

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

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

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

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

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

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

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

Dated: July 19, 2005.

**Paul D. Jewell,**

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

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

**BILLING CODE 4910-15-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

#### 49 CFR Part 171

[Docket No. PHMSA-04-19173 (HM-223A)]

**RIN 2137-AE04**

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

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

**ACTION:** Final rule.

**SUMMARY:** PHMSA is amending the Hazardous Materials Regulations to add

a definition for "person who offers or offeror." The definition adopted in this final rule codifies long-standing interpretations and administrative determinations on the applicability of those regulations.

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

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

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

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

##### **II. Summary of Final Rule**

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

- We are defining "person who offers or offeror" to mean any person who performs or is responsible for performing any pre-transportation function required by the HMR or who tenders or makes the hazardous material available to a carrier for transportation in commerce. A carrier is not an offeror when it performs a function as a condition of accepting a hazardous material for transportation in commerce or when it transfers a hazardous

material to another carrier for continued transportation without performing a pre-transportation function.

- We are clarifying that there may be more than one offeror of a hazardous material and that each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform.

- We are clarifying that each offeror or carrier may rely on information provided by a previous offeror or carrier unless the offeror or carrier knows or, a reasonable person acting in the circumstances and exercising reasonable care, would have knowledge that the information provided is incorrect.

##### **III. Comments to the NPRM**

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

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

##### **A. Reasonable Reliance and Liability**

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

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

A person acts knowingly when—

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

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

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

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

#### *B. Person Who Offers and Pre-Transportation Functions*

A number of commenters express concern about the definition for “person who offers or offeror” proposed in the NPRM as it applies to carriers who may perform pre-transportation functions. These commenters support the specific language clarifying that a carrier that interlines a hazardous materials shipment is not an offeror when it performs no pre-transportation functions, but suggest that this provision of the NPRM does not “deliver the intended certainty.” (International Vessel Operators Hazardous Materials Association (VOHMA) and World Shipping Council (WSC)) They assert that the determination of “when a carrier might become an ‘offeror’ \* \* \* is further confused by the statement in [HM-223] that suggests that *who* performs a certain function (not what that function is) may determine whether that function is a ‘transportation’ function or a ‘pre-transportation’ function.” Referring to statements in the preamble to the HM-223 final rule that “fill[ing] and clos[ing] a bulk or non-bulk packaging” may be a “pre-transportation function” when performed by a shipper or a “transportation” function when

performed by a carrier, VOHMA and WSC state that “a carrier can never be an ‘offeror’ by virtue of performing a pre-transportation function, because such a function performed by a carrier is deemed to be a transportation function” and “the proposed language at 171.8(2) has no meaning.” These commenters state that, because

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

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

Another commenter notes that reviewing shipping papers to verify their compliance with the HMR or their international equivalents, which is defined as a pre-transportation function, may be performed by a carrier as a “mandated function of ‘acceptance’ for transportation of hazardous materials.” (Currie Associates) This commenter suggests that we add specific language to § 171.2 to indicate that the performance of a function required as a condition of acceptance of hazardous materials offered for transportation does not make a carrier an offeror if it

performs no other pre-transportation functions.

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

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

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

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

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

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

### C. Joint and Several Liability

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

a penalty by one violator does not satisfy a penalty assessed against another violator (unlike “joint and several liability,” where payment by one party satisfies the obligations of all liable parties).

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

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

\* \* \* \* \*

At the same time, an offeror who fails to properly declare (and prepare) a shipment of hazardous materials bears the primary responsibility for a hidden shipment. Whenever hazardous materials have not been shipped in compliance with the HMR, DOT generally will attempt to identify and bring an enforcement action against the person who first caused the transportation of a noncomplying shipment \* \* \*.

To the extent that any carrier, regardless of the mode of transportation, is truly “innocent” in accepting an undeclared or hidden shipment of hazardous materials, it lacks the knowledge required for assessment of a civil penalty.

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

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

#### *D. Definition of the Term "Shipper"*

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

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

Notwithstanding anything to the contrary in subsection (1), no carrier shall be deemed to be an offeror by virtue of the fact that such carrier transfers, interlines, or interchanges

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

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

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

#### *E. Emergency Response Telephone Number*

As noted above, VOHMA and WSC express concern about enforcement issues associated with transferring an emergency response telephone number provided by the original offeror of a shipment to shipping documents prepared by a subsequent offeror or carrier to facilitate the continued movement of a hazardous material. In addition, IME asks DOT to clarify

whether a freight forwarder or other carrier may legitimately transfer an emergency response telephone number "from that origin offeror's shipping paper to other shipping documents made necessary by intermodal transportation." IME states that "[e]mergency response telephone numbers and other essential information, such as the description of the hazardous material, from origin offeror's shipping papers are routinely transferred by entities in the transportation chain to forwarding shipping documents." Further, the American Chemistry Council commented that, in order for an organization such as CHEMTREC, which provides emergency response services, including a 24-hour telephone answering service, under contract to hazardous materials shippers and carriers, to be able to provide detailed emergency response information,

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

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

[A] carrier or freight forwarder may not rely on an emergency response telephone number provided by a preceding offeror when it is aware (or should be aware) of facts indicating the emergency response telephone number is not operative and does not meet the requirements of [49 CFR] 172.604(b). 69 FR at 57248 (internal quotations and citations omitted).

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

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

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

#### *F. Transferring, Interlining, or Interchanging Hazardous Materials Shipments*

In this final rule, we include in the definition of the term “person who offers or offeror” a provision that a carrier that transfers a hazardous material to another carrier for continued transportation is not an offeror when it performs no pre-transportation functions. We recognize that the terms “interline,” and “interchange” have specific meanings within the context of the functions performed and that these

meanings may not, in fact, be applicable to all modes of transportation. Therefore, in this final rule, we are revising the language proposed in the NPRM to indicate that a carrier who transfers a hazardous material to another carrier for continued transportation is not an offeror when it performs no pre-transportation functions. In this context, the term “transfer” means the shipment is physically passed or conveyed from one carrier to another for continued transportation in commerce.

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

#### *G. Miscellaneous Issue*

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

### **IV. Regulatory Analyses and Notices**

#### *A. Statutory/Legal Authority for This Rulemaking*

This final rule is published under the authority of 49 U.S.C. 5103(b), which authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. As set forth in 49 U.S.C. 5103(b)(1)(A), the regulations are to apply to, among others, a person transporting a hazardous material in commerce or causing hazardous material to be transported in commerce. In this final rule, we are codifying in the HMR longstanding interpretations concerning the applicability of the HMR to persons who offer hazardous materials for transportation. The terms “offer” or “person who offers” are used throughout the HMR to describe the process of causing a hazardous materials to be transported in commerce. Codifying the applicability of the HMR to persons who offer hazardous materials for transportation will help the regulated community understand and comply with regulatory

requirements applicable to specific situations and operations.

#### *B. Executive Order 12866 and DOT Regulatory Policies and Procedures*

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

#### *C. Executive Order 13132 (Federalism)*

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

#### *D. Executive Order 13175*

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

#### *E. Regulatory Flexibility Act*

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

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

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

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

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

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

consistent with requirements in the HMR.

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

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

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

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

#### *F. Unfunded Mandates Reform Act of 1995*

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

#### *G. Paperwork Reduction Act*

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

#### *H. Environmental Assessment*

There are no environmental impacts associated with this final rule.

#### *I. Regulation Identifier Number (RIN)*

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

#### *J. Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78), or at <http://dms.dot.gov>.

#### **List of Subjects in 49 CFR Part 171**

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

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

#### **PART 171—GENERAL INFORMATION, REGULATIONS AND DEFINITIONS**

■ 1. The authority citation for part 171 continues to read as follows:

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

■ 2. In § 171.2, revise paragraphs (b) and (f), to read as follows:

#### **§ 171.2 General requirements.**

\* \* \* \* \*

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

#### § 171.8 Definitions and abbreviations.

*Person who offers or offeror means:*

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

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

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

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

\* \* \* \* \*

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

**Brigham A. McCown,**  
*Deputy Administrator.*

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

BILLING CODE 4910-60-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

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

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

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

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

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

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

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

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

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

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under

authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

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

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

#### Classification

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

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

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

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