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October 2, 1995

Mr. Alan I. Roberts
Associate Administrator
Research and Special Programs Administration
Office of Hazardous Materials Safety
DHM-1, Room 8420
US Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Re: Petition P-1279, Definition of "In Transportation"

Dear Mr. Roberts:

This letter is in response to the above-referenced petition by the Hazardous Materials Advisory Council. The petition requested Research and Special Programs Administration (RSPA) to commence a rulemaking to more clearly describe when hazardous materials are considered to be "in transportation," including loading, unloading, and storage incidental to transportation activities.

The following organizations submit five copies of the enclosed paper in order to assist RSPA in more clearly defining the reasonable boundaries of its jurisdiction. We believe that this is a very important issue that will have significant impact on our industries.

If you have any questions regarding the enclosed paper, please feel free to contact Mike Lyden, The Chlorine Institute at (202) 872-4732, or Meredith Grider, Chemical Manufacturers Association at (202) 887-1263.

Sincerely,

Robert G. Smerko

On behalf of:
Chemical Manufacturers Association
Chlorine Institute, Inc.
Compressed Gas Association
Fertilizer Institute
National Paint and Coatings Association
Society of Plastics Industries, Inc.
Synthetic Organic Chemical Manufacturers Association

CMA 111321

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container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that it is loaded for shipment and should be considered in transportation. Any storage of the container/vehicle must be presumed incidental to transportation. Other facts, e.g., the shipper's demonstrated intent or past practices with respect to the container/vehicle, may rebut the presumption that it is in transportation. If the container/vehicle is not suitable for transportation under the Hazardous Materials Regulations, or if the material in the container/vehicle is reloaded into another container/vehicle or is returned to the manufacturing process, it is not considered to be stored incidental to transportation.

2. When a container/vehicle arrives at a consignee's facility, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that the container/vehicle is delivered for unloading in the ordinary course of business. Thus, a presumption exists that the container/vehicle remains in transportation and storage is incidental to transportation until the container/vehicle is unloaded. As with other presumptions, facts may rebut the presumption.

IV. PROPOSED RESOLUTION

It is imperative for Federal agencies to work together when developing rules that will overstep another's jurisdiction. Overlapping jurisdiction is not a concern *as long as there is not overlapping regulation*. Agencies should take proactive action to develop Memoranda of Understanding (MOU) at any time when jurisdictional authority is unclear. Once DOT's jurisdiction is determined, government and industry (experts in the transportation of hazardous materials and any other affected parties) must then work together to ensure that regulations are in place to adequately protect the public, employees, and the environment. The chemical manufacturing industry is eager to participate in this process.

defines "transportation" as "the movement of property and loading, unloading, and storage incidental to the movement," (49 U.S.C. 5102 (12)) and states that "The Secretary [of Transportation] shall prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce" (49 U.S.C. 5103 (b)). Congress passed the HMTA, as amended by the HMTUSA, because it recognized that the most effective way to protect the public from the dangers inherent in the transportation of hazardous materials was to promote consistency and uniformity in the laws and regulations governing the movement, loading, unloading, and incidental storage of those materials. It ensures this consistency and uniformity by granting DOT preemptive authority over state and local regulations.

Historically, DOT's Research and Special Programs Administration (RSPA) has regulated loading, unloading, and storage incidental to transportation activities under the authority granted the agency in the HMTA, as amended by the HMTUSA. RSPA similarly defines "transportation" in 49 CFR §107.3 as "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." However, recent public comments by officials of DOT, and a recent preemption determination by RSPA, have called into question the long-held belief that in-plant storage of DOT specification tank cars and tank trucks is under the exclusive jurisdiction of DOT. As matters now stand, there is considerable debate as to which of various Federal, state or local authorities has jurisdiction over this activity.

This paper discusses the reasonable boundaries of DOT's jurisdiction, especially as it applies to in-plant loading, unloading and storage incidental to transportation activities. Once DOT's jurisdiction is determined, however, government and industry (experts in the transportation of hazardous materials and any other affected parties) must then work together to ensure that regulations are in place to adequately protect the public, employees, and the environment.

INTERPRETATION OF DOT JURISDICTION

On February 15, 1995, DOT issued Preemption Determination Nos. PD-8(R) et al. (60 F.R. 8774). In these determinations (collectively referred to as the "Four Pack" decision), RSPA made several legal determinations that severely limit the concept of storage incidental to transportation.

It is reasonable to assume that without the intent to ship a container loaded with material off of the plant site, that container will not be placed into commerce and is therefore, not subject to DOT's jurisdiction. Therefore, it is reasonable to accept the legal conclusion upon which the "Four Pack" decision is primarily based, which appears at 60 F.R. 8792:

Federal hazmat law and the Hazardous Materials Regulations (HMR) apply to transportation in commerce. Ground transportation is "in commerce" when it takes place on, across, or along a public way. Ground transportation of hazardous material that takes place entirely on private property is not transportation "in commerce," and is not regulated by Federal hazmat law and the HMR.

RSPA was at fault to rely upon the EPA to determine RSPA's own jurisdiction. RSPA and EPA both should recognize that DOT-authorized equipment is designed to withstand the rigors of transportation and, therefore, should certainly be able to stand the rigors of sitting in a fixed location. As long as the transportation equipment is within the DOT's test date, which has been determined by DOT to be appropriate to contain specific materials based on the risks they pose, there is no safety concern - either for humans or the environment.

Furthermore, if the material is "in transportation" then DOT has the exclusive right to establish rules about the container's or package's integrity and suitability for the material and its containment and the handling of the container/package in a loading/unloading situation. OSHA generally retains the responsibility for setting the standard around worker health and safety in the work environment, including, for example, personal protective equipment, safe loading platforms, and dock equipment, training on the use and wearing of personal protective equipment and safe work practices, etc. DOT's responsibility includes determining and establishing appropriate transportation equipment specifications, hazard communication during transportation, loading/unloading procedures, and training on all of those issues. Both EPA and DOT currently share responsibility for spill cleanup and emergency notification. EPA sets the standards for hazardous waste classification and processing, while DOT regulates the transportation of hazardous waste. If there is a conflict, the agencies involved need to resolve the conflict, but, in general, DOT should preempt the other agencies for material in transportation.

Again, what constitutes "in transportation" is essential to determining DOT's legitimate jurisdiction. For purposes of determining when material is in transportation, the loading and unloading process for non-bulk packages needs to be defined as the act of placing non-bulk packages in or removing them from a transport vehicle. Therefore, non-bulk packages contained in a plant warehouse or at a plant site would not be considered "in transportation." Transport vehicles or packages that are being temporarily held in transit at a location other than the shipper's intended final destination (e.g., a carrier's terminal) are considered "in transportation." For purposes of determining when a material is in transportation, the loading and unloading process for bulk containers includes the act of placing the hazardous material in or removing it from the bulk equipment. Therefore, bulk containers stored in an area waiting to be transported are "in transportation" whereas the material stored in a fixed storage tank is not "in transportation."

To understand the impact of DOT jurisdiction on the plant site, it is important to understand the transportation life cycle. There are seven steps during the commercial life cycle continuum for hazardous materials in transportation:

1. Production of hazardous material
2. For non-bulk packages, loading of hazardous material into a non-vehicle packaging at the consignor's site and loading of the filled package onto a transport vehicle at the consignor's site; for bulk containers, loading of hazardous material into a bulk container

container/vehicle is reloaded into another container/vehicle or is returned to the manufacturing process, it is not considered to be stored incidental to transportation.

2. When a container/vehicle arrives at a consignee's facility, and the material remains in that container/vehicle, and that container/vehicle is suitable for transportation under the Hazardous Materials Regulations, it should be presumed that the container/vehicle is delivered for unloading in the ordinary course of business. Thus, a presumption exists that the container/vehicle remains in transportation and storage is incidental to transportation until the container/vehicle is unloaded. As with other presumptions, facts may rebut the presumption.

PERIPHERAL ISSUES

When drawing the boundaries around DOT's legitimate jurisdiction, it is impossible to mention every instance when DOT's jurisdiction may overstep into another agency's jurisdiction. However, some activities that are impacted by the issues raised in this paper and that deserve mention include the impact of DOT's jurisdiction on emergency response activities and DOT-authorized container design.

In regards to the impact on emergency response activities, clearly, agency jurisdiction over transportation equipment and loading and unloading is important. The preemption authority that comes with DOT jurisdiction is necessary to avoid inconsistent state and local regulations that can jeopardize the "hard won" system of uniform hazardous materials regulations that are so necessary in today's business climate. That notwithstanding, industry recognizes that local emergency responders need to clearly understand the potential hazards they may encounter during a response activity. Loaded bulk containers and transport vehicles can present a problem for responders, particularly if the responder did not anticipate the presence of the vehicles. These issues should be addressed, but should not impact the boundaries of DOT jurisdiction as described in this paper. It is appropriate, therefore, that the question of "presence" of hazardous materials and planning in the event of an emergency situation be addressed in concert with existing and ongoing contingency and risk management plan requirements.

In regards to the impact on DOT-authorized container design, DOT is the only federal agency with expertise in the design of transportation equipment intended to carry hazardous materials. EPA has already overstepped its jurisdiction in attempting to regulate transportation equipment in EPA's RCRA Subpart CC rule (59 F.R. 62896, published on December 6, 1994). EPA requires additional testing requirements apart from DOT's leakproof and pressure tests, and because the standards are enacted once the transportation equipment crosses the property line of 90 day generators or hazardous waste treatment, storage, and disposal facilities, the rule infringes on DOT's jurisdiction over loading, unloading, and storage incidental to transportation. Similar standards have been proposed in EPA's "National Emission Standards for Hazardous Air Pollutants for Source Category: Off-Site Waste and Recovery Operations" rule. Because these rules will impose standards on containers that are intended for the off-site

consistency in hazardous materials transportation regulations is essential to the continuous flow of intrastate, interstate, or foreign commerce. Current DOT regulations also provide for adequate protection of the public and workers. If another Federal agency determines that DOT regulations *do not* adequately protect the public and workers, that Federal agency should consult with DOT to revise its rules rather than create divergent standards.