Daimler Vans USA:		
2007–2008	Freightliner	Sprinter (non-HAH)
2007–2008	Dodge	Sprinter (non-HAH)
Ford:		
2005–2006	Ford	GT (non-HAH)
2009–2014	Ford	Mustang (non-HAH)
2004–2006	Ford	Ranger (non-HAH)
GM:		
2007–2008	Chev/GMC	Silverado/Sierra (non-HAH)
2005	GM-Saab	9–2X (non-HAH)
Honda:		
2005	Honda	RL (HAH and non-HAH)
2008–2011	Honda	Element (non-HAH)
2008	Honda	Pilot (non-HAH)
Mazda:		
2004–2006	Mazda	B-Series (non-HAH)
Nissan:		
2003	Infiniti	FX (non-HAH)
2004–2005	Infiniti	FX (HAH and non-HAH)
2001	Infiniti	I30 (non-HAH)
2002–2004	Infiniti	I35 (HAH and non-HAH)
2006	Infiniti	M (HAH and non-HAH)
2001–2003	Nissan	Maxima (non-HAH)
Subaru:		
2004–2005	Subaru	Impreza/WRX/STI (non-HAH)
2003–2004	Subaru	Legacy, Outback, Baja (non-HAH)
Toyota:		
2002–2006	Lexus	SC430 (HAH and non-HAH)
2002–2004	Toyota	Sequoia (non-HAH)
2003–2004	Toyota	Tundra (non-HAH)

[FR Doc. 2015–28924 Filed 11–13–15; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–RSPA 2000–7486; PDs 8(R)–11(R)]

Hazardous Materials: California and Los Angeles County Requirements Applicable to the On-Site Handling and Transportation of Hazardous Materials

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

ACTION: Decision on petitions for reconsideration of administrative determinations of preemption.

Petitioners: Hasa, Inc., National Propane Gas Association, National Tank Truck Carriers, Inc., Pioneer Chlor Alkali Company, Inc., The Society of the Plastics Industry, Inc.

State and Local Laws Affected: California Health & Safety Code (CHSC), Chapter 6.95, Los Angeles County Code (LACoC), Titles 2 and 32.

Mode Affected: Rail.

SUMMARY: Federal hazardous material transportation law does not preempt California and Los Angeles County requirements on (1) the unloading of hazardous materials from rail tank cars by a consignee and (2) the consignee's on-site storage of hazardous materials following delivery of the hazardous materials to their destination and departure of the carrier from the consignee's premises or private track adjacent to the consignee's premises.

FOR FURTHER INFORMATION CONTACT: Vincent Lopez or Joseph Solomey, Office of Chief Counsel (PHC–10), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Background

This is a decision on petitions for reconsideration of PHMSA's determinations of preemption regarding certain of the State of California and Los Angeles County requirements applicable to unloading of hazardous materials from rail tank cars and the on-site storage of hazardous materials in rail tank cars or after unloading. The filing of these petitions for reconsideration rendered PHMSA's determinations of preemption non-final. With this decision on the petitions for reconsideration, the determinations of preemption that PHMSA was asked to reconsider become final.

A. Preemption Determinations (PDs) Nos. 8(R)–11(R)

In PDs Nos. 8(R)–11(R), published in the **Federal Register** on February 15, 1995 (60 FR 8774), PHMSA [1] considered certain requirements of the State of California and Los Angeles County applicable to unloading of hazardous materials from rail tank cars and the on-site storage of hazardous materials in rail tank cars or after unloading. In these determinations, PHMSA responded to applications by the Swimming Pool Chemical Manufacturers Association (SPCMA) and one of its members, Hasa, Inc. (Hasa), questioning whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* preempts the definition or classification of compressed gases and cryogenic fluids in the Uniform Fire Code (adopted in Title 32 of the Los Angeles County Code [LACoC]) and requirements on:

- Permits to store, transport, or handle these materials;
- unloading and storage of these materials, including the design and construction of tanks and containers;
- markings on containers of cryogenic liquids;

[1] Effective February 20, 2005, PHMSA was created to further the ''highest degree of safety in pipeline transportation and hazardous materials transportation,'' and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108–426, § 2, 118 Stat. 2423 (Nov. 30, 2004)), and 49 CFR 1.97(b), as redesignated at 77 FR 49964, 4987 (Aug. 17, 2012). For convenience, this decision refers to ''PHMSA'' in discussing actions taken by RSPA before February 20, 2005.

• placards and equipment on vehicles used to transport cryogenic liquids; and

• the fees in Title 2 of LACoC on ''handlers'' of hazardous materials.

SPCMA also challenged the definitions of ''handle'' and ''storage'' in Chapter 6.95 of the California Health and Safety Code (CHSC), which make substantive requirements in Chapter 6.95 applicable to on-site handling and storage of hazardous materials in rail tank cars at SPCMA members' facilities.[2]

In PDs 8(R)–11(R), PHMSA discussed its responsibility under 49 U.S.C. 5103(b) to ''prescribe regulations for the safe transportation of hazardous material in intrastate, interstate and foreign commerce,''[3] and the definition of ''transportation'' in former 49 U.S.C. 5102(12) as ''the movement of property and any loading, unloading, or storage incidental to the movement.''[4] 60 FR at 8777. PHMSA stated that ''Federal hazmat law and the HMR do not apply to the movement of hazardous material exclusively at a consignee's facility.'' *Id.* However,

• ''Unloading that is incidental to transportation includes consignee unloading of tank cars containing hazardous materials,'' and must be performed in accordance with 49 CFR 174.67. *Id.*

• ''Storage that is incidental to transportation includes storage by a carrier that may occur between the time a hazardous material is offered for transportation to a carrier and the time it reaches its intended destination and is accepted by the consignee,'' and is governed by requirements in 49 CFR 174.204(a)(2), but ''consignor and consignee storage of hazardous materials is not incidental to transportation in commerce.'' 60 FR at 8778.

• Other Federal agencies, including the Environmental Protection Agency (EPA) and the Department of Labor's Occupational Safety and Health Administration (OSHA) also regulate hazardous materials ''to ensure that they are not unintentionally or unlawfully released into the environment'' and ''to ensure worker safety'' in the workplace. *Id.*

PHMSA found there was insufficient information to make a determination whether four specific requirements were preempted and that Federal hazardous material transportation law preempts only the following specific provisions challenged in the applications of SPCMA and Hasa:

• The prohibition in Title 32 LACoC 79.809(c) against allowing a tank car to remain on a siding at point of delivery for more than 24 hours while connected for transfer operations, because tank car unloading requirements in 49 CFR 174.67 did not limit the amount of time a tank car may remain on a siding at a point of delivery while connected for transfer operations. 60 FR at 8788.

• The requirement in Title 32 LACoC 79.809(f) for in-person attendance of a tank car during unloading, because Los Angeles County did not recognize the authority granted to Hasa in former DOT exemption E 10552 for the use of electronic surveillance to monitor tank car unloading, under certain conditions and restrictions. 60 FR at 8789.

• The fees imposed on ''handlers'' of hazardous materials under Title 2 LACoC 2.20.140, 2.20.150, 2.20.160 and 2.20.170 to the extent that these fees applied to tank car unloading activities, because the fees collected were not being used for purposes related to hazardous materials transportation. 60 FR at 8784.

B. Petitions for Reconsideration; Initiation of Rulemaking

Within the 20-day time period provided in 49 CFR 107.211(a), petitions for reconsideration of PHMSA's determinations in PDs 8(R)–11(R) were submitted by Hasa, The Chlorine Institute and the American Chemistry Council (ACC),[5] National Propane Gas Association (NPGA), National Tank Truck Carriers, Inc. (NTTC), Pioneer Chlor Alkali Company, Inc., and The Society of the Plastics Industry, Inc. In general, all of these petitioners disagreed with PHMSA's finding that ''Federal hazmat law and the HMR do not apply to a consignee's transportation of hazardous materials solely within the gates of a private manufacturing facility.'' 60 FR at 8785. Hasa asked ''who regulates what and when?'' It stated that regulation of railroad tank cars ''while loading, unloading, and incidental storage occurs, by the State of California, the County of Los Angeles, and other local governmental agencies as well as by Federal requirements . . . is likely to be uneven, contradictory, confusing, and provide a lack of uniformity.''

In their jointly-filed petition, The Chlorine Institute and ACC asserted that, because ''49 CFR parts 174 and 177 set forth detailed regulations for the loading and unloading of hazardous materials on private property, loading and unloading on private property are held to be in commerce even though they clearly cannot be accomplished in commerce as that term is being construed by [PHMSA].'' These petitioners referred to other Federal statutes which apply to transportation-related activities on private property; they stated that the environmental statutes administered by EPA, which authorize State and local requirements, ''do not regulate the on-site transportation, handling or storage of hazardous materials.'' They also stated that PHMSA should resolve any ambiguity in a State or local law ''against the enforcing entity,'' and that a State or local requirement ''must be held to be preempted'' whenever its enforcement could create a conflict with a requirement in the HMR.

The Society of the Plastics Industry stated that it concurred with and supported the petition for reconsideration filed by The Chlorine Institute and ACC. It asserted that the decisions in PDs 8(R)–11(R) ignore ''the fact that the HMTA applies to loading and unloading, activities which occur within plant gates'' and also ''the 'stream of commerce' decisions adopted under the Interstate Commerce Act.''

NTTC expressed agreement with the position that the HMR do not apply to a hazardous material which ''has been removed from specification packaging . . . and not reloaded into another specification container or package.'' NTTC stated that the definition of ''commerce'' in Federal hazardous material transportation law ''embraces both 'transportation' and [that] which affects . . . transportation.'' NTTC also stated that the decisions in PDs 8(R)–11(R) were in conflict with prior interpretations that the HMR apply to representations that a packaging complies with a specification marking, ''regulations regarding the removal of placards from cargo tanks (prior to such being cleaned, purged and/or laden with another product),'' and enforcement actions against carriers who failed to report an unintentional release of hazardous materials during loading or

[2] CHSC Chapter 6.95 requires plans for emergency response and/or risk prevention, and these requirements are implemented at the local level—in this case, by Los Angeles County in LACoC Titles 2 and 32.

[3] In 2002, Congress amended this mandate to direct DOT to ''prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.'' Homeland Security Act of 2002, Public Law 107–296 § 1711(a), 116 Stat. 2319 (Nov. 25, 2002).

[4] In 2005, this paragraph was redesignated § 5102(13). Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users), Public Law 109–59 § 7102(8), 119 Stat. 1893 (Aug. 10, 2005).

[5] ACC was formerly known as the Chemical Manufacturers Association. For consistency, this decision refers to ''ACC'' throughout.

unloading, ''which invariably occur on private property.''

Pioneer Chlor Alkali Company addressed ''a loaded tank car on the receiver's property'' which it stated, prior to PHMSA's decisions, meant that ''the car is under Federal Jurisdiction from the time it is loaded, while it is being transported, held/stored, and up to the time it is unloaded.'' It stated that the ''change'' in PDs 8(R)–11(R) ''is not in the best interest of the general public,'' because, instead of ''one set of uniformly applied rules/regulations,'' there would be ''one set of rules/regulations covering the car at the loading point, another set (Federal) while it is in the so called 'Commerce' area and another third set at the unloading point.''

SPCMA and NPGA submitted further comments in support of the petitions for reconsideration. SPCMA stated that State and local regulations are likely to vary from place to place, so that hazardous materials ''will be subject to different—and without doubt conflicting—requirements throughout the journey'' from one place to another in commerce. NPGA stated that the decisions in PDs 8(R)–11(R) open up the possibility of ''a plethora of local regulations governing the loading and unloading operations that are already subject to DOT regulation.''

Additional comments on the petitions for reconsideration were submitted by the California Office of Emergency Services (OES), the Contra Costa County Health Services Department (Contra Costa County), and the Association of Waste Hazardous Materials Transporters (AWHMT). OES stated that the California regulatory scheme was aimed at facilities, not transporters, and does not apply to transportation or incidental activities regulated under Federal hazardous material transportation law or the HMR. It stated that the California statutes and implementing local regulations relate to emergency response planning and do not prohibit storage of hazardous materials; rather these provisions merely define ''storage'' and when compliance with the State law is triggered. OES argued that there is no evidence of any ''obstacle'' to accomplishing and carrying out the Federal hazardous material transportation law and the HMR, and that it is irrelevant how other Federal laws and the Commerce Clause have been interpreted. Contra Costa County indicated its concurrence with the OES comments and referred to a July 1993 incident involving the release of sulfur trioxide at Richmond, California, when the company allegedly failed to train its personnel, report the quantity of materials present, or implement a risk management and prevention program under CHSC Chapter 6.95.

AWHMT recommended that PHMSA delay taking action on the petitions for reconsideration and open a rulemaking docket with notice and opportunity for public comment and participation by EPA and OSHA. AWHMT stated that further clarification was needed ''on a number of points, not necessarily relevant to the fact-specific situation presented in PDs 8(R)–11(R),'' because ''there is no bright line that distinguishes the moment materials are placed in or out of transportation at consignee/consignor facilities.''

On July 24, 1996, PHMSA published a notice in the **Federal Register** announcing that it was deferring action on the petitions for reconsideration ''until the agency can complete a rulemaking, RSPA Docket HM–223, which focuses on numerous issues that are raised in the petitions for rulemaking.'' 61 FR 38513.[6] Over the next three years, PHMSA issued an advance notice of proposed rulemaking (ANPRM) (61 FR 39522 [July 29, 1996]); held public meetings in Atlanta, Sacramento, and Philadelphia; published further notices of the issues to be discussed at the public meetings (61 FR 49723 [Sept. 23, 1996], 61 FR 53483 [Oct. 11, 1996]); and issued a supplemental ANPRM (64 FR 22718 [Apr. 27, 1999]).

On August 20, 1999, The Chlorine Institute and ACC submitted a petition to ''supplement the record and for discharge'' of their March 1995 petition to PHMSA for reconsideration of the determinations in PDs 8(R)–11(R). They provided a recently-issued interpretation by EPA on the applicability of the Clean Air Act, which these petitioners contended ''is at odds'' with findings in PDs 8(R)–11(R), and stated that ''there is every reason to discharge the Petition for Reconsideration and finally decide this matter.'' In its October 19, 1999 letter, PHMSA advised these parties that it was granting their request to supplement the record in this proceeding and it had placed the August 20, 1999 petition in the docket of both the HM–223 rulemaking and the preemption proceeding. PHMSA also stated that it was denying their request to ''discharge'' the March 1995 petition for reconsideration ''pending completion of the HM–223 rulemaking,'' and that, after completion of the HM–223 rulemaking, PHMSA would reopen the docket in the preemption proceeding ''so that all participants in that proceeding may supplement the record if they wish,'' before acting on the petitions for reconsideration.

In June 2000, The Chlorine Institute and ACC formally withdrew their joint petition for reconsideration of PDs 8(R)–11(R) and filed a complaint in the United States District Court for the District of Columbia asking the court to ''reverse the holdings in the preemption determinations'' and ''such other and further relief as may be proper.'' *The Chlorine Institute, et al.* v. *U.S. Department of Transportation,* C.A. No. 00–1312 (WBB) (DDC). That complaint was dismissed on May 7, 2002, on the ground that these claims were not ripe for judicial review. The court noted that PHMSA had published a notice of proposed rulemaking (NPRM) in Docket HM–223 in the **Federal Register** on June 14, 2001 (66 FR 32420), and that it was not clear that the 1995 determinations in PDs 8(R)–11(R) reflected PHMSA's ''current position. Therefore, the Court would be in the unenviable position of having to enter its judgment on an issue that has not yet been decided by the Agency that has the expertise to make a more informed decision regarding this important issue of national policy.''

C. PHMSA's HM–223 Final Rules

After considering the extensive comments to the July 24, 1996 ANPRM, including the comments at the three public meetings, and the comments submitted in response to the April 1999 supplemental ANPRM and the June 2001 NPRM, PHMSA issued a final rule in its HM–223 rulemaking on October 30, 2003 (68 FR 61906). On April 15, 2005, PHMSA published in the **Federal Register** (70 FR 20018) amendments and corrections to its October 30, 2003 final rule in response to administrative appeals filed by fourteen companies and industry associations.[7]

In those final rules, PHMSA amended the HMR to define several terms including ''pre-transportation function,'' ''transportation,'' ''loading incidental to movement,'' ''unloading incidental to movement,'' ''storage incidental to movement,'' and ''transloading.'' 68 FR at 61907, 61940–41; 70 FR at 20021, 20033–34. PHMSA made clear that storage of hazardous materials ''at its final destination as shown on a shipping document'' is not ''storage incidental to movement'' of the materials, and

[6] This rulemaking was assigned Docket No. RSPA–1998–4952 on the Federal eRulemaking Portal at *http://www.regulations.gov.*

[7] Five additional industry associations submitted administrative appeals of PHMSA's October 30, 2003 final rule in HM–223, but withdrew those appeals and, with five other associations, filed a petition for judicial review of the HM–223 final rules.

unloading of hazardous materials after the materials have been delivered to the consignee and the carrier has departed from the consignee's facility or premises is not ''incidental to movement'' of the materials. 70 FR at 20033–34.

PHMSA amended 49 CFR 171.1 to list examples of regulated and non-regulated functions and to ''indicate that facilities at which functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other Federal agencies or to applicable state or local governmental laws and regulations (except to the extent that such non-Federal requirements may be preempted under Federal hazmat law).'' 68 FR at 61907; *see also id.* at 61937–39, and 70 FR at 20021, 20032–33. With respect to rail tank car unloading, PHMSA added a new paragraph 49 CFR 173.31(g) to set forth requirements to ''assure that a tank car that is being loaded or unloaded does not inadvertently enter transportation or endanger transportation personnel (*i.e.,* posting warning signs, setting brakes, blocking wheels) are regulated under the HMR.'' 68 FR at 61931, 61941. PHMSA also revised 49 CFR 174.67 to set forth the requirements applicable to transloading operations, and clarified that ''storage of hazardous materials at transloading facilities is storage incidental to movement and subject to regulations applicable to such storage under the HMR. 70 FR at 20020; *see also id.* at 20034; 68 FR at 61931, 61941–42. Otherwise however, ''[u]nloading of rail tank cars by consignees after delivery by the carrier is not regulated under the HMR,'' and ''unloading of rail cars at a facility after delivery by and departure of the rail carrier is subject to OSHA regulations applicable to worker protection and safety.'' *Id.* at 61931.

PHMSA also specifically noted that ''DOT specification packagings, such as rail tank cars, cargo tank motor vehicles, and cylinders, are subject to DOT regulation at all times that the packaging is marked to indicate that it conforms to the applicable specification requirements.'' 70 FR at 20024. Moreover, under the HM–223 final rules, the HMR continue to apply ''to pre-transportation functions, such as filling a rail tank car and preparing shipping papers.'' *Id.* at 20025. However, Federal hazardous materials transportation law does not preclude other Federal agencies or their state counterparts from regulating workers at a facility where hazardous materials are prepared for transportation or stored incidental to movement, so long as the other Federal or non-Federal requirements governing transportation of hazardous materials are not specifically displaced or preempted. *See id.* at 20028–29. PHMSA noted that a non-Federal safety regulation affecting the transportation of hazardous materials may be preempted under the Commerce Clause of the Constitution or 49 U.S.C. 5125; 49 U.S.C. 20106 (regarding rail transportation); or 49 U.S.C. 31141 (regarding motor vehicle transportation). *Id.* at 20024, 20025.

Ten industry associations petitioned the United States Court of Appeals for the District of Columbia for review of PHMSA's October 30, 2003 and April 15, 2005 final rules. *American Chemistry Council, et al.* v. *Department of Transportation,* Nos. 03–1456, 05–1191. Five additional associations were permitted to intervene in support of the petitioners. At oral argument on March 20, 2006, the Court questioned whether these associations had ''standing'' to assert that PHMSA should be required to apply the Federal hazardous material transportation law and the HMR to unloading and storage of hazardous materials on a consignee's private property, after delivery of the materials to their final destination and departure of the carrier. Following the submission of supplemental briefs, the Court found that neither the petitioners nor intervenors had shown that PHMSA's failure to assert authority to regulate consignee unloading and storage had caused a likely actual or imminent injury to these associations. 468 F.3d 810 (D.C. Cir. 2006). The Court found that the petitioners had not shown that:

- The costs of complying with local requirements are ''fairly traceable'' to the HM–223 final rules or that, if the HM–223 final rules had not been issued, the local requirements would likely be preempted under 49 U.S.C. 5125. *Id.* at 817–18.

- They would suffer an actual or imminent injury because of an alleged ''gap'' or ''void'' in Federal, State, or local safety requirements governing the unloading of hazardous materials by a consignee. *Id.*

The Court also found that the intervenors had not provided evidence to show that ''there are inconsistent state and local regulations which a properly-issued Final Rule would have preempted'' or ''that they face increased liability risks associated with gaps in federal oversight over the safe and secure transportation of hazardous materials.'' *Id.* at 821. On February 15, 2007, the Court denied rehearing *en banc. Id.* at 810.

D. PHMSA's Further Examination of Loading and Unloading of Bulk Shipments of Hazardous Materials

PHMSA specifically recognized in PDs 8(R)–11(R) that OSHA and EPA also regulate activities involving hazardous materials ''to ensure that they are not unintentionally or intentionally released into the environment'' and ''to ensure worker safety'' in the workplace. 60 FR at 8778. In HM–223, PHMSA provided in 49 CFR 171.1(e) that: ''Each facility at which pre-transportation or transportation functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other Federal agencies.'' 68 FR at 61938. PHMSA explained in the preamble to its October 30, 2003 final rule that ''unloading of rail cars at a facility after delivery by and departure of the rail carrier is subject to OSHA regulations applicable to worker protection and safety.'' *Id.* at 61931.

Nonetheless, concerns continued to be raised as to whether further Federal requirements or guidance are necessary to address the loading and unloading of shipments of hazardous materials in bulk packagings, such as rail tank cars and cargo tank motor vehicles. In recommendations I–02–1 & I–02–2, the National Transportation Safety Board had urged DOT, together with OSHA and EPA, to develop regulations ''that apply to the [certain aspects of] loading and unloading of railroad tank cars, highway cargo tanks, and other bulk containers'' and, separately in recommendation R–04–10, ''require safe operating procedures to be established before hazardous materials are heated in a railroad tank car for unloading.'' [8] In 2006, the U.S. Chemical and Safety Hazard Investigation Board (CSB) issued recommendation 2005–06 I–LA–R1 to ''Expand the scope of DOT regulatory coverage to include chlorine rail car unloading operations'' and provide specific requirements for ''remotely operated emergency isolation devices'' as part of a ''shutdown system . . . capable of stopping a chlorine release from both the rail car and the facility chlorine receiving equipment.'' [9]

During late 2006 and early 2007, PHMSA reviewed incident reports submitted during the prior decade in

[8] On November 29, 2013, the NTSB closed these three recommendations as ''Acceptable Alternative Action'' based upon the safety precautions and recommended guidance for persons responsible for unloding or transloading hazardous materials from rail tank cars, as set forth in PHMSA's July 12, 2013 safety advisory guidance. 78 FR 41853.

[9] On June 1, 2015, the CSB voted to designate this recommendation as ''Closed—No Longer Applicable'' because the board determined that the recommendation no longer applies to DOT.

accordance with the reporting requirements in 49 CFR 171.16 and concluded that ''roughly one quarter to one half of overall hazardous materials transportation incidents may be attributable to loading and unloading operations, particularly bulk packages.'' Notice of public workshop on loading/unloading practices, 72 FR 26864 (May 11, 2007). As later summarized in its notice requesting comments on ''Proposed Recommended Practices for Bulk Loading and Unloading of Hazardous Materials in Transportation,'' 73 FR 916, 917 (Jan. 4, 2008):

- During 2004–06, ''hazardous materials shipments transported by highway and rail in bulk packagings were involved in approximately 9 out of 10 high consequence events.'' *Id.*
- ''Many of the identified causes of both en route and storage incidents can be attributed to loading and unloading operations (*i.e.,* overfilled, overpressurized, loose closure, component, or device, etc.).'' *Id.*

In the January 4, 2008 notice, PHMSA also discussed the public workshop which had been held on June 14, 2007, to discuss ''the risks associated with loading and unloading bulk materials and the range of actions that could be taken by the government and industry to address those risks.'' *Id.* at 919. The participants included ''[r]epresentatives from industry, federal agencies, state and local government, standards organizations, the emergency response community, employee groups, environmental and public interest organizations, and the public.'' *Id.* At this workshop, the Interested Parties Working Group, representing thirteen industry associations including ACC, The Chlorine Institute, and NTTC, presented ''a draft operating procedures document for the loading, unloading, and storage of hazardous materials in bulk packagings having a capacity of greater than 3,000 pounds.'' *Id.* Following the workshop, PHMSA received further comments and a petition from the Dangerous Goods Advisory Group to initiate a rulemaking to adopt ''operational procedures in the HMR applicable to loading, unloading and incidental storage of hazardous materials in bulk packagings.'' *Id.*

Thereafter, PHMSA proposed to amend the HMR to require each person who engages in loading or unloading cargo tanks to perform a risk assessment of the loading and unloading operations and develop and implement safe operating procedures based upon the results of a risk assessment. NPRM, ''Cargo Tank Motor Vehicle Loading and Unloading Operations,'' 76 FR 13313 (Mar. 11, 2011); extension of comment period, 76 FR 27300 (May 11, 2011).[10] In response, however, a number of commenters ''noted confusion about the applicability of the proposed rule,'' ''expressed concern over the possibility of duplication of efforts by facilities and carriers,'' ''questioned the intent of provisions for the maintenance and testing of transfer equipment,'' and ''strongly opposed'' the proposal of an ''annual evaluation of hazmat employees performing CTMV loading and unloading operations.'' PHMSA's ''Withdrawal of notice of proposed rulemaking,'' 79 FR 10461, 10463–64 (Feb. 25, 2014). After conducting a supplementary policy analysis, PHMSA ''concluded that adopting the regulations proposed under the NPRM is not the best course of action at this time.'' *Id.* at 10465. But instead would:

- Issue ''a guidance document for CTMV loading and unloading operations;''
- Implement ''an outreach campaign to educate the regulated community on current regulatory requirements and best safety practices; and''
- Conduct ''human factors research to examine human involvement in release of hazmat and to potentially use this to support further consideration of rulemaking to address CTMV loading and unloading operations.''

During the meantime, Congress considered but failed to adopt proposals to apply the HMR to the unloading of certain packagings containing hazardous materials after delivery to the consignee. *See* S. 1813 § 34007 (as passed by the Senate on March 14, 2012), and H.R. 7 § 9005 (as reported by the Transportation and Infrastructure Committee on February 13, 2012).

II. Discussion

In its February 15, 1995 decisions in PDs 8(R)–11(R), PHMSA considered and addressed the applicability of the HMR to unloading and storage of hazardous materials in rail tank cars at a consignee's facility after a tank car has been delivered by the rail carrier and the carrier has departed. At the conclusion of its ten-year HM–223 rulemaking, after considering the many comments submitted in that rulemaking by the parties petitioning for reconsideration of PDs 8(R)–11(R), PHMSA amended the ''applicability'' provisions in the HMR to clarify that the following activities or functions are not subject to the requirements of the HMR:

- ''Unloading of a hazardous material from a transport vehicle or bulk packaging performed by a person employed by or working under contract to the consignee following delivery of the hazardous material by the carrier to its destination and departure from the consignee's premises of the carrier's personnel or, in the case of a private carrier, departure of the driver from the unloading area.'' 49 CFR 171.1(d)(2).
- Storage of a freight container, transport vehicle, or package containing a hazardous material after its delivery to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a rail car, storage of a rail car on private track.'' 49 CFR 171.1(d)(3).

Since issuance of PDs 8(R)–11(R), the issues relating to post-delivery unloading and storage have been exhaustively presented and considered in rulemaking proceedings and federal court litigation. Affirmance of the fundamental holdings in the initial preemption determinations is consistent with the clarifications in the HM–223 rulemaking with regard to the scope of the definition of ''transportation'' in Federal hazardous material transportation law and the applicability of the HMR. Moreover, it is unlikely that any further submissions on the petitions for reconsideration will contain any new information or arguments. Reopening the docket on those petitions for reconsideration, as PHMSA offered to do in 1999, is no longer warranted. The time has come to close the preemption proceeding and devote future efforts to actions to reduce the safety risks in activities involved in the loading and unloading of shipments of hazardous materials, as outlined in PHMSA's February 25, 2014 withdrawal of notice of proposed rulemaking. 79 FR at 10465.

III. Ruling

For all the reasons set forth above, PHMSA finds that that Federal hazardous material transportation law does not preempt California and Los Angeles County requirements on (1) the unloading of hazardous materials from rail tank cars by a consignee and (2) the consignee's on-site storage of hazardous materials following delivery of the hazardous materials to their destination and departure of the carrier from the consignee's premises or private track adjacent to the consignee's premises.

IV. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes PHMSA's final agency action on the applications by SPCMA and Hasa for

[10] In the preamble to this NPRM, PHMSA stated that it was separately ''evaluating the safety issues associated with rail tank car loading and unloading operations and may propose regulatory changes if our safety analysis concludes that such action is warranted.'' *Id.* at 13314.

administrative determinations of preemption as to certain requirements in Chapter 6.95 of the California Health and Safety Code and Titles 2 and 32 of the Los Angeles County Code relating to unloading and storage of hazardous materials.

A person who is adversely affected or aggrieved by a preemption determination may file a petition for judicial review of that determination in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Issued in Washington, DC, on November 10, 2015.

Joseph Solomey,

Senior Assistant Chief Counsel.

[FR Doc. 2015–28921 Filed 11–13–15; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Market Risk

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Market Risk.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: You should submit written comments by: December 16, 2015.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0247, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *prainfo@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0247, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by email to: oira *submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is requesting extension of OMB approval for this collection. There have been no changes to the requirements of the regulations.

Title: Market Risk.

OMB Control No.: 1557–0247.

Description: The Office of the Comptroller of the Currency's (OCC) market risk capital rules (12 CFR part 3, subpart F) capture positions for which the market risk capital rules are appropriate; reduce procyclicality in market risk capital requirements; enhance the rules' sensitivity to risks that are not adequately captured under the current regulatory measurement methodologies; and increase transparency through enhanced disclosures.

The information collection requirements are located at 12 CFR 3.203 through 3.212. The rules enhance risk sensitivity and include requirements for the public disclosure of certain qualitative and quantitative information about the market risk of national banks and Federal savings associations. The collection of information is necessary to ensure capital adequacy appropriate for the level of market risk.

Section 3.203 sets forth the requirements for applying the market risk framework. Section 3.203(a)(1) requires national banks and Federal savings associations to have clearly defined policies and procedures for determining which trading assets and trading liabilities are trading positions and specifies the factors a national bank or Federal savings association must take into account in drafting those policies and procedures. Section 3.203(a)(2) requires national banks and Federal savings associations to have clearly defined trading and hedging strategies for trading positions that are approved by senior management and specifies what the strategies must articulate. Section 3.203(b)(1) requires national banks and Federal savings associations to have clearly defined policies and procedures for actively managing all covered positions and specifies the minimum requirements for those policies and procedures. Sections 3.203(c)(4) through 3.203(c)(10) require the annual review of internal models and specify certain requirements for those models. Section 3.203(d) requires the internal audit group of a national bank or Federal savings association to prepare an annual report to the board of directors on the effectiveness of controls supporting the market risk measurement systems.

Section 3.204(b) requires national banks and Federal savings associations to conduct quarterly backtesting. Section 3.205(a)(5) requires institutions to demonstrate to the OCC the appropriateness of proxies used to capture risks within value-at-risk models. Section 3.205(c) requires institutions to develop, retain, and make available to the OCC value-at-risk and profit and loss information on sub-portfolios for two years. Section 3.206(b)(3) requires national banks and Federal savings associations to have policies and procedures that describe how they determine the period of significant financial stress used to calculate the institution's stressed value-at-risk models and to obtain prior OCC approval for any material changes to these policies and procedures.

Section 3.207(b)(1) details requirements applicable to a national bank or Federal savings association when the national bank or Federal savings association uses internal models