



U.S. Department  
of Transportation

**Research and  
Special Programs  
Administration**

400 Seventh Street, S.W.  
Washington, D.C. 20590

MAR 21 2000

Norman J. Phillion, Esq.  
Thompson, Hine & Flory L.L.P.  
1920 N. Street, NW  
Washington, DC 20036-1601

Ref. No. 99-0251

Dear Mr. Phillion:

This is in response to your August 31, 1999 letter regarding the use of recycled materials in packaging. Specifically, you address California's recent law requiring 25 percent post-consumer recycled resin in eight-ounce to five-gallon plastic containers from and the potential problems faced by your client concerning the integrity of such packagings when shipping two-cycle lubricant.

Based on the information contained in your letter that the flash point of the two-cycle lubricant is 170°-200°F, it is properly classed as a Combustible Liquid, not as a Class 3 (Flammable) liquid. A combustible liquid that is not a hazardous substance, hazardous waste, or marine pollutant is not subject to the Hazardous Materials Regulations (49 CFR Parts 171-180) if packaged in non-bulk containers for highway transport. Accordingly, we recommend that documentation supporting your belief that packagings containing 25 percent post-consumer waste are insufficient to provide secure containment should be forwarded to the appropriate agency in the State of California.

I hope this satisfies your request.

Sincerely,

Delmer F. Billings  
Chief, Standards Development  
Office of Hazardous Materials Standards



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*Attorneys at Law*

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File: 1240 NT  
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**Telephone:**  
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**August 31, 1999**

**Facsimile:**  
202/331-8330

**VIA FACSIMILE**

Mr. Edward T. Mazzullo  
Director  
Office of Standards  
Research and Special Programs Administration  
U.S. Department of Transportation  
400 Seventh Street, SW  
Washington, DC 20590

**Re: Letter Request to You from AR Packaging Corp. Dated August 12, 1999**

Dear Mr. Mazzullo:

This letter is written in support of the request submitted to you by Mr. Bruce C. Davidson, the Vice President of Marketing, AR Packaging Corp. by letter dated August 12, 1999. A copy of Mr. Davidson's letter is attached for your convenient reference. In that letter, Mr. Davidson describes the problem created by the law in California that now requires the use of 25 percent post-consumer recycled resin in plastic containers from eight (8) ounces to five (5) gallons. Experience has shown that compliance with the California statute results in plastic containers that are likely to leak when they are utilized for packaging a two-cycle lubricant such as used in lawn mowers. This fact has created a significant dilemma for our client, The Toro Company and its Lawn-Boy Subsidiary ("Toro"). This dilemma has been recognized by officials in California who, as Mr. Davidson notes in his letter, have shown an interest in trying to find an appropriate solution and who, to this end, have requested that the Department of Transportation provide information to the California Waste Management Board concerning the Department's requirements for packaging of the kind used for the two-cycle lubricant. It is our hope such information will be used by the California Waste Management Board to exempt manufacturers like AR and Toro from the requirement of the "25 percent recycle rule."

Toro is in the business of manufacturing and distributing lawn mowers and other power equipment, and related equipment and supplies. The related supplies include a two-cycle lubricant which consumers purchase from Toro's distributors for use in their products. This two-cycle lubricant is identified in the Hazardous Materials Table (49 C.F.R. §172.101) as "Petroleum products, n.o.s., UN1268, Packaging Group III." The lubricants are a Class 3 material

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(flammable liquid). As Mr. Davidson points out in his letter, because the flash point of the two-cycle lubricant is 170°-200°F, it may be reclassified as a combustible liquid; and if it is so reclassified and packaged in non-bulk containers, the requirements of the hazardous materials regulations do not apply. §173.150(f)(1) and (2)<sup>1</sup> The two-cycle lubricant has been so reclassified, as Mr. Davidson notes. Nevertheless, the fact that the two-cycle lubricant has been reclassified as a combustible liquid does not eliminate the need to maintain the integrity of the non-bulk packaging. For if such packaging is to serve its purpose of holding the lubricant in a non-bulk configuration, it must not leak. If the package does leak, the terms of the exception specified in §173.150(f) would apparently no longer be met (*i.e.* the lubricant, released to the environment, is no longer in a non-bulk package).

It would appear from the foregoing that, although the exception in §173.150(f) is a blanket exception, the integrity of the packaging is critical if the exception is not to be jeopardized. The problem is how to define the requirement for such packaging if the commodity is otherwise exempt. It appears reasonable to conclude that the applicable standards are those generally set forth in §173.24. The requirements of §173.24(b) are specified clearly and unambiguously:

Each package used for the shipment of hazardous materials under this subchapter shall be designed, constructed, maintained, filled, its contents so limited, and closed, so that under conditions normally incident to transportation--

(1) Except as otherwise provided in this subchapter, there will be no identifiable (without the use of instruments) release of hazardous materials to the environment;

(2) The effectiveness of the package will not be substantially reduced; for example, impact resistance, strength, packaging compatibility, etc. must be maintained for the minimum and maximum temperatures encountered during transportation....

If a plastic container conforming to the requirements of the California statute results in the release of the combustible liquid to the environment, then that packaging fails to meet the requirements of the foregoing provision and, by implication, the requirement for "non-bulk packaging" in §173.150(f)(2). Your Office's confirmation of this fact will help to modify the

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<sup>1</sup>The two-cycle lubricant is not a hazardous substance, a hazardous waste, or a marine pollutant. Therefore, it properly falls within the terms of §173.150(f)(1) and (2).

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position of the California Waste Management Board.

Another fact that supports the need for modification of California's position is provided by §173.24(c). That subsection reads in relevant part:

- (c) Authorized packagings. A packaging is authorized for a hazardous material only if--  
(1) The packaging is prescribed or permitted for the hazardous material in a packaging section specified for that material in Column 8 of the §172.101 Table....

Column 8 for combustible liquid, n.o.s., NA1993 (Packaging Group III) refers to §173.203. That section authorizes a variety of non-bulk packagings made from a variety of materials for liquid hazardous materials. §173.203 in turn (and as relevant hereto) refers to the standards for plastic drums and jerricans in §178.509. As there specified:

- (b) Construction requirements for plastic drums and jerricans are as follows:  
(1) The packaging must be manufactured from suitable plastic material and be of adequate strength in relation to its capacity and intended use. No used material other than production residues or regrind from the same manufacturing process may be used unless approved by the Associate Administrator for Hazardous Materials Safety.  
(Emphasis added)

Now, although it may be argued (1) that the plastic containers which hold the two-cycle lubricant are not, strictly speaking, drums or jerricans; and (2) that, in any event, neither §173.203 nor §178.509 are applicable to shipments covered by the exception in §173.150(f), nevertheless, the quoted requirement provides a reference from which it is possible to glean a recognized fact-- plastic containers used for the non-bulk transportation of materials such as a combustible liquid should conform to this standard to ensure package integrity. Put another way, the standard recognizes the kind of problem created by the use of recycled materials as implemented by the State of California. Moreover, as §178.509 goes on to state: "The packaging must be adequately resistant to aging and to degradation caused either by the substance contained or by ultra-violet radiation. Any permeation of the substance contained may not constitute a danger under normal conditions of transport." In the present case, the "permeation" *does* constitute a danger because the two-cycle lubricant is permitted to leak into the environment when the plastic is created to the formula mandated by the California statute.

For the foregoing reasons, Toro respectfully requests that your Office provide a statement

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of the Department's position (as requested by Mr. Davidson) so that the California requirement does not result in the kind of harm to the environment and to public safety that the Federal Hazardous Materials Regulations are intended to avoid. To the extent that the analysis contained in this letter is of any help in this connection, you may use it as you wish. Finally, if you have any questions, please do not hesitate to contact me.

Sincerely yours,



Norman J. Philion

cc: C. Joseph Newberg  
Bruce C. Davidson

92422

**A/R** **PACKAGING CORP.**  
CUSTOM LUBRICANT FILLING AND PACKAGING

P.O. BOX 466  
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August 12, 1999

Mr. Edward T. Mazzullo  
Director of the Office of Hazardous Materials Standards  
United States Department of Transportation  
(DHM - 10)  
400 7<sup>th</sup> Street SW  
Washington DC, 20590-0001

Dear Mr. Mazzullo;

I am writing to request your Department's input regarding a packaging law in the State of California that concerns our company and the clients we do business with.

Specifically, our company packages two-cycle engine oils for original equipment manufacturers. These two-cycle engine oils have flash points of approximately 170-200 degrees F. resulting from these lubricant formulas containing a percentage of solvent that facilitates mixing with gasoline. Because of this combustible flash point, DOT regulates these lubricants in their bulk form, but they are currently exempt from HM regulations in non-bulk packing.

Typically these oils are packaged in polyethylene containers or bottles for consumer use. California has recently passed regulations requiring the use of 25% post consumer resin (or recycled plastic) in all plastic containers to encourage plastics recycling in that state. While our packaging experience with 100% virgin polyethylene containers and two-cycle lubricants has been very positive, our experience with two-cycle engine oils in containers that have been made with recycled plastic has been negative due to the increased stress cracking that occurs with these bottles containing recycled resin. We have concern that if the requirement for 25% post consumer resin is enforced, packagers of two-cycle lubricants will be faced with the increased potential for leaking containers. The alternative is to strengthen the bottle by adding additional plastic to the bottle. This option defeats the purpose of the California law, the primary purpose of which is to reduce plastic that will eventually end up in California trash.

The California law requiring 25% post consumer resin in plastic bottles does provide exemptions for DOT regulated materials. Further, California Waste Management officials, recognizing our dilemma, have been sympathetic to our concerns regarding the use of the 25% post consumer resin and have suggested that we contact the Department of Transportation for your input into this issue.

*Providing Solutions for your Packaging Needs*

I am requesting that the Department of Transportation provide input to the State of California supporting our stance that packaging two-cycle lubricants in bottles that are more prone to stress cracking is not in the best interests of the consuming public. Your prompt input on this issue will be very much appreciated. The California Waste Management Board is currently reviewing this matter and your input at this time would be most timely. A decision from the board is anticipated in the next two to three weeks.

Our contact at the California Integrated Waste Management Board, Department of Environmental Protection is Mr. John Nuffer. Mr. Nuffer's address is 8800 Cal Center Drive, Sacramento CA 95826. His phone number is 916-255-2437. Please feel free to contact me for further background on this issue. I look forward to hearing from your department.

Sincerely:

Bruce C. Davidson  
Vice President - Marketing

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