U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue SE
Washington, DC 20590

OCT 25 2012

Timothy W. Wiseman, Esq.
Jeffrey S. Jackson, Esq.
Scopelitis, Garvin, Light, Hanson & Fears
10 West Market Street
Suite 1500
Indianapolis, IN 46204

Reference No. 12-0155

Dear Messrs. Wiseman and Jackson:

This is in response to your July 13, 2012 letter concerning the transportation of a hazardous material in a package discovered to be damaged, defective, or leaking at some point while it is in possession of a common carrier by highway (i.e., after the carrier picks up the package from the offeror and before delivering it to the consignee). As we understand the circumstances, when the motor carrier discovers that the package is damaged, defective or leaking (presumably this would occur most often at the carrier's "local terminal"), the carrier:

- Places the damaged, defective, or leaking packaged in a salvage drum so that the package may be "shipped for repackaging or disposal" in accordance with 49 C.F.R. § 173.3(c).

- Transports the salvage drum and its contents from its local terminal to its "larger hub" facility where the damaged, defective, or leaking package and its contents are evaluated to determine if the material or product is suitable for recycling,[1] donation, or disposal.

- "[U]tilizes a licensed hazwaste transporter and follows applicable state hazardous waste law" when damaged, defective, or leaking "packages must be disposed of from the hub as hazwaste."

Specifically, you ask us to comment on whether "the carrier opens itself up to the state's hazwaste regulations during the brief period in which it takes steps at its local terminal to utilize the [salvage] drum for continued transportation to the hub." You state that a local municipality takes the position that "the transportation of the shipment actually stops at the local terminal," and the package and its transportation are therefore no longer governed by the HMR. Instead, according to the municipality, the carrier actually holds the package at

[1] We assume that, under the appropriate circumstances, "recycling" may include returning the package to the original offeror or delivering it to the intended consignee.

the local terminal for management as hazwaste and, because transportation of the shipment has purportedly stopped, opens itself up to the application of state and local hazwaste regulations at its local terminal (e.g., those requiring hazwaste generator permits for each local terminal, those requiring the manifesting and transportation of the damaged hazmat packages from each local terminal as hazwaste by a licensed hazwaste transporter, etc.).

We do not agree that under these circumstances, "transportation" stops at the carrier's local terminal or that the HMR no longer applies to any further movement of the damaged, defective or leaking package or preparation of the package for such further movement. As defined in 49 C.F.R. § 5102(13), "'transportation' means the *movement* of property and loading, unloading, or storage incidental to the movement." (Emphasis supplied) Between the carrier's local terminal and its larger hub facility at which the package and its contents are evaluated, the package would clearly be in "movement."

As you describe the situation, the shipment was not consigned to the local terminal or any other facility of the carrier. The package it is still in the possession of the carrier, and it has not been "delivered to the destination indicated on a shipping document, package marking, or other medium." *See* 49 C.F.R. § 171.1(c) including 171.1(c)(4) (storage incidental to movement). The carrier may become an "offeror" by performing pre-transportation functions to enable onward transportation of the package (for example, by repackaging the hazardous material and preparing shipping papers, which may include a uniform hazardous waste manifest). *See* 49 C.F.R. §§ 171.8 (definition of "person who offers" or "offeror") and 173.3(c). However, that would not mean that movement of the package from the local terminal to the hub is no longer "transportation" and not subject to the requirements in the HMR.

The authority of a State or local municipality to regulate transportation of hazardous waste is not completely precluded by a finding that the transportation and/or pre-transportation functions are subject to the HMR. Rather, the Resource Conservation and Recovery Act provides that regulations of the U.S. Environmental Protection Agency (EPA) applicable to transporters of hazardous waste must be "consistent with" the HMR, and State hazardous waste programs must be "equivalent to" and "consistent with" EPA's program. 42 U.S.C. §§ 6923(b), 6926(b). *See* the discussion in Preemption Determination No. 12(R), New York Department of Environmental Conservation; Requirements on the Transfer and Storage of Hazardous Wastes, 60 Fed. Reg. 62527, 62533 (Dec. 6, 1995), decision on petition for reconsideration, 62 Fed. Reg. 15970 (Apr. 3, 1997), regarding "repackaging" of hazardous wastes at a carrier's "transfer facility." As noted in that decision, EPA's authorization of a State program does not "shield[] state regulations touching upon hazardous material transport from possible preemption challenges under" Federal hazardous material transportation law. *Id.*, quoting from the August 17, 1994 letter signed by the Director of EPA's Office of Solid Waste.

The thrust of your letter appears to be whether a local municipality may impose requirements on the transportation a hazardous material in a damaged, defective, or leaking package from a local terminal to its hub where the package is evaluated to determine whether the material or produce is suitable for recycling, donation, or disposal. This would

include consideration of various issues including, among others, the point at which the contents of a damaged, defective, or leaking package become "discarded" and meet the definition of "solid waste" in 40 C.F.R. § 261.2. A full consideration of these issues may require PHMSA to consult and coordinate with EPA and may be better handled in an administrative preemption determination proceeding in response to an application from a person who is "affected" by the State or local requirement in question. *See* 49 U.S.C. § 5125(d)(1) and 49 C.F.R. § 107.201 *et seq.*

I hope this responds to your questions. If we can be of further assistance, please do not hesitate to contact me or Frazer C. Hilder in PHMSA's Office of Chief Counsel.

Sincerely,

Delmer Billings
Senior Regulatory Advisor
Standards and Rulemaking Division

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Webb
§173.3
§ 177.854
§ 171.1
Damaged Packages
12-0155

July 13, 2012

Via U.S. Mail & E-mail (john.gale@dot.gov)
Mr. John Gale
Director of Standards and Rulemaking
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
East Building, 2nd Floor
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Washington, DC 20590

Re: Proper Procedures Regarding Damaged Hazmat Packages Discovered After Pick Up from Customer

To Whom It May Concern:

We represent a number of companies nationwide that provide package pick up and delivery services for customers. These companies utilize truck equipment when performing these services and sometimes transport hazardous materials regulated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). While each entity operates slightly differently from the others, each company has, at one time or another, requested information and guidance with regard to the best practice (from both a safety and legal perspective) for transporting packages containing hazardous materials that are discovered to be damaged after initial pick up from the customer (i.e., while in transit, whether at a local carrier terminal or in a vehicle). Below we have attempted to construct a hypothetical scenario that succinctly describes/outlines our basic issue and would appreciate PHMSA's interpretation regarding the same.

Pursuant to 49 CFR § 173.3(c), a motor carrier utilizes salvage drums to transport hazardous materials ("hazmat") packages, discovered to be damaged, defective, or leaking, from its local terminals to its larger hub within the applicable state. At the hub,

the packages are evaluated and repackaged, recycled, donated, or properly disposed of as hazardous waste ("hazwaste"). In the event that the packages must be disposed of from the hub as hazwaste, the carrier utilizes a licensed hazwaste transporter and follows applicable state hazardous waste law. This procedure appears to be authorized by, and compliant with, federal hazardous materials regulations ("HMR"), including, without limitation, 49 CFR § 171.1, 49 CFR § 173.3(c), 49 CFR § 177.854(c)(2), and 49 CFR § 177.854(d).

Nevertheless, a local municipality argues that because a salvage drum transported under this procedure is forwarded to the hub for evaluation and disposition—following which it seldom, if ever, ultimately reaches its original "destination" or the "shipper," (see 49 CFR § 177.854(c)(2))—the carrier opens itself up to the state's hazwaste regulations during the brief period in which it takes steps at its local terminal to utilize the drum for continued transportation to the hub. Specifically, the municipality argues that because the carrier takes such steps, the transportation of the shipment actually stops at the local terminal. Accordingly, the municipality further argues, additional carrier activities undertaken with respect to the damaged, defective, or leaking hazmat package are not functions governed by 49 CFR § 171.1, and the package and its transportation are therefore no longer governed by the HMR. Instead, according to the municipality, the carrier actually holds the package at its local terminal for management as hazwaste and, because transportation of the shipment has purportedly stopped, opens itself up to the application of state and local hazwaste regulations at its local terminal (e.g., those requiring hazwaste generator permits for each local terminal, those requiring the manifesting and transportation of the damaged hazmat packages from each local terminal as hazwaste by a licensed hazwaste transporter, etc.).

We believe, however, that the carrier's procedure in this scenario is not only authorized by, and compliant with, the HMR, but also the safest possible means by which to carry out the carrier's HMR-governed functions. To begin with, all of the events described in the scenario occur during continuous transportation because, whether or not the shipment is ultimately delivered to its original destination, they occur after the "carrier takes physical possession of the hazardous material for the purpose of transporting it" but before "the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium." 49 CFR § 171.1(c). (Moreover, even if the events described in the scenario did not

occur during transportation, they would still be governed by the HMR as "[p]re-transportation functions" under 49 CFR § 171.1(b).)

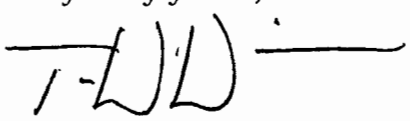
We also believe that the procedure described in this scenario is specifically authorized by, and compliant with, (1) 49 CFR § 173.3(c), since the procedure can be properly characterized as the "ship[ping]" of salvage drums (in this scenario, to the carrier's hub) "for repackaging or disposal"; (2) 49 CFR § 177.854(c)(2), since the procedure can also be properly characterized as the "forward[ing]" of salvage drums "to destination" or the "return[ing]" of salvage drums to the shipper unless and until (a) the package is evaluated at the hub and (b) the package documentation is subsequently changed to reflect a "destination" that is neither the original, documented "destination" nor the address of the "shipper"; and/or (3) 49 CFR § 177.854(d), since the procedure can be properly characterized as the "repair[ing]" of packages and the "transport[ing]" of those packages "to the nearest place" (again, in this scenario, the carrier's hub) "at which" they "may safely be dispos[ed] of."

With the above considerations in mind, we had an opportunity on June 19, 2012, to speak directly with Mike Hilder, a senior attorney with PHMSA's Chief Counsel's office. Mr. Hilder reviewed a draft version of this letter and provided his opinion that, under the described set of facts, the damaged packages would never fall out of "transportation" (as that term is defined by the HMR) and that the carrier would remain compliant with the HMR throughout the process.

Considering the apparent strength of our independent analysis, as well as the informal opinion of Mike Hilder of the Chief Counsel's office, we now respectfully request PHMSA to review this issue and provide a formal letter of interpretation.

We greatly appreciate any information you can provide regarding the above-stated scenario. If you require anything further to respond, please feel free to contact us directly.

Very truly yours,



Timothy W. Wiseman
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cc: Mike Hilder, Adjudications Counsel