chlorine Institute, Inc.
Cara Guzik, American Petroleum Institute
Cliff Harvison, National Tank Truck Carriers, Inc.
Maureen Healey, Society of Plastics Industries, Inc.
Cynthia Hilton, Association of Waste Hazardous Materials Transporters
Chris Leason, Representing The Fertilizer Institute, Inc.
Mike Lyden, The Chlorine Institute, Inc.
Bob Matthews, Railway Progress Institute
Ron McGrath, Compressed Gas Association
Carol Toth, Representing Society of Plastics Industries, Inc.
Harold Weber, The Sulphur Institute

SUBJECT: FINAL Alliance comments on Docket HM-223

Enclosed are the final Alliance comments submitted to RSPA on the Docket HM-223 advanced notice of proposed rulemaking. Please distribute them to your memberships.

I would like to thank each of you for your hard work in preparing these comments. Your input made great improvements to the comments with each draft. I apologize for having to bother you with so many variations of the draft comments, but the end result is that the Alliance has submitted a strong position to RSPA on this docket.

In case any of you were breathing a sigh of relief, don't! We still have some work to do. RSPA has stated it expects to publish a notice of proposed rulemaking in late spring/early summer 1997. Prior to that, however, the Alliance committed to providing RSPA with "examples of regulatory initiatives that are or are not "covered subjects," obstacles to accomplishment and execution of Federal Hazmat Law, or items that meet the "dual compliance" test." I will organize a meeting of Alliance representatives in January/February 1997 to accomplish this task. In the meantime, if you have any examples that you would be willing to share with the Alliance and RSPA, please send them to me.

If you have any questions regarding the comments or the effort to provide RSPA with preemption examples, please feel free to call me at (703) 741-5256.

Sincerely,

Meredith Grider

Meredith Grider
Manager
Distribution Safety Programs

Enclosure

cc: G. Griffith T. Schick R. Speight



CHEMICAL MANUFACTURERS ASSOCIATION

M.L. MULLINS
VICE PRESIDENT
REGULATORY AFFAIRS

December 3, 1996

Dockets Unit
U.S. Department of Transportation
Research and Special Programs Administration
Nassif Building, Room 8421
400 Seventh Street, SW
Washington, DC 20590-0001

RE: Docket HM-223; Notice 96-15
Applicability of the Hazardous Materials Regulations to Loading,
Unloading, and Storage

Dear Sir or Madam:

Please find enclosed five copies of the written statement of the American Petroleum Institute, American Trucking Associations, Association of Waste Hazardous Materials Transporters, Chemical Manufacturers Association, The Chlorine Institute, Inc., Compressed Gas Association, The Fertilizer Institute, National Propane Gas Association, National Tank Truck Carriers, Inc., Railway Progress Institute, Society of Plastics Industries, Inc., and, The Sulphur Institute regarding the Research and Special Programs Administration (RSPA) docket referenced above.

Thank you for the opportunity to submit these comments regarding the issues in Docket HM-223. If you need additional information or clarification, please contact Meredith S. Grider, CMA, at (703) 741-5256.

Sincerely,

CMA 111288

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

DOCKET HM-223; Notice No. 96-15

APPLICABILITY OF THE HAZARDOUS MATERIALS REGULATIONS TO
LOADING, UNLOADING, AND STORAGE

COMMENTS OF:

AMERICAN PETROLEUM INSTITUTE
AMERICAN TRUCKING ASSOCIATIONS
ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS
CHEMICAL MANUFACTURERS ASSOCIATION
THE CHLORINE INSTITUTE, INC.
COMPRESSED GAS ASSOCIATION
THE FERTILIZER INSTITUTE
NATIONAL PROPANE GAS ASSOCIATION
NATIONAL TANK TRUCK CARRIERS, INC.
RAILWAY PROGRESS INSTITUTE
SOCIETY OF PLASTICS INDUSTRIES, INC.¹
THE SULPHUR INSTITUTE

SATURDAY, NOVEMBER 30, 1996

¹ The comments reflected herein represent the opinion of a majority of the members of the Society of Plastics Industries, Inc. (SPI). Individual members of SPI may be filing comments that express varying viewpoints.

TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE NUMBER(S)</u>
Executive Summary.....	i-ii
Introduction.....	1-2
General Statement:	
A. Appropriate Preeminent Authority of Federal Agencies.....	2-4
B. DOT Has Broad Authority to Regulate Hazardous Materials Transportation.....	4-6
C. General Positions on Loading, Unloading, and Storage.....	6-10
D. DOT Jurisdiction over the Container/Package/Vehicle.....	10
E. Regulatory "Silence" in the HMR.....	11-12
F. Positions on Issues Specific to the Questions Posed in the ANPRM.....	12-13
Responses to Questions.....	13-19
Conclusion.....	19-20

EXECUTIVE SUMMARY

These comments represent the position of the following associations (hereafter referred to as the "Alliance"): American Petroleum Institute; American Trucking Associations; Association of Waste Hazardous Materials Transporters; Chemical Manufacturers Association; The Chlorine Institute, Inc.; Compressed Gas Association; The Fertilizer Institute; National Propane Gas Association; National Tank Truck Carriers, Inc.; Society of Plastics Industries, Inc.¹; and The Sulphur Institute. The Alliance represents a large portion of the companies in the hazardous materials manufacturing and transportation industries which has a significant interest in this advanced notice of proposed rulemaking (ANPRM), Docket HM-223.

The Alliance firmly believes that agency jurisdictions cannot be segregated by certain criteria, such as physical location; time; etc. Rather, each individual activity should be considered separately, in joint consultations between the affected agencies, and the agency with the preeminent authority for that activity should regulate it, if regulation is necessary. The Alliance believes that two of the US Department of Transportation's (DOT) preeminent authorities support safety and commerce through transportation safety regulations and uniform Federal transportation standards; the preeminent authority of the Occupational Safety and Health Administration (OSHA) is worker safety and health (except where DOT chooses to "exercise authority to prescribe or enforce standards and regulations affecting occupational safety and health" (29 USC 653(b)(1)); and, the preeminent authority of the Environmental Protection Agency (EPA) is environmental protection.

Congress has given DOT broad authority to designate materials as hazardous and to prescribe regulations for the "safe transportation of hazardous materials in intrastate, interstate, and foreign commerce" (49 USC §5103). The Hazardous Materials Transportation Act (HMTA), as amended by Hazardous Materials Transportation Uniform Safety Act (HMTUSA), defines "transportation" as "the movement of property and loading, unloading, and storage incidental to the movement," (49 USC §5102(12)). *DOT's jurisdiction applies to loading, unloading, and storage incidental to transportation activities.* The law makes that abundantly clear. The Secretary of Transportation has an obligation to prescribe regulations to address these activities. However, just because DOT's jurisdiction covers loading, unloading, and storage incidental to transportation activities does not preclude other Federal/state/local agencies from also prescribing regulations affecting these activities in certain circumstances.

The Alliance suggests that any Federal requirements concerning loading, unloading, and storage activities impacting transportation, that could give rise to non-Federal requirements subject to HMTA preemption, should be regulated by DOT. Therefore, if there are gaps in the Hazardous Materials Regulations (HMR), The Research and Special Programs Administration (RSPA) should consider incorporation

¹ The comments reflected herein represent the opinion of a majority of the members of Society of Plastics Industries, Inc. (SPI). Individual members of SPI may be filing comments that express varying viewpoints.

of applicable non-DOT regulations, standards, etc., into the HMR if they impact transportation. Any activity impacting transportation that could pose an obstacle to the accomplishment of the HMTA or the HMR should be regulated by DOT.

The Alliance is also concerned about the potentially narrow direction of this rulemaking, as evidenced in the title "Applicability of the HMR to Loading, Unloading, and Storage." It is limiting if RSPA examines this activity *only as it applies to the current HMR*, though it is necessary for RSPA to address the parallel jurisdictions that exist among the Federal agencies in these activities. The Alliance acknowledges that the HMR do not address every single activity that occurs during loading, unloading, and storage. However, the Alliance strongly believes that RSPA should be the agency to consider and issue a regulation, if necessary, for a hazardous material transportation activity where there currently is no Federal regulation.

The outcome of this rulemaking could have serious safety and economic consequences if the result is a multitude of conflicting and burdensome state or local regulations in the intrastate and interstate transportation of hazardous materials. Therefore, the Alliance cautions that RSPA consider safety and economic impacts of decisions made in this rulemaking, as well as compliance difficulties if the result is varying and/or conflicting regulations governing the transportation of hazardous materials.

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

DOCKET HM-223; Notice No. 96-15

APPLICABILITY OF THE HAZARDOUS MATERIALS REGULATIONS TO
LOADING, UNLOADING, AND STORAGE

COMMENTS OF:

AMERICAN PETROLEUM INSTITUTE
AMERICAN TRUCKING ASSOCIATIONS
ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS
CHEMICAL MANUFACTURERS ASSOCIATION
THE CHLORINE INSTITUTE, INC.
COMPRESSED GAS ASSOCIATION
THE FERTILIZER INSTITUTE
NATIONAL PROPANE GAS ASSOCIATION
NATIONAL TANK TRUCK CARRIERS, INC.
RAILWAY PROGRESS INSTITUTE
SOCIETY OF PLASTICS INDUSTRIES, INC.¹
THE SULPHUR INSTITUTE

SATURDAY, NOVEMBER 30, 1996

I. INTRODUCTION

The associations listed above (hereafter referred to as "the Alliance") appreciate the opportunity to make these comments regarding the US Department of Transportation's (DOT) Research and Special Programs Administration (RSPA) Docket HM-223, titled "Applicability of the Hazardous Materials Regulations (HMR) to Loading, Unloading, and Storage." The Alliance represents a large portion of the

¹ The comments reflected herein represent the opinion of a majority of the members of Society of Plastics Industries, Inc. (SPI). Individual members of SPI may be filing comments that express varying viewpoints.

companies in the hazardous materials manufacturing and transportation industries which has a significant interest in this advanced notice of proposed rulemaking (ANPRM).

The member companies of the Alliance are subject to various complex regulations, many of which are in place to further safety and protect workers, the public and the environment. Many member companies of the Alliance also participate in voluntary industry initiatives designed to continuously improve environmental, health, and safety operations. The Alliance is committed to safe transportation of hazardous materials.

The questions posed in the ANPRM are relevant to the purpose of this rulemaking; however, many are specific in nature and do not allow for broad position statements concerning various hazardous materials transportation activities. Therefore, the Alliance submits these general statements prior to responding to the questions so that parties reading these comments understand our general positions as they read our responses to the questions. While some of the statements repeat positions that have already been submitted to the docket, they are restated to emphasize our strong belief in our proposed solutions for resolving jurisdictional overlap - solutions that provide for public safety but do not impede commerce.

The Alliance also suggests that RSPA consider issuing a supplemental advanced notice of proposed rulemaking if the agency believes that there are further questions relevant to this rulemaking, as RSPA representatives have indicated in the three public meetings. The Alliance believes that addressing these questions in a formal rulemaking procedure will allow all affected parties the opportunity to comment on these important matters.

The general statements concern the following issues: appropriate preeminent authority of Federal agencies; DOT's broad authority to regulate hazardous materials transportation; general positions on loading, unloading, and storage; DOT jurisdiction over the package; regulatory "silence" in the HMR; and, positions on issues specific to the questions (posed in the ANPRM). Following the "General Statement" section are the Alliance's specific responses to the questions posed in the ANPRM, and the conclusion.

II. GENERAL STATEMENT

A. Appropriate Preeminent Authority of Federal Agencies

Determining the appropriate boundaries of Federal agency jurisdictions on the plant site is an exercise that cannot be conducted at one moment in time, or determined as the result of a single rulemaking, such as Docket HM-223. Rather, determining the appropriate boundaries of agency jurisdictions should be considered each time a new regulatory activity is proposed. (NOTE: The main focus of the Alliance's comments is on the consignor/consignee plant site). The Alliance realizes that there always has been overlap among DOT's, the Environmental Protection Agency's (EPA), and the Occupational Safety and Health Administration's (OSHA) jurisdictions on the plant site and it anticipates that such overlap will continue. Yet, the Alliance also realizes that it

is necessary to draw some distinctions among the three Federal agencies in order to avoid regulatory conflicts and nonproductive overlap. However, the Alliance is concerned about statements made in the three public meetings that have been held on HM-223, suggesting the need to "draw lines" among agency jurisdictions on the plant site. While distinguishing among the agency jurisdictions is a necessary and beneficial exercise, attempting to resolve the overlapping jurisdictions by "drawing lines" at the plant site is, in our opinion, the wrong approach. The Alliance firmly believes that agency jurisdictions cannot be segregated by certain criteria, such as physical location; time; etc. Rather, each individual activity should be considered separately, in joint consultations between the affected agencies, and the agency with the preeminent authority for that activity should regulate it, if regulation is necessary.

Recognizing the preeminent authorities of each agency is important because the relationship of the various Federal agency regulations to state regulations is different due to variances in their respective authorizing statutes. Both EPA and OSHA regulations set forth the minimum standard within the area of their preeminent authority; states may develop stricter standards regarding environmental and worker health and safety issues. DOT hazardous materials regulations, however, set forth a maximum standard; therefore, as discussed under Section B of the "General Statement," states generally are preempted from regulating in the field of hazardous materials transportation. Preemption in hazardous materials transportation is critical because if shippers and carriers were required to comply with a myriad of different state regulations it would substantially burden commerce and cause potentially conflicting and confusing regulatory schemes.

It is necessary to identify the preeminent authority, in industry's view, of DOT, OSHA, and EPA. The Alliance believes that two of DOT's preeminent authorities support safety and commerce through transportation safety regulations and uniform Federal transportation standards; the preeminent authority of OSHA is worker safety and health (except where DOT chooses to "exercise authority to prescribe or enforce standards and regulations affecting occupational safety and health" (29 USC 653(b)(1)); and, the preeminent authority of EPA is environmental protection.

That notwithstanding, the Hazardous Materials Transportation Act (HMTA), as amended by the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), explains that the purpose of the act is to "provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." (49 USC §5101) Therefore, for the purposes of hazardous materials transportation, DOT does have certain responsibilities to accomplish the protection of life and property. These are common goals with OSHA and EPA and should be pursued in consultation with those agencies.

For the purposes of this debate, the Alliance is focusing on DOT's preeminent authority. The Alliance believes that examples of critical areas integral to DOT's preeminent authority are:

- transportation equipment/containers/packages;
- rail tracks;

- roads;
- pipelines;
- loading/unloading docks;
- freight terminals; and,
- marine docks.

Primary regulatory responsibility impacting transportation safety and uniform Federal transportation standards in these areas should, and, we believe, does lie within DOT.

The Alliance also suggests a set of fundamental principles that the agencies and industry can use to determine which agency should regulate various activities on the plant site. The fundamental principles are as follows:

- a. With a few exceptions (e.g., the California "Four Pack" preemption determinations; portions of EPA's Risk Management Program), the requirements of the existing transportation, worker, and environmental safety regulations are fundamentally sound, though they still need to be addressed relative to jurisdictional application and to determine if there are more examples of overlapping or duplicative regulations. Government and industry should focus their efforts to delineate agency jurisdiction on future regulatory issues.
- b. Coordination is needed at the Federal and State levels to avoid duplicative and/or conflicting regulatory coverage. This will provide the regulated community with a clear understanding of requirements and responsibilities.
- c. There is no rational geographic line between the DOT, OSHA, and EPA regulatory arenas on the plant site. However, DOT should maintain regulatory authority for the critical areas integral to DOT's preeminent authority, such as transportation vehicles from loading, up to and including unloading.
- d. One agency should not issue regulations that are inconsistent with another agency's preeminent authority.

The Alliance requests that RSPA, in consultation with OSHA and EPA, use these fundamental principles to determine which is the appropriate agency to regulate a proposed activity. Any resulting proposed regulatory activity should, of course, follow the guidelines for notice and public comment as described in the Administrative Procedures Act.

B. DOT Has Broad Authority to Regulate Hazardous Materials Transportation

While the Alliance suggests the use of the fundamental principles listed above to assist in resolving jurisdictional questions, we also believe it is necessary to distinguish between "DOT's jurisdiction" and the "application of Federal preemption." The reason this rulemaking is so complex is because it involves the question, "Which activities are subject to Federal preemption and which are not?" However, one must first understand the extent of DOT's jurisdiction in order to understand the application of Federal preemption.

Congress has given DOT broad authority to designate materials as hazardous and to prescribe regulations for the "safe transportation of hazardous materials in intrastate, interstate, and foreign commerce." (49 USC §5103) The HMTA, as amended by HMTUSA, defines "transportation" as "the movement of property and loading, unloading, and storage incidental to the movement," (49 USC §5102(12)). DOT's jurisdiction applies to loading, unloading, and storage incidental to transportation activities. The law makes that abundantly clear. The Secretary of Transportation has an obligation to prescribe regulations to address these activities.

However, just because DOT's jurisdiction covers loading, unloading, and storage incidental to transportation activities does not preclude other Federal/state/local agencies from also prescribing regulations affecting these activities in certain circumstances. Federal statutes governing the transportation of hazardous materials must be read in harmony and it must be determined what those statutes say about the relationship of each statute to other Federal, state, or local laws. It should be presumed that all Federal statutes are enacted by Congress with full knowledge of existing law and they are, therefore, to be construed in harmony with existing law, if reasonably possible.

The HMTA, and thus the HMR, are very specific about certain activities (state/local requirements) that are subject to Federal preemption. Title 49 of the United States Code states in §5125(b)(1):

... unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as any provision of this chapter or a regulation prescribed by this chapter, is preempted:

- (A) the designation, description, and classification of hazardous material.*
- (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.*
- (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.*
- (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.*
- (E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting of hazardous material.*

DOT has implemented this provision by regulation in Title 49 of the Code of Federal Regulations (CFR), §107.202(a). For clarification, §107.202(d) further states, "For purposes of this section, 'substantively the same' means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted."

The other preemption provisions are found at 49 USC §5125(a) which states:

...unless otherwise authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if -

- (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or*
- (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.*

State/local requirements must, if not subject to the "covered subjects" provisions of 49 USC §5125(b)(1), be reviewed under the "obstacle" or "dual compliance" tests, found in 49 USC §5125(a). Does the exercise of jurisdiction by a state/local agency over a particular activity constitute an obstacle to the accomplishment and execution of the HMTA or the HMR?

The Alliance suggests that any Federal requirements concerning loading, unloading, and storage activities impacting transportation, that could give rise to non-Federal requirements subject to HMTA preemption, should be regulated by DOT. Therefore, if there are gaps in the HMR, RSPA should consider, and if appropriate, incorporate applicable non-DOT regulations, standards, etc., into the HMR. Any activity impacting transportation that could pose an obstacle to the accomplishment of the HMTA or the HMR should be regulated by DOT.²

The Alliance recognizes that currently there are many questions of whether Federal preemption should apply to particular plant activities. We are eager to work with RSPA and other interested parties to help identify examples of regulatory initiatives that are or are not "covered subjects," obstacles to accomplishment and execution of Federal Hazmat Law, or items that meet the "dual compliance" test. Currently, the memberships of the associations that submit these comments are attempting to do this. We intend to submit further comments to the docket as soon as we have reached consensus on these issues. As these are difficult issues, we will not have a list of examples before the November 30, 1996, deadline for the ANPRM. However, we intend to submit them prior to RSPA issuing the notice of proposed rulemaking, which it hopes to do in the spring/summer of 1997. We hope that RSPA is aware that the Alliance is working diligently to assist the agency in this rulemaking by clearing up the jurisdictional confusion that exists today.

C. General Positions on Loading, Unloading, and Storage

The Alliance would like to restate its definition of the life cycle of a hazardous material, including its transportation, as it will assist in understanding the impact of DOT jurisdiction on the plant site. There are seven steps during the commercial life cycle continuum for hazardous materials in transportation:

² The Alliance is aware of the recent decision by the US Court of Appeals for the District of Columbia Circuit in Massachusetts v. US Department of Transportation, which reversed a DOT preemption decision based on the activity posing an obstacle to the purposes of the HMTA. We understand that this decision could be subject to further judicial review.

1. Production of hazardous material;
2. For non-bulk packages, loading (filling) of hazardous material into a packaging at the consignor's site and loading of the filled package onto a transport vehicle at the consignor's site; for bulk containers, loading (filling) of hazardous material into a bulk container³;
3. Storage incidental to transportation at the consignor's site prior to travel;
4. Travel and storage, loading and unloading incidental to transportation of hazardous material and/or hazardous material packagings at points between the consignor and the consignee;
5. Storage incidental to transportation at the consignee's site after travel and prior to unloading;
6. For non-bulk packages, removal of the filled package from the transportation vehicle at the consignee's site; for bulk containers, unloading of the hazardous material from the bulk container at the consignee's site; and,
7. Storage and/or use of the hazardous materials by the consignee or consumer.

It is clear that the first and last steps mentioned are not part of the transportation cycle. The fourth step clearly is transportation. The loading and unloading steps and any storage that is incidental to this transportation (steps 2, 3, 5, and 6), pose problems with the interpretation of what constitutes "in transportation" because transfers in and out of containers are not instantaneous. Relevant to the application of DOT's jurisdiction during loading, unloading, and storage, however, is the fact that DOT's jurisdiction also covers activities *beyond* the application of the HMR to loading, unloading, and storage. For example, DOT's jurisdiction covers design and construction of transportation containers/packages/vehicles; transportation packaging specifications; the classification of hazardous materials for transportation; selection of appropriate packagings for transportation; marking of transportation containers/packages/vehicles; labeling of transportation containers/packages/vehicles; placarding of transportation containers/packages/vehicles; pre-trip inspection activities; etc. These are activities that do not occur during loading, unloading, and storage, but that are clearly within the purview of DOT. The Alliance cautions RSPA to recognize the application of DOT's jurisdiction to these activities that are beyond the application of the HMR to loading, unloading, and storage.

The Alliance believes that a shipper's intent to ship a DOT-authorized container establishes whether that container falls under DOT or other agency jurisdiction.

³ Throughout these comments, the Alliance refers to transportation "containers," as well as to "packages," "packagings," and "vehicles." DOT has defined the terms "package," "packaging," and "transport vehicle" in 49 CFR §171.8. While "container" (by itself) is not a term defined in 49 CFR §171.8, the Alliance uses this term to refer to bulk or non-bulk packagings used for transportation.

Consistent with established law, the critical factor in determining whether a particular shipping container is being stored incidental to transportation is the intent of the person or persons shipping and/or receiving the container. While subjective intent is the critical factor under the law, it can be examined by reliance upon objective facts. Thus, in order to facilitate a determination of intent, we suggest that the following rebuttable presumptions may be relied upon in the absence of other controlling facts:

1. When a material is loaded into the bulk container or, in the case of non-bulk shipments in the transport vehicle, in which the material will be shipped, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the container/vehicle must be presumed incidental to transportation. Other facts, e.g., the shipper's demonstrated intent or past practices with respect to the container/vehicle, may rebut the presumption that it is in transportation. If the container/vehicle is not suitable for transportation under the Hazardous Materials Regulations, or if the material in the container/vehicle is reloaded into a fixed storage container or is returned to the manufacturing process⁴, it is not considered to be stored incidental to transportation.
2. When a container/vehicle arrives at a consignee's facility, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that the container/vehicle is delivered for unloading in the ordinary course of business. Thus, a presumption exists that the container/vehicle remains in transportation and storage is incidental to transportation until the container/vehicle is unloaded. As with other presumptions, facts may rebut the presumption.

The Alliance recognizes that some Federal/state/local regulators have expressed frustration with the concept of "the intent of the person or persons shipping and/or receiving the container" establishing whether that container falls under DOT's or another agency's jurisdiction. However, the Alliance believes that there *are* objective facts, as stated above, which serve to guide the agency to determine jurisdiction. Furthermore, the Alliance believes that rebuttable presumptions may be relied upon to establish intent. If a company were to claim that a transportation container/package/vehicle is under DOT's jurisdiction when the objective facts prove that it is not, the presumption would be rebutted. In all other cases, however, the presumption would provide important clarity to the regulated industries as well as to non-DOT agencies and the public.

Furthermore, the Alliance positions are based upon the generic consideration of what is "in-transportation." The Alliance agrees with DOT that "Ground transportation

⁴ In the event of an overfilled container, the Alliance reminds DOT that some material will have to be partially unloaded (e.g., returned to the manufacturing process) in order to meet the filling limit requirement, which would be subject to DOT regulation.

is 'in commerce' when it takes place on, across, or along a public way." (60 FR 8792) (EPA, however, under Resource Conservation and Recovery Act (RCRA) authority, does not consider movement of EPA regulated hazardous wastes *across a road* to owned property to be considered transported; thus, this movement is exempt from the uniform manifest standard). However, the Alliance also asserts that "transportation" encompasses activities such as classification, marking, labeling, placarding; therefore, "transportation" (and the application of DOT's jurisdiction) is more extensive than "transportation in commerce." While the HMTA, and therefore DOT, rely upon the use of the phrase "transportation in commerce," the Alliance believes that DOT's jurisdiction also applies to activities that occur *before* or *after* "transportation in commerce." The statute recognizes this as it defines "commerce" to mean "trade or transportation in the jurisdiction of the United States... (B) that affects trade or transportation between a place in a State and a place outside of the State." (49 USC §5102) Thus, DOT's jurisdiction extends to activities that occur before or after transportation in commerce. Nothing in the Alliance's comments is intended to minimize this authority. The Alliance is concerned that if DOT adopts a limited view of the application of its jurisdictional authority that it may result in varying and/or conflicting regulations being applied to transportation that could impede commerce. As DOT is the only Federal agency granted authority to regulate hazardous materials transportation in commerce, the Alliance suggests that RSPA consider the consequences on commerce as it defines the scope of its jurisdiction.

Question "Storage 2" illustrates our interpretation of the broad applicability of DOT's jurisdiction:

The question asks if the HMR should "continue to apply only to storage that may occur between the time a hazardous materials shipment is offered for transportation...and the time the shipment reaches its intended destination and is accepted by the consignee." (61 FR 39524) Storage incidental to transportation should be interpreted more broadly. For example, a DOT-specification tank car loaded pursuant to or in anticipation of an order is stored incidental to transportation. The car is loaded and secured pursuant to RSPA regulations. It is placarded and marked as required by the HMR. During the time the tank car awaits pick up by the rail carrier, it is prepared for transportation in most respects. Similarly, a tank car arriving at a plant for unloading is constructively placed by the rail carrier on the facility premises as directed by the consignee and the car is to be unloaded in its turn. In all respects the car meets the specification, test date, securement, and communication requirements of DOT. The Alliance maintains that this car is being stored incidental to transportation.

Likewise, a DOT-authorized cargo tank dropped by a motor carrier for loading is loaded and placed on the pick up pad awaiting arrival of the carrier's motive power. We maintain that this cargo tank is being stored incidental to transportation. It is secured, marked, and placarded in accordance with the HMR. Its specification is stipulated by RSPA.

Products in non-bulk containers ready for shipment are likely to be produced for inventory. Although these containers are prepared for shipment and are subject to DOT's jurisdiction, their storage in a plant warehouse is not incidental to

transportation and is not subject to DOT's jurisdiction. On the other hand, a shipment of non-bulk packages arriving at an end user's facility may or may not go through a storage incidental to transportation phase. Usually, the package is taken immediately into non-transportation related storage, usually indoors, in a work area set aside for the purpose of providing for an inventory of materials.

Again, while the non-bulk container is subject to DOT's jurisdiction, storage of it within a plant warehouse is not.

The above illustration should help to clarify the Alliance's position on the broad applicability of DOT's jurisdiction.

D. DOT Jurisdiction over the Container/Package/Vehicle

If there is intent to ship a container/package/vehicle, it should be presumed that it is in transportation, and DOT has the exclusive right to establish rules about the container's/package's/vehicle's integrity and suitability for the material, its containment, and its handling in a loading/unloading/storage incidental to transportation situation. DOT is the main Federal agency with expertise in the design of transportation equipment intended to carry hazardous materials. The Alliance expresses the strong view that no other Federal/state/local regulatory body has the jurisdiction to regulate transportation equipment that is used for the purpose of transportation (refer to 49 USC §5125(b)(1)). This includes transportation equipment that is in a phase of storage incidental to transportation. Clearly a potential result (that has already been evidenced in EPA's RCRA Subpart CC rule (59 FR 62896, when it was first published on December 6, 1994) is that these other regulatory agencies, *which do not have the expertise in transportation equipment design*, may create regulations that could force modifications to the equipment. The result of this scenario is varying state regulations pertaining to equipment design which could restrict or even halt interstate commerce.

The Alliance also believes it is necessary for RSPA to recognize the differences between bulk and non-bulk packages as it pursues this rulemaking. For example, the Alliance contends that non-bulk packages are not in-transportation until they are loaded onto the transport vehicle. However, this position does not relieve RSPA of its responsibilities to regulate those activities governing non-bulk packages in preparation for shipment, such as selection of the package, marking, labeling, etc. Storage of non-bulk packages awaiting loading to a transport vehicle or after unloading from a transport vehicle is correctly regulated by local building and fire code officials that regulate containment of those packages as they sit within a plant warehouse. However, it is again necessary to clarify that DOT always has the exclusive jurisdiction to regulate the specific transportation equipment (e.g., non-bulk packages) that is used for the purpose of transportation. Conversely, for bulk equipment, DOT has exclusive jurisdiction over this equipment if it is being used for transportation, including loading, unloading, and storage incidental to transportation.

E. Regulatory "Silence" in the HMR

The Alliance is concerned about the potentially narrow direction of this rulemaking, as evidenced in the title "Applicability of the HMR to Loading, Unloading, and Storage." It is limiting if RSPA examines this activity *only as it applies to the current HMR*, though it is necessary for RSPA to address the parallel jurisdictions that exist among the Federal agencies in these activities. The Alliance acknowledges that the HMR do not address every single activity that occurs during loading, unloading, and storage. However, the Alliance strongly believes that RSPA should be the agency to consider and issue a regulation, if necessary, for a hazardous material transportation activity where there currently is no Federal regulation.

To help alleviate confusion when other agencies propose regulations addressing transportation issues where RSPA has been silent, the Alliance also suggests that any agency (DOT or non-DOT) proposing a new regulatory activity affecting the transportation of hazardous materials be required to work with RSPA. Any initiative that affects hazardous materials transportation should be pursued under RSPA's authority, if warranted, to ensure the applicability of Federal preemption. This would alleviate confusion among the agencies and the regulated industry, and help to eliminate regulatory gaps in transportation activities. In other words, the Alliance again cautions against RSPA limiting the applicability of its jurisdiction to only those activities that are currently addressed in the HMR.

Allow us to be very clear on one point: The Alliance is not trying to hide in the "regulatory gaps." In fact, the Alliance has been a strong advocate to DOT that we would like to close any regulatory gaps that currently exist. It is the question of how regulatory gaps are closed that is at issue. For example, we believe that DOT should maintain its statutory jurisdiction over loading, unloading, and storage incidental to transportation activities. But, if more regulation is needed in these areas that impact transportation, then DOT should be the agency to issue the regulation. Primary regulatory responsibility impacting transportation safety and uniform Federal transportation standards should, and we believe do, lie within DOT. The Alliance cannot emphasize enough the importance of national uniformity to ensure safety and promote commerce in hazardous materials transportation regulations. DOT is the only Federal agency granted preemption authority over state and local regulations that may vary from the Federal transportation regulation. This is why we will continue to strongly advocate that DOT maintain its statutory jurisdiction.

Furthermore, the Federal Administrative Procedures Act was passed by Congress in order to ensure that the Federal rulemaking process is an open and fair one that considers the views of all interested parties. Any individual or group, industry or regulator, can petition DOT to issue a rulemaking to regulate an activity, if it should be subject to a level of regulation.

That notwithstanding, the Alliance also believes that DOT has issued many well-considered, comprehensive, and useful regulations that provide for public safety and protection of life and property. The Alliance suggests that state and local regulators, or building and fire code officials, review the numerous DOT regulations that are in place to regulate hazardous materials transportation before attempting to regulate within that

arena. If the decision is made that the current DOT regulations are not sufficient, then the Alliance encourages interested parties to petition RSPA to issue rulemakings regarding hazardous materials transportation. Similarly, the Alliance urges DOT to preempt any state and local regulations creating an obstacle to transportation in commerce, or otherwise conflicting with any of its preemption authorities.⁵

Also, allow us to reiterate our position on RSPA's enforcement concerns and its concerns that it does not have expertise in worker safety and environmental protection. The Alliance suggests that it is unnecessary for RSPA to attempt to develop worker safety or environmental protection expertise when these are, respectively, the preeminent authorities of OSHA and EPA. The Alliance encourages dialogue among the Federal agencies and suggests that RSPA consider incorporating by reference into the HMR other agency standards that impact hazardous materials transportation, and that meet the tests found in 49 USC §5125. RSPA has already recognized areas of shared jurisdiction with its sister DOT modal administrations. The Alliance is concerned that if RSPA does not reference other Federal standards in the HMR, this might be deemed an abdication of the preeminent authority of DOT over activities related to the transportation of hazardous materials. It is not clear whether RSPA's reference to other agency standards, without formally incorporating them by reference in the HMR, will preserve RSPA's preeminent authority over these issues. Where RSPA chooses to incorporate by reference the regulations of other agencies, the Alliance suggests that RSPA work with those other agencies to develop memoranda of understanding to address responsibility for enforcement actions.

F. Positions on Issues Specific to the Questions Posed in the ANPRM

RSPA raises other issues relevant to this rulemaking in the questions it poses in this ANPRM. The Alliance has chosen to explain its general positions concerning these issues in the "General Statement" section, rather than within the specific questions, because some of the questions were too specific to allow us to elaborate upon our overall position.

The first issue deals with questions addressing whether RSPA should recognize differences between private, contract or common carriers. The Alliance does not believe that RSPA should distinguish between private, contract or common carriers. RSPA's regulations are designed to promote safety regardless of who is conducting the activity.

A second issue addressed in the questions concerns "leased track" and how RSPA's regulations should apply to it. As we cautioned against distinguishing between types of carriers, the Alliance believes that RSPA should not distinguish between varying types of rail track. In fact, the Alliance asserts that a critical area of DOT's preeminent authority is rail tracks and primary regulatory responsibility concerning rail tracks should be addressed by DOT. DOT is the only agency with expertise to address issues regarding rail tracks, whether it is leased track or not. A shipper's intent to ship

⁵ The Alliance is aware of the recent decision by the US Court of Appeals for the District of Columbia Circuit in Massachusetts v. US Department of Transportation, which reversed a DOT preemption decision based on the activity posing an obstacle to the purposes of the HMTA. We understand that this decision could be subject to further judicial review.

a rail car establishes whether that car falls under DOT or another agency's jurisdiction. When a material is loaded into a rail car in which the material will be shipped, and the material remains in that rail car, and that rail car is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the rail car must be presumed incidental to transportation, whether it is on leased track or not.

A third issue addressed in the questions concerns "handling" and how RSPA's regulations should apply to this activity. The Alliance believes that "handling" causes jurisdictional confusion because there is no clear definition of what is meant by "handling."

The Alliance believes that "handling" is a DOT function that includes certain aspects of loading and unloading (such as filling and emptying containers) and movement of packages between the shipper and the consignee, including any temporary stops of packages at mid-transportation facilities (e.g., intermodal trans-loading facilities). RSPA should refer to the definition of a "hazmat employee" in 49 USC §5102(3) that states "... (C) includes an individual, employed by a hazmat employer, who during the course of employment - (i) loads, unloads, or *handles* (emphasis added) hazardous material;"

Loading, unloading, and storage incidental to transportation activities could be considered handling under the statute; however, the Alliance believes that a more appropriate approach would be to consider whether regulation of *specific* loading, unloading, or storage activities are "covered subjects," could pose an "obstacle" to accomplishment and execution of the HMTA or the regulations issued under the Act, or, meet the "dual compliance" test. If so, they should be regulated by DOT. Again, RSPA should consider the individual activity and whether it poses an obstacle to the objectives of the HMTA or not, rather than determining jurisdiction based on broadly interpreted terms such as "handling."

Given the positions stated above concerning issues relevant to this ANPRM and the questions posed in this rulemaking, the Alliance requests RSPA to consider these positions as it reads the responses to the questions.

III. RESPONSES TO QUESTIONS

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.

A shipper's intent to ship a DOT-authorized container establishes whether that container is in transportation. When material is loaded into a bulk container, in

which the material will be shipped, and the material remains in that container, and that bulk container or transport vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in-transportation. The same principles apply to non-bulk shipments: except for packaging specifications, filling, marking, and labeling requirements which also fall under RSPA jurisdiction, these do not enter transportation until the package is loaded onto the transport vehicle. Any storage of the bulk container or transport vehicle must be presumed incidental to transportation. Other facts may rebut the presumption that it is in-transportation. If the bulk container or transport vehicle is not suitable for transportation under the Hazardous Materials Regulations, or if the material in the container or vehicle is reloaded into a fixed storage container or is returned to the manufacturing process, it is not then considered to be stored incidental to transportation.

The Alliance also recognizes parallel jurisdictions between DOT and other agencies during loading. The Alliance again encourages RSPA not to "draw lines" between the agencies' jurisdictions, but consider the preeminent authorities of each agency and apply the suggested fundamental principles in order to determine the appropriate agency's jurisdiction.

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

RSPA should not make a distinction between private, contract and common carriers. In all cases, where the movement is intended as a step in the eventual transport off-site, the activity should be considered in transportation.

The Alliance also suggests that RSPA consider incorporating a provision into the HMR, similar to part 2.4(1)(b) of Canada's Transportation of Dangerous Goods (TDG) regulations. This provision states that the TDG regulations do not apply

"...to the handling, or offering for transport of dangerous goods solely within a facility or property ... if the dangerous goods are transported solely within that facility or property and the handling and offering for that transport is solely within that facility or property."

Adopting a provision similar to the TDG provision will help clarify RSPA's intent not to regulate transportation that takes place solely within a plant's property and for which there is no intent to place the hazardous material in commerce. Movement of material on private property with intent to move offsite would be regulated by the HMR. (refer to rebuttable presumption positions on page 8)

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

Same response as in Loading 2(a).

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

No. Public access has no relevance to this jurisdictional debate. Transport regulation over hazardous materials - including communication requirements - must be adequate to protect all in the vicinity of the hazardous material, e.g., the public, workers, and the environment, including those individuals who come in casual contact with the package as a result of public access to the facility. (Refer also to response in Loading 2(a)).

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

The Alliance believes that RSPA should regulate the loading and unloading of all bulk packagings. Regulations are already established for filling densities, outage requirements, attendance, securement of the transport container against movement, safety requirements, in addition to packaging selection and use. The Alliance believes that most regulations that should be required are already in place.

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. RSPA should not make a distinction between private, contract and common carriers (refer to the answer provided in Loading 2(a)).

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

See Alliance position "DOT Has Broad Authority to Regulate Hazardous Materials Transportation" of the "General Statement" section of these comments. The activity in question should be reviewed under DOT's preemption authorities. If the exercise of jurisdiction by another state/local agency over a particular activity constitutes an obstacle to the accomplishment of the HMTA or the HMR, the activity should be preemptively regulated by DOT.

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

No. RSPA should not make a distinction between private, contract and common carriers (refer to the answer provided in Loading 2(a)).

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

No, there are no other factors, other than those discussed in "Loading" questions 1-4.

UNLOADING

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

Yes. As in loading, there are a number of functions currently regulated by RSPA. These include (for tank cars) safety signs and equipment, attendance, assurance against movement (e.g., chocking, brakes set), and securement of the tank car for transportation. RSPA should, when and if necessary, regulate in the areas of bonding and grounding of transportation equipment, and operation of the transportation container cargo handling systems. These should apply to all bulk packages.

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

Yes (refer to the answer provided in Unloading 1(a)). The Alliance recognizes that OSHA is the preeminent authority for worker safety (except where DOT chooses to "exercise authority to prescribe or enforce standards and regulations affecting occupational safety and health" (29 USC 653(b)(1))). For those worker safety issues that impact transportation-related activities, the Alliance suggests that RSPA incorporate OSHA standards by reference into the HMR so that there will be one uniform regulation *for transportation*.

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

See answer provided for Unloading 1(b).

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?**

No, time should not be considered a factor in determining DOT's jurisdiction. Any specific time period is arbitrary and may create unsafe conditions. For

example, imposition of a time period may force companies to complete transportation functions, such as unloading, under inappropriate conditions in order for the unloading process to be completed within the DOT-specified time frame.

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?**

Yes, however RSPA should not make a distinction between private, contract and common carriers and unloading operations should be regulated by RSPA regardless of whether a carrier is involved. All packages containing hazardous materials (bulk or non-bulk) should be regulated by RSPA as appropriate during the unloading process, in order to not frustrate the transportation of hazardous materials in commerce.

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

No. Public access has no relevance to the jurisdictional debate. Transport regulation over hazardous materials - including communication requirements - must be adequate to protect all in the vicinity of the hazardous material, e.g., the public, workers, and the environment, including those individuals who come in casual contact with the package as a result of public access to the facility.

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?)**

Carrier responsibility is a defined responsibility regardless of what type of carrier is performing the activity. However, the completion of a carrier's responsibility does not signify the end of transportation, which extends beyond the completion of a carrier's responsibility. When a container/vehicle arrives at a consignee's facility, and the material remains in that container/vehicle, and the container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that the container/vehicle is delivered for unloading in the ordinary course of business. Thus, a presumption exists that the container/vehicle remains in transportation and storage is incidental to transportation until the container/vehicle is unloaded. As with other presumptions, facts may rebut the presumption. (see "General Positions on Loading, Unloading, and Storage").

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

No, there are no other factors, other than those identified in "Unloading" questions 1-4.

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 Alliance believes that RSPA should not distinguish between varying types of rail track. In fact, the Alliance asserts that a critical area of DOT's preeminent authority is rail tracks and primary regulatory responsibility concerning rail tracks should be addressed by DOT. DOT is the only agency with expertise to address issues regarding rail tracks, whether it is leased track or not. A shipper's intent to ship a rail car establishes whether that car falls under DOT or other agency's jurisdiction. When a material is loaded into a rail car in which the material will be shipped, and the material remains in that rail car, and that rail car is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the rail car must be presumed incidental to transportation, whether it is on leased track or not.

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

No. Simply put, the transportation container/package/vehicle that is in transportation should remain under DOT's jurisdiction until it is unloaded. (see "General Positions on Loading, Unloading, and Storage" for further elaboration on this question).

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?**

The Alliance does not believe that the presence of "active shipping papers" is the appropriate criterion for determining whether or not a transportation container is in transportation. This arbitrary criterion for determining whether a transportation container is subject to DOT's jurisdiction or another agency's jurisdiction is nowhere to be found in either DOT's, EPA's, or OSHA's enabling statutes. The adoption of this arbitrary criterion by DOT would result in DOT abdicating a great amount of its statutory authority under HMTA to EPA, which adopted this phrase in its regulations implementing the Clean Air Act §112(r), for regulating loading, unloading, and storage incidental to transportation. In fact, the status of shipping papers is becoming less defined as electronic data technology continues to change how documentation is prepared. Shipping papers are a consequence of hazardous materials being in commerce; they are not a precursor or a condition precedent/determinant to this finding.

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

No, there are no other factors, other than those identified in "Storage" questions 1-3.

HANDLING

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

The Alliance believes that "handling" is a DOT function that includes certain aspects of loading and unloading (such as filling and emptying containers) and movement between the shipper and the consignee, including any temporary stops at mid-transportation facilities. RSPA should refer to the definition of a "hazmat employee" in 49 USC §5102(3) that states "... (C) includes an individual, employed by a hazmat employer, who during the course of employment - (i) loads, unloads, or *handles* (emphasis added) hazardous material;"

Loading, unloading, and storage incidental to transportation activities could be considered handling under the statute; however, the Alliance believes that a more appropriate approach would be to consider whether regulation of loading, unloading, or storage activities are "covered subjects," could pose an "obstacle" to the accomplishment and execution of the HMTA or the regulations issued under the Act, or meet the "dual compliance" test. If so, they should be regulated by DOT. Again, RSPA should consider the individual activity and whether it poses an obstacle to the accomplishment and execution of the HMTA or the HMR or not, rather than determining jurisdiction based on broadly interpreted terms such as "handling."

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

See answer to Handling 1.

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?**

See answer to Handling 1.

CONCLUSION

The Alliance appreciates the opportunity to submit these comments. The outcome of this rulemaking, however, could have serious safety and economic consequences if the result is a multitude of conflicting and burdensome state or local regulations in the intrastate and interstate transportation of hazardous materials.

Therefore, the Alliance cautions that RSPA consider safety and economic impacts of decisions made in this rulemaking, as well as compliance difficulties if the result is varying and/or conflicting regulations governing the transportation of hazardous materials.