

The action is taken to respond to a Request for Extension of Time, and a Statement in Support of Request for Extension of Time, and a Statement in Support of Request for Extension of Time.

**DATES:** Comments are due on or before October 27, 2004, and reply comments are due on or before November 30, 2004.

**ADDRESSES:** Federal Communications Commission, Portals II, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:**

Debra Sabourin, Industry Analysis Division, Media Bureau, (202) 418-2330 or [Debra.Sabourin@fcc.gov](mailto:Debra.Sabourin@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Order, DA-04-2996, in MB Docket No. 04-256, released on September 16, 2004. The full text of this Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY-A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, Best Company and Printing, Inc., Room CY-B402, telephone (800) 378-3160, <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (electronic files, large print, audio format and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), 418-7365 (TTY).

On August 2, 2004, the Media Bureau ("Bureau") released a Notice of Proposed Rule Making ("NPRM") seeking comment on whether to attribute certain TV Joint Sales Agreements ("JSAs") for purposes of applying the broadcast ownership rules. On August 26, 2004, a summary of the Notice was published in the **Federal Register**, establishing deadlines for the filing of comments and reply comments of September 27, 2004, and October 12, 2004, respectively. (*Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 69 FR 52464, August 26, 2004).

On September 13, 2004, Paxson Communications Corporation ("Paxson") filed a Request for Extension of Time to file comments and reply comments. Paxson asks that the deadline for filing comments be extended to October 27, 2004, and the deadline for filing reply comments be extended to November 30, 2004. It asserts that, as owner and operator of 61 full power television stations and owner of the PaxTV broadcast network, it is party to a large number of JSAs. Paxson notes that the Commission asked parties to JSAs to gather and provide

information concerning the terms and conditions of those JSAs, as well as their public interest benefits. Paxson says it needs more time to prepare its comments and respond to the factual and legal issues raised in this proceeding given the number of other open Commission proceedings on broadcasting in which it is involved. According to Paxson, an extension will enable it to prepare and present a more thorough factual record and analysis of the legal issues in this proceeding. On September 14, 2004, the National Association of Broadcasters ("NAB") filed a "Statement in Support of Request for Extension of Time" in support of Paxson's motion for the same reasons, arguing that an extension will serve the public interest by allowing for a more complete record.

We conclude that Paxson and NAB have stated good cause to justify granting an extension of the deadlines for the filing of comments and reply comments in this proceeding. Granting the extensions will serve the public interest in gathering a full record on the factual and legal issues raised in the Notice, including the information sought on the terms and conditions of existing TV JSAs. The new deadline to file comments will be October 27, 2004, and the new deadline to file reply comments will be November 30, 2004.

Federal Communications Commission.

**Thomas L. Horan,**

*Legal Advisor, Media Bureau.*

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## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

#### 49 CFR Part 171

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

RIN 2137-AE04

#### Applicability of the Hazardous Materials Regulations to "Persons Who Offer" Hazardous Materials for Transportation in Commerce

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** RSPA is proposing to add to the Hazardous Materials Regulations a definition for "person who offers or offeror" in order to codify long-standing interpretations on the applicability of those regulations.

**DATES:** Submit your comments on or before November 23, 2004.

**ADDRESSES:** You may submit comments by any of the following methods:

- *U.S. Government Regulations.gov Web Site:* <http://www.regulations.gov>. Use the search tools to find this rulemaking and follow the instructions for submitting comments.

- *DOT Docket Management System Web site:* <http://dms.dot.gov>. Click on "Comment/Submissions" and follow the instructions for submitting comments.

- *Fax:* 1-202-493-2251.

- *U.S. Mail or Private Delivery Service:* Docket Management System, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-402, Washington, DC 20590-0001.

- *Hand Delivery:* To the Docket Management System, Room PL-401, on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**Instructions:** You must include the agency name and docket number, RSPA-04-19173 (HM-223A) or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comment. Note that all comments received will be posted without change to the DOT Docket Management System Web site: <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act section of this document.

**FOR FURTHER INFORMATION CONTACT:**

Frazer C. Hilder, Office of the Chief Counsel, (202) 366-4400, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) are promulgated under the mandate in section 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*, as amended by section 1711 of the Homeland Security Act of 2002, Public Law 107-296) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate." The HMR apply to a person:

(i) Transporting hazardous materials in commerce;

(ii) Causing hazardous material to be transported in commerce; or

(iii) Manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce.

49 U.S.C. 5103(b)(1)(A).

Activities governed by the HMR include “[t]he offering of hazardous materials for transportation and transportation of hazardous materials in interstate, intrastate, and foreign commerce by rail car, aircraft, motor vehicle, and vessel \* \* \*” 49 CFR 171.1(a)(1). In this manner, the HMR have used the term “offering” to describe the process of “causing hazardous material to be transported,” and numerous provisions in the HMR impose responsibilities on a “person who offers” (e.g., 49 CFR 107.600(a) (registration), 172.200(a) (shipping papers), 172.300(a) (package marking), 172.400(a) (hazard warning labels), 172.500(a) (placards), 172.600(c) (emergency response information), and 173.1(b) (general training requirement)).

On October 30, 2003, we published a final rule under Docket HM-223 to clarify the applicability of the HMR to functions and operations related to the transportation of hazardous materials in commerce. 68 FR 61906, revision of effective date, 69 FR 30588 (May 28, 2004), administrative appeals and judicial review pending in *American Chemistry Council v. U.S. Dep’t of Transp.*, No. 03-1456 (D.C. Cir.). The provisions of the HM-223 final rule are effective January 1, 2005.

The HM-223 final rule revised § 171.1 of the HMR to incorporate language to clarify the applicability of the regulations to persons who perform specific functions. The revised § 171.1(b) states that the HMR apply to “each person who offers a hazardous material for transportation in commerce, causes a hazardous material to be transported in commerce, or transports a hazardous material in commerce and who performs or is responsible for performing a pre-transportation function \* \* \*” 68 FR 61937. The first two subsections of § 171.2, as revised in the HM-223 final rule, provide that:

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

(b) Each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of this subchapter or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter.

68 FR 61939.

The HMR do not define the terms “offer” or “person who offers.” In 1990, RSPA published the text of a 1988 letter interpretation stating that, in the HMR, responsibilities generally are placed on “offerors” for performance of the functions associated with “offering” hazardous materials for transportation \* \* \*

The key issue in determining the regulatory responsibilities under the requirements in [the HMR] is determining which parties perform which functions. This involves a case-by-case determination based upon all relevant facts. Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform any of the functions assigned by the HMR to the offeror, is legally responsible under the HMR for the proper performance of those functions. \* \* \* In many cases, more than one person may be responsible for performing, or attempting to perform, “offeror” functions, and each such person may be held jointly and severally liable for all or some of the “offeror” responsibilities under the HMR.

55 FR 6758, 6760-61 (Feb. 26, 1990).

In a 1992 interpretation, RSPA further explained that:

While hazardous materials ownership and contractual assignment of functions are factors relevant to the determination of “offeror” status, they are not conclusive. \* \* \* Factors considered in determining a party’s “offeror” status include functions actually performed or undertaken by a party, and functions which the party contracts to perform. Past practices of the parties are also considered because they provide evidence of the parties’ division of functions.

“Offeror” functions include, but are not limited to, selection of the packaging for a regulated material, physical transfer of hazardous materials to a carrier, classifying hazardous materials, preparing shipping papers, reviewing shipping papers to verify compliance with the HMR or their international equivalents, signing hazardous materials certifications on shipping papers, placing hazardous materials markings or placards on vehicles or packages, and providing placards to a carrier.

57 FR 48739, 48740 (Oct 28, 1992).

In the NPRM issued under Docket HM-223 (66 FR 32420; June 14, 2001), we proposed to define “offer a hazardous material” to mean “perform, attempt to perform, or is required to perform a pre-transportation function under the HMR.” We proposed to define “pre-transportation function” to mean “tendering a hazardous material to a carrier for transportation in commerce; causing a hazardous material to be transported in commerce; or performing a function specified in the HMR that is required to assure the safe transportation of a hazardous material in commerce \* \* \*” 66 FR 32447. The intent of this proposal was “to clarify

that, consistent with Federal hazmat law [and our prior interpretations], the HMR apply to functions performed to prepare hazardous material for transportation in commerce as well as the actual transportation of hazardous materials in commerce.” 68 FR 61911.

Comments to the HM-223 NPRM pointed out that this proposed definition could create a circular result, because a shipper might be considered to offer a hazardous material “when performing pre-transportation functions that [must be performed] *prior to offering* a hazardous material for transportation.” *Id.* Accordingly, in the final rule in HM-223, “we revised the definition of ‘pre-transportation function’ to mean a function specified in the HMR that is required to ensure the safe transportation of a hazardous material in commerce,” and we did not include a definition for “offer a hazardous material.” *Id.* We recognized that an “offering” is not normally considered complete until “the hazardous material is staged for loading and the consignor or his agent signs the shipping paper,” at which time an offeror should be “able to demonstrate compliance with all applicable pre-transportation requirements.” *Id.* We also indicated that, “[e]ven in the absence of a signed shipping paper, a shipper may be responsible for assuring compliance with specific pre-transportation requirements if other factors indicate that a particular pre-transportation activity has been completed.” 68 FR 61912. Accordingly, RSPA stated that the agencies enforcing the Federal hazardous material transportation law and the HMR

will continue to exercise our statutory authority to inspect for compliance with the HMR requirements applicable to pre-transportation functions. We will also continue to exercise our authority to take appropriate enforcement action when we discover that a pre-transportation function has been performed in a manner that does not comply with the HMR, even if transportation of hazardous material in commerce has not yet begun (*i.e.*, the carrier has not yet taken possession of the material) or has not been performed at all (*i.e.* undeclared shipments offered for transportation).

*Id.*

This discussion in the preamble to the HM-223 final rule makes it clear that RSPA has not changed its long-standing position that any person who performs a regulated “pre-transportation” function comes within the concept of a “person who offers” as that and similar terms are used in the HMR, in the manner explained in the prior interpretations. In response to concerns

regarding entities such as freight forwarders, brokers, and non-vessel operating common carriers, who may have “no physical involvement with the shipment,” we made it clear that the HMR apply to persons who perform pre-transportation functions when they make arrangements for a shipment, but that, except for errors made by others about which they “knew or should have known,” they may rely on “information provided by the original shipper.” 68 FR 61911. The principle of reasonable reliance applies whenever there is more than one “person who offers” (*i.e.*, multiple offerors), and to all persons who participate in the transportation of hazardous materials. Accordingly, a freight forwarder, broker, non-vessel operating common carrier, or carrier may not accept, continue to transport, or forward or transfer a hazardous material to a subsequent carrier if it becomes aware or, in the exercise of reasonable care, should be aware that the shipment does not comply with the HMR.

## II. NPRM Proposal

In this NPRM, we propose to define “person who offers” or “offeror” to mean any person who performs, or is responsible for performing, any of the pre-transportation functions required under the HMR for transportation of a hazardous material; tenders or makes a hazardous material available to a carrier for transportation in commerce; or both performs, or is responsible for performing, pre-transportation functions and tenders or makes a hazardous material available to a carrier for transportation. Under the proposed definition, a carrier that transfers, interlines, or interchanges hazardous materials to another carrier for continued transportation is not an offeror when it does not perform any pre-transportation functions. In addition, § 171.2 would be amended to make explicit that:

- There may be more than one offeror of a shipment of hazardous materials
- Each offeror is responsible for complying with the requirements of the HMR with respect to any pre-transportation function that it performs or is required to perform.
- For a shipment involving more than one offeror, each offeror may rely on information provided by another offeror, unless the offeror knows or, in the exercise of reasonable care, should know that the information is incorrect. In a similar manner, a carrier may rely on information it receives from an offeror or a prior carrier, unless the carrier knows or, in the exercise of reasonable care, should

know that the information is incorrect.

These proposed definitions are consistent with the prior interpretations published in the **Federal Register** and with informal letters of clarification we have issued on this subject. (*See*, for example, the April 13, 1992 letter to EnviroSAFE Services, Inc.; June 27, 1996 letter to “K” Line America, Inc.; May 21, 1999 letter to CH2MHILL; May 30, 2000 letter to Mr. Todd Nash; January 11, 2001 letter to Corso Biomedical Consulting; July 17, 2002 letter to Hawks Logistics; April 22, 2003 letter to Henderson and Walton Women’s Center, P.C.; February 10, 2004 letter to Hyundai America Shipping Agency, Inc.) The proposed definitions incorporate our long-standing administrative determinations that any person who performs, attempts to perform, or is responsible for performing pre-transportation functions under the HMR is considered to be a “person who offers” (or an “offeror”) for purposes of the HMR requirements applicable to that function and that there may be more than one person responsible for performing pre-transportation functions for a hazardous materials shipment.

In accordance with the past interpretations we have issued on this subject, the proposed definition recognizes that, for a given hazardous materials shipment, the persons who offer the shipment for transportation include both those who perform pre-transportation functions and those who transfer the material to a carrier for transportation. For a given hazardous materials shipment, there may be more than one person acting as an offeror of the shipment, either because that person performs one or more pre-transportation functions or because that person makes the material available to a carrier for transportation. The definition further recognizes that there is one person with overall responsibility for ensuring that the shipment complies with applicable HMR requirements. Generally, that person will be responsible for the certification on the shipping paper that indicates that the shipment has been properly classed, described, packaged, marked, and labeled, and is in proper condition for transportation when tendered to the initial carrier.

Note that, while a person who performs a pre-transportation function is considered to be an offeror, that person is not necessarily responsible for the proper performance of all pre-transportation functions associated with a particular shipment. As stated above, the person who signs the shipper’s

certification is responsible for assuring that all applicable regulatory requirements are met; persons who perform one or more pre-transportation functions for the shipment are responsible only for the performance of the functions they perform. For example, a hospital may negotiate a contract with a carrier for the carrier to perform pre-transportation functions for shipments of regulated medical waste; the carrier may provide appropriate packaging to the hospital, close the filled packagings, and affix appropriate labels. If a hospital official signs the shipper certification for the shipment, the hospital is the person who completes the process of offering the shipment for transportation and is responsible for assuring that the contractor performed the pre-transportation functions correctly; the contractor is also an offeror for purposes of the HMR and will be held responsible for those functions that it performed or was obligated to perform under contract to the hospital.

As we stated in the 1992 interpretation, a freight forwarder who arranges for the transportation of a hazardous materials shipment, but performs no pre-transportation functions associated with that shipment is not an offeror for purposes of the HMR. Moreover, a carrier that does not perform a pre-transportation function is not a “person who offers” as that term is used in the HMR. Thus, the interlining of a package or freight container of hazardous materials from one carrier to another for further transportation does not make the first carrier an offeror if it does not perform any pre-transportation function. (*See* June 2, 1995 letter to Crowley American Transport, Inc.)

However, the proposed definitions recognize that a carrier or other entity may be required to perform certain pre-transportation functions in order to facilitate or continue the transportation of a hazardous material in commerce. If a carrier or freight forwarder performs a pre-transportation function, the carrier or freight forwarder is an offeror for purposes of the HMR and must perform the function in accordance with applicable regulatory requirements. For example, a carrier or freight forwarder may prepare a shipping paper for a hazardous materials shipment that will be consolidated or combined with other freight or transferred from one carrier to another during the course of its transportation in commerce. The carrier or freight forwarder must prepare the shipping paper in accordance with applicable requirements, but the person preparing the shipping paper may rely

on information provided by the original shipper for the preparation of the new shipping paper (e.g., the classification of the material, the compatibility of the material with the packaging being used, or the emergency response telephone number), so long as that person exercises due care. For example, 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)." (See February 10, 2004 letter to Hyundai America Shipping Agency, Inc.; June 27, 1996 letter to "K" Line America, Inc.) Similarly, the carrier or freight forwarder may rely on the original shipper's certification when recertifying the shipment for subsequent transportation unless objective factors are present that suggest that the condition of the shipment has changed since it was originally offered for transportation. (See June 2, 1995 letter to Crowley American Transport, Inc.; April 5, 2000 letter to Cosco North America, Inc.)

The definition of "person who offers" includes a person who makes a hazardous material available to a carrier for transportation in commerce when pre-transportation functions that should have been performed under the HMR were not, in fact, performed. Thus, a person who tenders undeclared hazardous materials for transportation is offering the hazardous material for transportation even though no pre-transportation functions required for the shipment were performed. We will continue to exercise our authority to take appropriate enforcement action when we discover that a pre-transportation function has been performed in a manner that does not comply with the HMR or has not been performed at all.

We note concerning undeclared shipments that a final rule published on May 26, 2004, under Docket No. HM-229 (69 FR 30114) includes a definition for "undeclared hazardous material" that is consistent with the definitions proposed in this NPRM. The May 26, 2004 final rule defines "undeclared hazardous material" to mean a hazardous material that is: (1) Subject to any of the hazard communication requirements in Subparts C, D, E, and F of Part 172 of the HMR or an alternative marking requirement in Part 173; and (2) offered for transportation in commerce without any clear indication to the person accepting the hazardous

material for transportation that a hazardous material is present.

The definition of "person who offers" also covers an entity that transports its own hazardous materials. For example, a company that uses its own motor vehicles to transport its own hazardous material performs pre-transportation functions required under the HMR and tenders the hazardous material to itself for transportation. Similarly, an air carrier transporting company material (COMAT) both offers and accepts hazardous materials for transportation. In this regard, note that, in some situations, a company may offer a hazardous material to itself for transportation by private carriage and then may re-offer the hazardous material to a succeeding carrier. The company is an offeror as we propose to define that term in this NPRM both when it offers the hazardous material to itself and when it reoffers the hazardous material to a subsequent carrier.

An airline passenger who transports hazardous materials in carry-on or checked baggage is included in the definition of a "person who offers" as proposed in this NPRM. On February 28, 2003, we published an interpretation addressing hazardous materials in carry-on and checked baggage (68 FR 9735). The interpretation noted that "[h]azardous materials in carry-on and checked baggage are subject to the HMR when offered for transportation in commerce" (68 FR 9736). The interpretation identifies, for purposes of the HMR, the point at which an airline passenger offers a hazardous material in carry-on or checked baggage. In accordance with the interpretation, a passenger in control of carry-on baggage (including items on his/her person) containing a hazardous material "offers and represents that the baggage is fit for transportation by aircraft when the passenger tenders the baggage to screening personnel at an airport security checkpoint or otherwise attempts to proceed through the checkpoint with the hazardous materials on his/her person." A passenger offers checked baggage containing a hazardous material "at the point the passenger presents the baggage for acceptance by the carrier" (68 FR 9737). Nothing in this NPRM is intended to change the determinations made in the February 28, 2003 interpretation.

### III. Regulatory Analyses and Notices

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

This NPRM 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 NPRM, we are proposing to codify 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. Clarifying 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 proposed 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 proposed 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 proposed definition of "person who offers" would simply restate and codify long-standing interpretations on the applicability of the HMR without making any substantive change and, thus, would 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.

We invite interested persons to submit comments on our conclusion that there would not be any increase or decrease in the costs of compliance with the HMR. Those comments should specifically describe and quantify any change in the costs of compliance and also identify (and quantify to the extent possible) any benefits that would result if the proposed definition of "person who offers" are adopted.

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

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This proposed rule would make 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, RSPA believes that nothing in this proposed rule, if adopted, will preempt any State law or regulation or have any substantial direct effect or sufficient federalism implications that would limit the policymaking discretion of the States. RSPA invites States and other interested parties to comment on whether they believe any State requirement would be affected by the adoption of this proposed rule.

#### *D. Executive Order 13175*

This proposed 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 proposed 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 proposed rule.* This proposed rule is intended to codify prior interpretations on the applicability of the HMR to persons who offer a hazardous material for transportation in commerce. If adopted, this proposed rule would be 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, RSPA 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 would incur no new costs to comply with the HMR, because the

proposed rule would make 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 proposed rule would make no change in the applicability of the HMR and impose no new costs of compliance with the HMR requirements. I hereby certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

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

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

#### *G. Paperwork Reduction Act*

This proposed rule would not impose any new information collection requirements.

#### *H. Environmental Assessment*

There would not be any environmental impacts associated with this proposed 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, we propose to amend 49 CFR, subtitle B, chapter I 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 (a) and (b), to read as follows:

### **§ 171.2 General requirements.**

(a) No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this subchapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, 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 an offeror knows or, in the exercise of reasonable care, should know that the information provided by the other offeror is incorrect.

(b) No person may transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this subchapter, if applicable, and the hazardous material is handled and 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, in the exercise of reasonable care, should know 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.

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

(2) A carrier that transfers, interlines, or interchanges hazardous material to another carrier for continued transportation is not an offeror when it does not perform any pre-transportation function.

\* \* \* \* \*

Issued in Washington, DC on September 21, 2004, under the authority delegated in 49 CFR part 106.

**Robert A. McGuire,**

*Associate Administrator for Hazardous Material Safety.*

[FR Doc. 04–21535 Filed 9–23–04; 8:45 am]

**BILLING CODE 4910–60–P**

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**RIN 1018–AJ07**

### **Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Gaura neomexicana* ssp. *coloradensis* (Colorado Butterfly Plant)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; extension of comment period and notice of availability of draft economic analysis and draft environmental assessment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) announce the availability of a draft economic analysis and draft environmental assessment for the proposed designation of critical habitat for *Gaura neomexicana* ssp. *coloradensis* (hereafter referred to as “Colorado butterfly plant”) under the Endangered Species Act of 1973, as amended (Act). In addition, we announce the extension of the comment

period on the proposed rule to designate critical habitat for the Colorado butterfly plant.

**DATES:** We will accept all comments received on or before October 25, 2004. Any comments that we receive after the closing date may not be considered in the final decision on this proposal.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposed rule, the draft economic analysis, and the draft environmental assessment by any one of several methods:

(1) You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Wyoming Field Office, 4000 Airport Parkway, Cheyenne, Wyoming 82001, or by facsimile (307) 772–2358.

(2) You may hand-deliver written comments to our office, at the address given above.

(3) You may send comments by electronic mail (e-mail) to [fw6\\_cobutterflyplant@fws.gov](mailto:fw6_cobutterflyplant@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

Comments and materials received, as well as supporting documentation used in preparation of the proposed critical habitat rule, will be available for public inspection, by appointment, during normal business hours at the above address. You may obtain copies of the draft economic analysis and draft environmental assessment for the Colorado butterfly plant by contacting the Wyoming Field Office at the above address. The draft economic analysis, draft environmental assessment, and the proposed rule for critical habitat designation also are available on the Internet at <http://www.r6.fws.gov/species/plants/cobutterfly/>. In the event that our Internet connection is not functional, please obtain copies of documents directly from the Wyoming Fish and Wildlife Office.

**FOR FURTHER INFORMATION CONTACT:** Brian T. Kelly, Field Supervisor (telephone (307) 772–2374; facsimile (307) 772–2358), Wyoming Field Office, at the address listed above.

### **SUPPLEMENTARY INFORMATION:**

#### **Public Comments Solicited**

We intend any final action resulting from the proposed rule to be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific