U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Office of
Chief Counsel

08/23/2010

Mr. Phil Zlaket
Director of Manufacturing
And Corporate Compliance
ACCU CHEM Conversion, Inc.
13226 Nelson Avenue
City of Industry, CA 91746

Dear Mr. Zlaket:

This responds to your April 16, 2010 letter to Frazer Hilder of my office concerning facilities operated by your company at which rail tank cars are received and the liquid hazardous materials contained in the tank cars are transferred to cargo tank motor vehicles for delivery to the ultimate recipient. You ask whether these operations constitute "transloading" and are subject to the Federal hazardous material transportation law, 49 U.S.C. § 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180.

As you describe your company's transfer operations:

1. Your company owns the track on which the transfer operations take place.

2. The "original shipper" of the hazardous material to your facility is filling an order for this material by its customer, but that shipper does not provide the rail carrier with documentation which identifies the ultimate recipient of the material. Rather, during the transfer operations at your facility, separate documentation is prepared which identifies the "original shipper as the shipper of the cargo tank containing the HM and the end user as the consignee."

3. On occasion, the original shipper of the hazardous material asks you to dilute the material with water, and you do this by adding the appropriate amount of water to the cargo tank just before transferring the hazardous material from the rail tank car to the cargo tank motor vehicle.

Federal hazardous material transportation law defines "transports" and "transportation" to mean "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. § 5101(13). As explained in the HMR, storage incidental to the movement of a hazardous material, which is part of transportation of a hazardous material in commerce, does not include "storage of a hazardous material at its final destination as shown on a shipping

document," but does include "storage at a transloading facility, provided the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material." § 171.1(c)(4)(i)(A). "Transloading" is defined as "the transfer of a hazardous material by any person from one bulk packaging to another bulk packaging, from a bulk packaging to a non-bulk packaging, or from a non-bulk packaging to a bulk packaging for the purpose of continuing the movement of the hazardous material in commerce." 49 C.F.R. § 171.8.

These provisions in the HMR were adopted in PHMSA's "HM-223" rulemaking. *See* the final rules published October 30, 2003 (68 Fed. Reg. 61906), and April 15, 2005 (70 Fed. Reg. 20018). As your letter suggests, language in the preamble to these final rules helps to explain whether or not your company's operations are "transloading" subject to the HMR, as follows:

First, transfer operations that meet the definition of "transloading" in the HMR may take place on track owned by your company.

> In the April 15, 2005 final rule, we removed the words "at an intermodal facility from the definition of "transloading" adopted in the October 30, 2003 final rule because we agreed that "the location at which transloading occurs should not dictate whether the operation is regulated as a transportation function." 70 Fed. Reg. at 20020. In this manner, we "clarif[ied] that transloading is regulated under the HMR irrespective of the location at which the operation occurs." *Id.* at 20021. The language in 49 C.F.R. § 171.1(c)(4)(ii), that "[s]torage incidental to movement includes rail cars containing hazardous materials that are stored on track that does not meet the definition of 'private track or siding' in § 171.8" does not mean that the storage may not take place on a "private track or siding."

Second, unless some "original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material" the transfer operations conducted at your facility do not meet the definition of "transloading" and are not "storage incidental to movement" of a hazardous material. 49 C.F.R. § 171.1(c)(4)(i)(A).

> In the October 30, 2003 final rule, we explained that "storage incidental to movement" of a hazardous material "includes storage by any person between the time that a carrier takes physical possession of a hazardous material for the purpose of transporting it until the package containing the hazardous material is delivered to the destination indicated on shipping papers or other documentation." 68 Fed. Reg. at 61920. In the April 15, 2005 final rule, we agreed that "transloading is a transportation function," rather than a "pre-transportation" activity, but did not modify the condition that "the original shipping document include[] information that the shipment is a through-shipment to an identified destination." 70 Fed. Reg. at 20020.
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> The discussion of "transloading" in these final rules recognized that a "through-shipment" may involve both rail and highway transportation. *Id.* We also recognize that the shipping documentation that accompanies the rail portion of a "through-shipment" may only show the transfer facility as the destination, but original documentation prepared by the "original shipper," before transportation has started, is considered the

only reliable evidence of a "through-shipment." The "three separate documents" you describe cannot be "taken as a whole" to constitute "original shipping documentation" of a "through-shipment" when one of these documents is prepared during the transfer operations at your facility. Under that scenario, the original shipper has the ability to select the consignee of what is, essentially, a "new" shipment by motor carrier.

Third, the dilution of the material transported to your facility by rail car, during transfer to a cargo tank motor vehicle, creates a different material and is not simply "storage incidental to movement" of a hazardous material.

> As noted above, transloading" is defined as "the transfer of a hazardous material by any person from one bulk packaging to another bulk packaging, from a bulk packaging to a non-bulk packaging, or from a non-bulk packaging to a bulk packaging for the purpose of continuing the movement of the hazardous material in commerce." 49 C.F.R. § 171.8. We explained in the October 30, 2003 final rule that "'transloading' is a pure transfer" of the hazardous material, and it "does not include operations that involve the transfer of a hazardous material from one packaging to another for purposes of mixing, blending, or otherwise altering the hazardous materials." 68 Fed. Reg. at 61919. Thus, the dilution that takes place at your facility is an alteration of the material delivered by the rail carrier, so that there is not a "pure transfer" from the rail car to cargo tank motor vehicles.

Finally, we also explained in 49 C.F.R. § 171.1(f)(2) that, even when the transfer operations at a facility meet the definition of "transloading" and are "storage incidental to movement" of a hazardous material, that facility may still be "subject to applicable laws and regulations of state and local governments and Indian tribes," so long as those non-Federal requirements are not preempted under the criteria set forth in 49 U.S.C. § 5125.

> In the April 15, 2005 final rule, we added a clarification to § 171.1(f) "that non-Federal entities may impose regulations on functions that are not covered by the HMR or Federal hazmat law, except where PHMSA has specifically determined that the regulation of the hazardous materials-related function is not necessary. Appellants correctly note that PHMSA has in some cases determined that safety or security regulations may not apply to all hazardous materials or to specific types of shipments." 70 Fed. Reg. at 20025. We also noted that, "separate from the preemption criteria in 49 U.S.C. 5125, a non-Federal requirement affecting transportation, including the transportation of hazardous materials, may also be preempted under the commerce clause of the United States Constitution or other statutes such as 49 U.S.C. 20106, 31141." 70 Fed. Reg. at 20024. Thus, a state or local requirement applying to hazardous materials at a transfer facility, that constitutes an "obstacle" to accomplishing and carrying out Federal hazardous material transportation law or the HMR, would be preempted – even if the non-Federal requirement did not directly apply to a transportation activity.

In sum, operations at a transfer facility that fall within the definition of "transloading" are "storage incidental to movement" of the hazardous material and subject to requirements in the HMR, but state or local requirements on the transfer facility may not be preempted when those non-Federal requirements do not apply to the subject matters in 49 U.S.C. § 5125(b)(1) and are

not otherwise an "obstacle" to accomplishing and carrying out Federal hazardous material transportation law and the HMR. Conversely, operations at a transfer facility that do not meet the definition of "transloading" would not be "storage incidental to movement" of the hazardous material and would not be subject to requirements in the HMR, but those non-Federal requirements may be preempted if their practical effect would conflict with requirements in the HMR on the subject matters in 49 U.S.C. § 5125(b)(1) or otherwise create an "obstacle" to accomplishing and carrying out Federal hazardous material transportation law and the HMR.

I hope this information is helpful. If you need further assistance, you may contact Mr. Hilder at 202-366-4400.

Sincerely

Bizunesh Scott
Chief Counsel