U.S. Department
of Transportation

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

**Pipeline and Hazardous
Materials Safety Administration**

Office of
Chief Counsel

JAN 2 0 2010

Jerry W. Cox, Esq.
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Ref. No.: 10-0026

Dear Mr. Cox:

Ms. Douglass has asked me to respond to your September 24, 2009 letter to her concerning the definition in the Hazardous Material Regulations (HMR), 49 C.F.R. parts 171-180, of a "non-bulk packaging" when used as a receptacle for solids: "a packaging which has: . . . (2) A maximum net mass of 400 kg (882 pounds) or less and a maximum capacity of 450 L (119 gallons) or less." 49 C.F.R. § 171.8. As you note, under that definition, a packaging must meet both the weight (or mass) and capacity (or volume) criteria to be a "non-bulk packaging" under the HMR. You state that your client questions whether this definition was validly issued and carries out the intention of the Pipeline and Hazardous Materials Administration (PHMSA) and its predecessor agency, the Research and Special Programs Administration (RSPA).

I regret that it has taken more time to respond to your letter than we initially anticipated, and I hope that this delay has not caused any inconvenience for your client.

Before RSPA's rulemaking in Docket No. HM-181, a "non-bulk packaging" as a receptacle for a solid material was defined as a packaging with "a capacity of 400 kilograms (881.8 pounds) or less." 49 C.F.R. § 171.8 (Oct. 1, 1990 edition). In a similar manner, a "bulk packaging" as a receptacle for a solid material was defined as a packaging with "a capacity greater than 400 kilograms (881.8 pounds)." *Id.*

In response to the notice of proposed rulemaking in Docket No. HM-181, a commenter suggested revising the definitions of "bulk packaging" and "non-bulk packaging" based upon their volumetric capacity, rather than the mass or weight of their contents, because "the distinction for non-bulk vs. bulk packaging of solids . . . in pounds . . . would cause an identical package to be 'bulk' in some cases and 'non-bulk' in others given the various density of materials transported." RSPA's December 21, 1990 final rule (55 Fed. Reg. 52402) did not fully carry out this proposed revision in defining these terms, in relevant part, as follows:

> *Bulk packaging* means a packaging . . . which has: . . . (2) A capacity by weight greater than 400 kg (882 pounds) or internal volume greater than 450 L (119 gallons) as a receptacle for a solid.
>
> *Non-bulk packaging* means a packaging which has: . . . (2) A capacity of 400 kilograms (882 pounds) or less or an internal volume of 450 liters (119 gallons) or less as a receptacle for a solid.

55 Fed. Reg. 52471. The problem with the definitions adopted in the December 21, 1990 final rule is that a packaging having a capacity by weight greater than 400 kg and an internal volume no more than 450 liters could be both a bulk packaging and a non-bulk packaging at the same time. Similarly, a packaging having a capacity or 400 kg or less and an internal volume greater than 450 liters could also be both a bulk packaging and a non-bulk packaging at the same time.

On December 20, 1991, RSPA published a further final rule in Docket No. HM-181 making revisions and editorial and technical corrections to the December 21, 1990 final rule. 56 Fed. Reg. 66124. At that time, RSPA revised the definitions of "bulk packaging" and "non-bulk packaging" in relevant part, as follows:

> *Bulk packaging* means a packaging . . . which has: . . . (2) A maximum net mass greater than 400 kg (882 pounds) or a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid.
>
> *Non-bulk packaging* means a packaging which has: . . . (2) A maximum net mass of 400 kg or less and a maximum capacity of 450 L (119 gallons) or less as a receptacle for a solid.

56 Fed. Reg. at 66158. By changing "or" to "and" in the definition of a "non-bulk packaging" RSPA eliminated the possibility that a packaging could be both a "bulk" and a "non-bulk" packaging at the same time. Under the revised definitions, only a packaging that has both a net mass (or weight) up to 400 kg and a capacity (or volume) up to 450 L would be considered a "non-bulk packaging." A packaging that exceeds either the weight or volume threshold would be considered a "bulk packaging."

As you also discuss, on October 1, 1992, RSPA published another final rule in Docket No. HM-181 to correct editorial errors and make minor regulatory changes to the December 21, 1990 and December 20, 1991 final rules. 57 Fed. Reg. 45446. In this final rule, the definitions of "bulk packaging" and "non-bulk packaging" were revised, in relevant part, to read:

> *Bulk packaging* means a packaging . . . which has: . . . (2) A maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid.

> *Non-bulk packaging* means a packaging which has: . . . (2) A maximum net mass less than 400 kg (882 pounds) and a maximum capacity less than 450 L (119 gallons) as a receptacle for a solid.

57 Fed. Reg. 45453. However, clerical errors in this final rule led to, first, a correction to that part of the definition of "bulk packaging" when used as a receptacle for a liquid (57 Fed. Reg. 47513 [Oct. 16, 1992])[1] and, second, revisions to the threshold quantities in the definition of "non-bulk packaging" by replacing the wording "less than 400 kg (882 pounds)" and "less than 450 L (119 gallons)" with ""400 kg (882 pounds) or less" and "450 L (119 gallons) or less," respectively. 57 Fed. Reg. 59309 (Dec. 15, 1992).

As you have noted, in the preamble to the October 1, 1992 final rule, RSPA stated that it was revising the definition of "non-bulk packaging" "to clarify that the maximum capacity of the packaging must be less than 450 L (119 gallons) *and* for solids the maximum net mass of the packaging must be less than 400 kg or a maximum capacity of less than 450 L." 57 Fed. Reg. 45446. Any significance of this preamble statement is weakened by the December 15, 1992 revisions to the definition of "non-bulk packaging" which (1) corrected the unintended change in October 1992 to "less than" from "or less" in the 1990 and 1991 final rules, and also (2) left unchanged the need for such a packaging to have both a net mass no greater than 400 kg and a capacity no greater than 450 L.

Based on this rulemaking history, it is clear that—

> --The revisions to the definition of a "non-bulk packaging" in 1990, 1991, and 1992 were part of the rulemaking in Docket No. HM-181, in which RSPA issued a notice of proposed rulemaking and adopted final rules after considering the comments in response to that notice. There is no basis for your argument that the 1991 and 1992 final rules were not adopted in a "notice-and-comment" rulemaking proceeding.
>
> --In every case, any interested party had an opportunity to petition RSPA to reconsider the final rules it had adopted. *See* 49 C.F.R. § 106.35, as in effect during 1990-92. No petition was submitted for reconsideration of the revisions of the definition of "non-bulk packaging," nor was judicial review sought of any of these final rules.
>
> --The definition of "non-bulk packaging" as a receptacle for a solid material has remained unchanged since December 15, 1992, and the agency has consistently interpreted the plain words of the definition to mean that only a packaging that has both a net mass no greater than 400 kg and a capacity no greater than 450 L meets the definition of a "non-bulk packaging" as a receptacle for a solid.

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[1] In the October 1, 1992 final rule, the threshold for a "bulk packaging" as a receptacle for a liquid was set forth as "450 L (199 gallons)" rather than "450 L (119) gallons." See. 57 Fed. Reg. at 45453.

For these reasons, I am unable to agree with your client's position that a combination packaging weighing less than 400 kg but having an internal volume greater than 450 L meets the definition of a "non-bulk packaging" as intended and adopted in the Docket No. HM-181 rulemaking and as currently set forth in 49 C.F.R. § 171.8. Rather, such a packaging may meet the definition in 49 C.F.R. § 171.8 of a "large packaging" as adopted in RSPA's June 21, 2001 final rule (66 Fed. Reg. 33335), which may be used for the transportation of hazardous materials in commerce "if approved by PHMSA's Associate Administrator." 49 C.F.R. § 178.801(i). Therefore, PHMSA is not accepting your suggestions to (1) publish a letter of interpretation that the current definition of "non-bulk packaging" in 49 C.F.R. § 171.8 was not validly adopted, (2) initiate a new rulemaking to revise the current definition of "non-bulk packaging" (beyond the current proceeding in Docket No. HM-231)[2], or (3) provide assurances that enforcement actions will not be taken if your client makes shipments of hazardous materials in packagings that are not authorized under the HMR, an approval, or a special permit.

If you have further questions or need additional information, you may contact me or Frazer C. Hilder of my staff at 202-366-4400.

Sincerely,

Sherri L. Pappas

Sherri L. Pappas
Acting Chief Counsel

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[2] *See* the September 1, 2006 notice of proposed rulemaking in Docket No. PHMSA-06-25736 (HM-231) (71 Fed. Reg. 52017, 52026), in which PHMSA is currently considering revisions to the definitions of "bulk packaging" and "non-bulk packaging" to clarify how these terms are defined without changing their meaning.. Your letter will be considered a comment in this rulemaking and placed in the public docket.

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September 24, 2009

The Hon. M. Cynthia Douglass
Deputy Administrator (Acting)
U.S. Department of Transportation
Pipeline and Hazardous Materials
Safety Administration
1200 New Jersey Ave., S.E.
Washington, DC 20590

by hand

Re: Request for Correction of an Error in the Published Definition of "Non-bulk Packaging"

Dear Ms. Douglass:

This is to advise the Pipeline and Hazardous Materials Safety Administration ("PHMSA") that the agency's predecessor submitted certain language for publication in the Code of Federal Regulations ("C.F.R.") that is incorrect, not lawfully adopted, unenforceable, unnecessary for safety and harmful to the ability of American manufacturers to compete in global commerce. One of my clients, a manufacturing company who asked not to be identified at this point, instructed me to explain PHMSA's error for the following purposes: (1) to give the agency a fair opportunity to respond; and (2) to avoid misguided and wasteful efforts to enforce an unenforceable restriction on the permissible volume of certain types of packaging in which hazardous materials ("hazmat") may be shipped.

With strong encouragement from Congress, the former Research and Special Programs Administration ("RSPA"), PHMSA's predecessor in regulating transportation of hazmat, published a series of final rules between 1987 and 1992 to promote safety and facilitate international commerce by bringing U.S. hazmat packaging regulations into greater harmony with international dangerous goods regulations. RSPA specifically recognized, as a threshold matter, a need to define a category of hazmat shipments smaller than truckloads or rail tank carloads. The agency established in the U.S. Hazardous Materials Regulations ("HMRs") stringent requirements, consistent with globally recognized safety rules, for various packagings that could safely be utilized to ship hazmat. It also set standards for testing the performance of such "non-bulk packaging." *See* 49 C.F.R. Subtitle B, Chapter I, Part 178, Subparts L & M.

Accordingly, "in order to be consistent with the United Nations Recommendations on the Transport of Dangerous Goods," *Final Rule, Bulk Packaging & Misc. Amendments*, 52 Fed. Reg. 29526 (Aug. 10, 1987), under your signature as Administrator, RSPA defined "non-bulk packaging" for solid hazmat to include boxes, drums and other containers with a weight capacity at or below 400 kg. *Id.* at 29527. *See also* 49 C.F.R. § 171.8 (Oct. 1, 1990). The definitions you issued were correct and consistent with the U.N. Recommendations.

Three years later, after an extensive notice-and-comment rulemaking proceeding, RSPA broadened the definition of "non-bulk" to include any packaging that had a maximum capacity of either 400 kg or a maximum internal volume of 450 L. *Final Rule, Performance-Oriented Packaging Standards; Changes to Classification, Hazard Communications, Packaging and Handling Requirements*, 55 Fed. Reg. 52402, 52471 (Dec. 21, 1990). A hazmat shipper could, for example, use packaging with an internal volume greater than 450 L if the weight was 400 kg or less – provided, of course, that the greater-volume packaging met the strict safety performance tests and other requirements of the above-referenced subparts of Part 178 of the HMRs.

One year later, however, RSPA published another final rule – this time *without* notice-and-comment rulemaking – expressly stating the agency's intention to make no substantive changes, but only to "clarify and correct certain provisions . . . and *impose no new regulatory burden* on any person." *Final Rule, Revisions & Response to Petitions for Reconsideration*, 56 Fed. Reg. 66124 (Dec. 20, 1991) (*emphasis supplied*). Under the signature of then-Administrator Travis Dungan RSPA, without single word of explanation, flipped the "non-bulk" definition on its head. Overnight, greater-volume packaging that was permissible as "non-bulk" all over the world one day was banned in the United States the next. *Compare* 55 Fed. Reg. at 52471 ("a capacity of 400 kg or less ***or*** an internal volume of 450 L or less" (*emphasis supplied*)) *with* 56 Fed. Reg. at 66158 ("A maximum net mass of 400 kg or less **and** a maximum capacity of 450 L" (*emphasis supplied*)).

This purported change in the "non-bulk packaging" definition – effectively, a new ban on certain hazmat shipments – without explanation, with no notice to affected parties or any opportunity to comment, is a textbook example of unlawful rulemaking. Even though RSPA submitted it for publication, *see* 49 C.F.R. § 171.8 (Dec. 31, 1991), the revised language (substituting the word "and" in place of "or") is plainly void and without legal effect under the Administrative Procedure Act, 5 U.S.C. § 553(c) ("APA").

In fact, RSPA never intended to change "or" to "and" in the "non-bulk packaging" definition. The agency discovered and acknowledged the error in a final rule it published the following year. One stated purpose for this new revision of the "non-bulk packaging" definition was to correct what RSPA submitted for publication in the C.F.R., to make it clear that greater-volume packaging certainly could be "non-bulk," and "to clarify that . . . for solids the maximum net mass of the packaging must be less than 400 kg ***or*** a maximum capacity of less than 450 L." *Final Rule, Editorial & Technical Revisions*, 57 Fed. Reg. 45446 (Oct. 1, 1992) (*emphasis*

supplied). However, the agency erred once again when it submitted the wrong language, which appears instead to ban the use of any non-bulk packaging that has a maximum volume greater than 450 L. *See id.* at 45453 ("A maximum net mass less than 400 kg ***and*** a maximum capacity less than 450 L.") (*emphasis supplied*)). This omission, also unsupported by notice-and-comment rulemaking, is the only reason the incorrect, unintended and unlawfully adopted language currently appears at 49 C.F.R. § 171.8 (Oct. 1, 2008).

The only enforceable definition of "non-bulk packaging," therefore, is the one adopted pursuant to the requirements of APA and included in the 1990 Final Rule. As RSPA determined at that time, a rule that allows packaging with a maximum volume greater than 450 L best serves American interests in both safety and the global competitiveness of U.S. manufacturers. The above-mentioned U.N. Recommendations permit importation greater-volume packages, which safely and lawfully enter the United States every day. Due to PHMSA/RSPA's repeated, unsuccessful attempts to publish a correct definition in the C.F.R. and its steadfast refusal to admit those errors, *see, e.g.*, *Notice of Proposed Rulemaking, Hazardous Material; Miscellaneous Packaging Amendments*, 72 Fed. Reg. 52017, 52019 (Sept. 1, 2006)("packagings with a volume greater than 450 L with a net mass less than 400 kg would be defined as non-bulk packagings [but] [i]t has been our longstanding interpretation that such packagings are defined as bulk"), my client and other U.S. manufacturers have together suffered tens of millions of dollars in additional and unnecessary packaging expenditures. The result has been to put Americans at a competitive disadvantage vis-à-vis foreign manufacturers with no benefit to safety whatsoever.

My client plans to proceed under the 1990 definition and to export certain Packing Group III environmentally hazardous substances in approved combination packaging that weigh less than 400 kg but have an internal volume greater than 450 L. No enforcement action should be commenced against them or can ultimately succeed because, for all the reasons stated above, the only lawful rule adopted by the agency includes such packaging in the "non-bulk" definition.

To avoid still more confusion, distraction and unnecessary expense, PHMSA should immediately take the following two actions. First, it should publish a Letter of Interpretation and otherwise advise enforcement officials across the Transportation Department that, notwithstanding the language that appears in the C.F.R., the 1991 and 1992 revisions are null and void. Second, before the 2009 edition of the C.F.R. goes to press, PHMSA should publish in the *Federal Register* a new "technical corrections" Final Rule that replaces the incorrect language ("and") with the correct language ("or").

The circumstances are not exactly right to make this request a Petition for Rulemaking under 49 C.F.R. § 106.95 because no additional action by PHMSA is legally necessary to make shipments in such packaging lawful. However, if that or some other type of formal proceeding would help to get the C.F.R. in line with the actual legal requirements, please feel free to docket this letter as a request to initiate such a proceeding.

If PHMSA disagrees with this conclusion – i.e., if it believes the lawful definition of "non-bulk packaging" is other than what appears in the 1990 Final Rule, 55 Fed. Reg. at 52471 – it would be best for all concerned if the responsible officials would please let me know immediately.

Respectfully,

Jerry W. Cox

Jerry W. Cox, Esq.

CC: PHMSA Office of Chief Counsel