

INSIGHTS

DOT Site Security Plans – Potential Application to Pipelines as Offerors

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The Department of Transportation (“DOT”) requires “offerors” of hazardous materials to develop and adhere to a site-specific security plan that evaluates transportation security risks and appropriate measures to address those risks. For the midstream sector, questions often arise as to whether or not the activities of a pipeline owner or operator trigger DOT’s site security plan requirements. Below, we briefly address the relevant regulations as well as some of the actions that may trigger these planning requirements.

Background

Under the Hazardous Material Regulations (“HMRs”), 49 C.F.R. Parts 171-180, the DOT’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) establishes regulations for the safe and secure transportation of hazardous materials in commerce. The HMRs establish the manner in which hazardous materials must be transported or offered for transport via air, highway, rail and water. Notably, pipelines are not included here. The regulations are expansive and include requirements for security, hazardous material classification, hazard communication, packaging and training.

Under the HMRs, a person must develop and adhere to a security plan when that person transports or offers for transport hazardous material in commerce. The security plan requirements are located at 49 C.F.R. Part 172, Subpart I. The term “person” is broadly defined in 49 C.F.R. § 171.8 to include individuals, organizations, governments and a variety of other entities.

Indicia of an Offeror

A site security plan is required for any person who offers hazardous material for transport in commerce. The “hazardous material,” “transport” and “commerce” elements of this definition are relatively straightforward under the HMRs. The hazardous material element depends on the classification of the material being transported. Transport means the movement of property, including loading, unloading or storage incident to movement. The commerce component means trade or transportation within a state or between states. The “offeror” element is more complex.

An “offeror” is defined in 49 C.F.R. § 171.8:

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.

For pipeline owners and operators, it is notable that an offeror can be a person who (i) makes hazardous material available to a carrier for further transportation in commerce, or (ii) performs a pre-transportation function. A carrier is “a person who transports passengers or property in commerce by rail car, aircraft, motor vehicle, or vessel.” 49 C.F.R. § 171.8.

Pre-transportation functions are defined in 49 C.F.R. § 171.8:

[A] function specified in the HMR that is required to assure the safe transportation of a hazardous material in commerce, including—

(1) Determining the hazard class of a hazardous material.

(2) Selecting a hazardous material packaging.

(3) Filling a hazardous material packaging, including a bulk packaging.

(4) Securing a closure on a filled or partially filled hazardous material package or container or on a package or container containing a residue of a hazardous material.

(5) Marking a package to indicate that it contains a hazardous material.

(6) Labeling a package to indicate that it contains a hazardous material.

(7) Preparing a shipping paper.

(8) Providing and maintaining emergency response information.

(9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.

(10) For each person importing a hazardous material into the United States, providing the shipper with timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States.

(11) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

(12) Loading, blocking, and bracing a hazardous material package in a freight container or transport vehicle.

(13) Segregating a hazardous material package in a freight container or transport vehicle from incompatible cargo.

(14) Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it contains a hazardous material.

The pre-transportation function test is not absolute, however. A carrier is not an offeror when it receives the material and passes it on to another carrier without preparing the material for transport. In the course of transporting the material, the carrier may perform some functions that could be classified as pre-transportation functions, but transportation functions and pre-transportation functions are often identical. If the carrier does not perform its functions to prepare the material for transportation and is instead simply doing so in the ordinary course of transportation, then the carrier is not an offeror. 70 Fed. Reg. at 43641. For example, a carrier is not an offeror when it reviews a shipping paper tendered by an offeror before it accepts the shipment for transportation in commerce, or when it transfers information from a shipping paper to a shipping document for its own use without changing the information.

Components of a Security Plan

The requirements for a security plan are located at 49 C.F.R. § 172.802. A security plan must include an assessment of possible transportation security risks for specified hazardous materials and appropriate measures to address those risks. It must also address personnel security, unauthorized access and en route security. The plan must be in writing and updated annually, with notification to employees responsible for implementing with every new version. Additionally, a copy of the plan must be kept at the principal place of business.

Specifically, the plan must include measures to confirm information provided by job applicants for positions involving access to or handling of hazardous materials and must address the risk that unauthorized persons may gain access to the hazardous materials. The plan must include measures to address security risks anticipated during transportation, including the security of shipments temporarily stored en route. Additionally, the plan must identify the senior management official responsible for the plan, outline security duties for each position or department responsible for implementing the plan, provide a process for notifying employees when portions of plan must be implemented and provide a plan for training hazmat employees.