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49 CFR Part 171 et al.

Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act; Interpretations of Regulations

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 174, 175, 176, 177, 178, 179, and 180

[Notice No. 90-2]

Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Interpretations of regulations.

SUMMARY: This notice publishes the formal interpretations of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–180) issued under the Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 49 App. U.S.C. 1801–1803). These interpretations have been rendered by the Chief Counsel of RSPA. This Notice is being published to facilitate better public understanding and awareness of these interpretations. It may be particularly useful to industry members and state and local governmental officials involved in or regulating hazardous materials transportation.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001 (Tel. (202) 366–4400).

SUPPLEMENTARY INFORMATION: As part of its implementation of the HMTA, RSPA issues the regulations contained in the HMR. Informal interpretations of the HMR frequently are issued by the Standards Division of RSPA's Office of Hazardous Materials Transportation (OHMT).

Less frequently, RSPA's Chief Counsel issues formal interpretations of the HMR. These interpretations generally involve multimodal issues and are coordinated with other DOT agencies which, together with RSPA, enforce the HMTA. (Those agencies are the U.S. Coast Guard, Federal Aviation Administration, Federal Highway Administration and the Federal Railroad Administration.)

Publication of these interpretations should promote a better understanding of the HMR and improved compliance therewith. These opinions are available, and future interpretations will be available on OHMT's Hazardous Materials Information Exchange (HMIX) (1–800–367–9592).

Issued in Washington, DC, on February 16, 1990, under the authority delegated in 49 CFR part 106, appendix A.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[Int. No. 87–1–RSPA]

Issued: February 2, 1987.

Source: Illinois Department of Transportation.

Facts: The Illinois DOT requests an interpretation to clarify the relationship between 49 CFR 172.504(c) and 172.505 as applicable to the placarding of materials which are subject to the "Poison-Inhalation Hazard" shipping paper description. § 172.504(c) excepts from placarding transport vehicles and freight containers that carry less than 1,000 pounds of a Table 2 hazardous material. However, § 172.504(c) additionally states: "This paragraph does not apply to * * * transport vehicles and freight containers subject to § 172.505". Section 172.505 states: "Each transport vehicle and freight container * * * must be placarded POISON * * * in addition to the placards required by § 172.504." The Illinois DOT interprets these regulations as excluding § 172.505 materials from the 1,000 pound placarding exception for transport vehicles and freight containers, and a material so defined must be placarded POISON pursuant to § 172.505, in addition to any other required hazard class placard. Illinois' first inquiry is whether its interpretation of §§ 172.504(c) and 172.505 is correct. Illinois specifically asks, what placards are necessary for a truck that carries one 55 gallon drum of flammable liquid hazardous material which also meets the poison-inhalation hazard definition. Lastly, Illinois inquires about placard requirements on a transport vehicle which carries the aforementioned 55 gallon drum and another hazardous material of a different Table 2 hazard class that is in excess of 1,000 pounds.

Interpretation: The Illinois Department of Transportation's interpretation is correct. A shipment consisting, for example, of one drum (500 pounds) of a material classed as a flammable liquid which also poses an inhalation hazard, requires both FLAMMABLE and POISON placards under the provisions of § 172.504(a) and § 172.505, respectively. If, for example, a quantity of a corrosive material (e.g., 10 boxes weighing a total of 400 pounds) is added to the shipment then the vehicle must be placarded CORROSIVE, FLAMMABLE and POISON. The shipment is not eligible for the 1,000 pound exception in § 172.504(c) because it includes a material that is toxic by inhalation. To allow shippers and carriers to placard shipments otherwise could cause emergency response errors, since emergency response personnel, seeing placards, are likely to presume that the placards reflect the hazards of all commodities in the transport vehicle or freight container. Under the provisions of § 172.504(b), the DANGEROUS placard may be substituted for either the CORROSIVE or FLAMMABLE placards, or both, but not for the POISON placard required by § 172.505.

[Int. No. 87–2–RSPA]

Issued: March 2, 1987.

Source: Mark Swartz, Esq., Amesbury, MA.

Facts: Section 173.301 prescribes the general requirements for shipping compressed gas cylinders. Paragraph (b) of § 173.301 states: "A container charged with a compressed gas must not be shipped unless it was charged by or with the consent of the owner of the container." Mr. Swartz has two questions: (1) Is the consent of the owner necessary if the cylinder is not offered and accepted for transportation (i.e., shipped) [?] (2) Is there any specific required method (i.e., written proof) to establish the ownership of a cylinder [?]

Interpretation: Under § 173.301(b), there is no prohibition against charging a cylinder without the consent of the owner of the cylinder, provided the charged cylinder is not offered for transportation in commerce. Therefore, if a person who offers a cylinder for transportation is also the person who charged it, the question of whether that person may be held accountable in a particular case depends on whether he obtained the permission of the cylinder owner to charge the cylinder. If, for example, the refiller who offered the container for transportation received it from the owner, then permission to fill the container can be inferred under § 173.301(b). However, the refiller may be held accountable under § 173.301(b) if he offers a container for transportation that he received from a person who he "knows" is not the owner of the cylinder. Applying the definition of "knowledge" in 49 CFR 107.299, a person has the requisite knowledge when he actually knows or should have known that an individual does not own a container. Written proof of ownership is not required. To insulate oneself from liability under § 173.301(b), the person who offers the cylinder for transportation should have sufficient "objective" facts to establish that a particular person owned the container.

[Int. No. 87-3-RSPA]

Issued: Feb. 17, 1987.

Source: David H. Jett, Esq., Keller and Heckman, Washington, DC.

Facts: David H. Jett requests an interpretation to clarify paragraphs (b) and (d) of 49 CFR 173.386. Section 173.386 defines etiologic agents and the regulations applicable to their transportation. Paragraph (b) specifically states: "* * * except as provided in paragraph (d), no person may ship any material, including * * * a biological product, containing an etiologic agent unless this material is packaged and prepared for shipment in accordance with § 173.24 and [the] other applicable regulations of this subchapter." Paragraph (d), which excepts certain substances from part 173 regulations, states:

> The following substances are not subject to any [re]quirements of this subchapter if the items as packaged do not contain any material otherwise subject to the requirements of Parts 170 through 189 of this subchapter:
>
> * * * * * *
>
> (2) Biological Products
> (3) Cultures of etiologic agents. * * *

Mr. Jett inquires whether pursuant to paragraph (b), biological products that include etiologic agents are subject to the packaging provisions of Part 173 or whether they are exempt from regulations under paragraph (d)?

Interpretation: Under paragraph (d), biological products that contain etiologic agents, but which do not contain another hazardous material are not subject to the packaging requirements of Part 173. There is a discrepancy between the language in paragraphs (b) and (d) of § 173.386. The applicability statement of paragraph (b) implies that biological products which contain etiologic agents are subject to the general packaging provisions of § 173.24 and the other requirements of the HMR. However, the exception provided in paragraph (d) is intended to exclude biological products that contain etiologic agents, but do not contain any other hazardous materials (e.g., formaldehyde, flammable liquid solvents). RSPA intends to address the discrepancy between paragraph (b) and (d) of § 173.386 in a future rulemaking action. Accordingly, biological products which contain etiologic agents, but no other hazardous material subject to the HMR, are not subject to the packaging requirements of part 173.

[Int. No. 87-4-RSPA]

Issued: Mar. 25, 1987.

Source: R.F. D'Onofrio, Regulations Coordinator, Hercules Incorporated, Wilmington, Delaware.

Facts: Hercules, Inc. requests an interpretation of "attendance" as contained in 49 CFR 174.67 and 177.834. Sections 174.67 and 177.834 are concerned with attendance requirements during the unloading of rail tank cars and motor vehicle cargo tanks, respectively. Section 174.67 specifically states in paragraph (i): "Throughout, the entire period of unloading, and while (the) car is connected to (the) unloading device, the car must be attended by the unloader." Section 174.67(a)(1) also requires that unloading operations be "performed only by reliable persons properly instructed in unloading hazardous materials and made responsible for careful compliance with this part." Section 177.834(i) announces the general requirement that motor carrier cargo tanks must be attended at all times during loading and unloading. Furthermore, paragraph (i)(3) of § 177.834 specifically defines "attends" as:

> A person "attends" the loading or unloading of a cargo tank if, throughout the process, he is awake, has an unconstructed view of the cargo tank, and is within 7.62 meters (25 feet) of the cargo tank.

Hercules proposes to install a system that includes electronic sensors which upon detection of minute levels of fumes or vapors will sound an alarm and shut down the unloading process. Also, periodic checks of the system will be conducted by workers in the general area. Hercules requests DOT to compare its proposed system to the attendance requirements of §§ 174.67 and 177.834.

Interpretation: Hercules' proposed system may comply with the requirements of § 174.67, but it does not comply with those contained in § 177.834(i)(3). The purpose of the attendance requirement is to ensure that hazardous materials are safely loaded or unloaded and that in the event of an emergency, such processes are rapidly halted. The key elements of the attendance requirements in §§ 174.67 and 177.834 are that the person or mechanical device monitoring the loading process be able to determine if a condition requiring cessation of operation occurs, and if so, that there is the ability to stop the operation.

The system proposed by Hercules meets the requirements of §§ 174.67(a)(1) and 174.67(i) if: (1) An employee is made responsible for unloading and is familiar with the nature and properties of the material being unloaded; (2) the employee responsible for unloading is instructed in the procedures to be followed during unloading and in the event of an emergency, and has the authority and ability to halt the flow of product immediately and take emergency action; (3) in the event of an emergency, the system must be capable of immediately halting the flow of product or alerting the employee responsible for unloading; (4) the monitoring device will provide immediate notification of any malfunction to the person responsible for unloading, or the device is checked hourly for malfunctions; and (5) in case of malfunction, the device will no longer be relied upon and instead the individual responsible for unloading will constantly observe the unloading.

Hercules' proposed system is acceptable under § 174.67, assuming that upon detection of fumes or vapors the monitoring system warns workers of the defect and automatically stops the unloading process. However, § 177.834(i)(3) specifically requires a "person" to have a continuous unobstructed view within "twenty-five feet" of the cargo tank. The motor vehicle attendance requirements are more specific than those for rail cars, because of the greater likelihood that motor vehicles will be unloaded in populated areas. Thus, an electronic monitoring device with periodic checks by workers in the "general area" does not comply with the specific attendance requirements of § 177.834(i)(3), because it utilizes non-human monitoring.

[Int. No. 87-5-RSPA]

Issued: June 2, 1987.

Source: Gordon Rousseau, Senior Technical Advisor, Lawrence W. Bierlein, P.C., Washington, DC.

Facts: Request for an interpretation of 49 CFR 173.12, regarding how § 173.12 applies to hazardous substances and poisonous materials, particularly poisonous liquids that are toxic-by-inhalation. Paragraph (a) of § 173.12 states:

> "Waste material * * * are excepted from the specification packaging requirements of this subchapter if packaged in combination packagings in accordance with this section * * * In addition, a generic proper shipping name from § 172.101 may be used in place of specific chemical names, when two or more waste materials in the same hazard class are packaged in the same outside packaging ["labpacks"], provided the waste materials are chemically compatible.

The request for interpretation involves four specific questions concerning § 173.12: (1) Does § 173.12 provide an exception to the additional poison and hazardous substance identification

requirements of § 172.203 (c) and (k); (2) Does § 173.12 apply when additional requirements are imposed by other sections (e.g., §§ 172.203, 172.301(a), 172.324); (3) How is § 173.12 affected by the marking requirements adopted under HM–196 and HM–145F; and (4) When combinations of waste stream sources are contained in the same labpack are waste stream numbers for each source to appear on the outside packaging and shipping papers[?]

Interpretation: Section 173.12 provides exceptions for shipments of waste materials and allows the use of "labpacks." However, § 173.12 does not relieve shippers of all the requirements of the Hazardous Materials Regulations [HMR], and there are limitations on the use of the exceptions in that section. First, § 173.12 is not intended to provide an exception from the description requirements of either paragraphs (c) or (k) of § 172.203. Second, § 173.12 does not grant relief from specific shipping paper and marking requirements such as those contained in §§ 172.203, 172.301, and 172.324. Moreover, regardless of § 173.12, materials that meet the toxic-by-inhalation requirements of § 173.3a pose extreme safety hazards and must be packaged as prescribed in § 173.3a. Third, § 173.12 does not provide exceptions from the requirements adopted under HM–196 and HM–145F. Under HM–145F, each hazardous substance contained in a "labpack" must be identified as required by § 172.324. Generic shipping names may be used only if the specific chemical names required by §§ 172.203 and 172.324 are included in the shipping descriptions. Last, if samples of different waste streams are contained within a labpack, each stream must be identified with the appropriate waste stream number on the shipping papers and the outside packages.

[Int. No. 87–6–RSPA]

Issued: Aug. 6, 1987.

Sources:

Paul R. Counterman, P.E., Chief, Bureau of Hazardous Waste Technology, Division of Solid & Hazardous Waste, New York State Department of Environmental Conservation, Albany, New York.

Neil M. Gingold, General Counsel, Envirosure Management Corp., Buffalo, New York.

Facts: Both parties have requested clarification of the applicability of 49 CFR 173.28 (a) and (m) to the operations of a hazardous waste processing facility located in Niagara Falls, New York. Frontier Chemical Waste Process, Inc., a subsidiary of Envirosure Management Corp., receives drums of flammable waste, partially or completely empties them (often removing liquids and leaving sludge or solids in the bottom of the drums), refills the drums with flammable solids or sludges (conceded by the Company to be "flammable solids" under § 173.150) for purposes of consolidation, and ships them to a disposal site. In some instances, State personnel have required compliance with §§ 173.28 (a) and (m). There is disagreement concerning whether all of the refilled and reused drums are emptied before being refilled. Both parties have requested interpretations concerning the applicability of §§ 173.28 (a) and (m) to these facts. This interpretation also addresses a related provision, § 173.28(p).

Interpretation: Section 173.28 applies only to certain reuses of containers. The general reuse requirements of § 173.28(a) apply only where a container has been refilled and reshipped "after having been previously emptied." The specific steel drum reuse requirements of § 173.28(m) apply only to DOT specification 17C, 17E, and 17H steel drums "from which contents have been removed." The quoted phrases in the two paragraphs are synonymous; they require, respectively, the emptying insofar as practicable of, and removal insofar as practicable of the contents from, the container before the reuse requirements apply. Neither § 173.28(a) nor § 173.28(m) applies in blending or mixing situations where some contents have been removed and others added. After a container has been emptied insofar as practicable, however, § 173.28(a) imposes requirements which must be met as prerequisites to the container's use for the transportation of hazardous materials.

Similarly, § 173.28(m) specifies requirements which certain specification 17C, 17E and 17H steel drums which have been emptied insofar as practicable must meet as prerequisites to their use for the transportation of specified hazardous materials.

An example of "emptying insofar as practicable" is turning drums upside down and thereby draining out most of their contents. Section 173.28(p) contains alternative provisions for NRC or STC container reuse solely for the shipment of hazardous waste to designated facilities. That paragraph does not require that containers be emptied as a prerequisite to its application; it applies to the specified reuse for hazardous waste shipments regardless of whether the NRC or STC containers have been emptied.

[Int. No. 88–1–RSPA]

Issued: May 16, 1988.

Source: Clifford J. Harvison, President, National Tank Truck Carriers, Inc., Alexandria, Virginia.

Facts: National Tank Truck Carriers, Inc. (NTTC) takes issue with a major oil company shipper of hazardous materials which recently commented in a DOT rulemaking docket as follows:

> While we (the major oil company) may supply HM, we are not necessarily the shipper because the product was sold 'at the rack'. This means we sold it as it was transferred from a pipe or hose into the truck's cargo tank. Our customer, the 'shipper', arranged transportation.

NTTC disagrees with the apparent conclusion that transfer of ownership of a hazardous material concurrent with or prior to physical loading of the hazardous material into a truck's (or vessel's) cargo tank transfers HMTA shipper responsibilities (under 49 CFR 173.22 and other regulations under the HMTA) from the seller (which may own the storage tank, pipe or hose from which the material is being loaded) to the buyer of the material. In addition, NTTC states that, regardless of who owns the cargo tank into which the hazardous material is transferred, the transfer of ownership has no bearing on the "shipper" responsibilities under the Hazardous Materials Regulations (HMR) and thus the original owner, the oil company, remains liable as the "shipper".

Interpretation: The word "shipper" is not specifically defined in the HMR (49 CFR parts 170–179), due primarily to the fact that it is not possible for the Department to account for the numerous commercial arrangements that may exist under that concept. Although the word "shipper" does appear, it is used in an ordinary layman's manner rather than as a specific, technical term of art. Consequently, responsibilities generally are placed on "offerors" for performance of the functions associated with "offering" hazardous materials for transportation (e.g., see the general duty and applicability provisions in §§ 171.1, 171.2, 172.3, and 173.1).

The key issue in determining the regulatory responsibilities under the requirements in parts 171, 172, and 173 is determining which parties perform which functions. This involves a case-by-case determination based upon all relevant facts. Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned by the HMR to the offeror, is legally

responsible under the HMR for the proper performance of those functions. Any person's performance or attempted performance of any "offeror" functions may be evidence of that person's responsibility for performance of other "offeror" functions. In many cases, more than one person may be responsible for performing, or attempting to perform, "offeror" functions, and each such person may be held jointly and severally accountable for all or some of the "offeror" responsibilities under the HMR. (Note that responsibilities for compliance may be expressed in terms other than "offeror" or "offering" (e.g., preparers of hazardous materials for shipment, § 173.1(a)(2), and other persons performing required functions § 173.1(c)).)

Application of these principles to the situation described by the NTTC could result in the oil company or the purchaser (or the carrier if different than the purchaser) being held legally responsible for compliance with requirements associated with offering hazardous materials for transportation. That determination would require consideration of all relevant facts, including ownership of the materials, functions performed or undertaken by the parties, past practices of the parties, and contractual arrangements among the parties. No single factor, however, conclusively determines legal responsibility for performance of "offeror" functions under the HMR. For example, transfer of ownership of the hazardous materials from the oil company to the purchaser does not, in itself, absolve the oil company of responsibility under the HMR for performance of "offeror" functions or impose them upon the purchaser. On the other hand, the oil company's original ownership does not necessarily result in the oil company being responsible under the HMR for performance of all "offeror" functions. The ownership of the hazardous materials before, during or after the transportation of hazardous materials is only one of the many relevant factors which must be considered in determining regulatory liability under the HMR.

[Int. No. 89-1-RSPA]

Issued: Apr. 14, 1989.

Source: Clifford J. Harvison, President, National Tank Truck Carriers, Inc., Alexandria, Virginia.

Facts: National Tank Truck Carriers, Inc. (NTTC) has requested a follow-up interpretation to Int. No. 88-1-RSPA concerning persons responsible as "offerors" (or "shippers") under regulations issued pursuant to the Hazardous Materials Transportation Act (HMTA).

The essence of Int. No. 88-1-RSPA is as follows:

> Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned to the offeror or shipper by the HMR is legally responsible under the HMR for their proper performance. Performance or attempted performance of any offeror or shipper functions may be evidence of responsibility under the HMR for performance of other offeror or shipper functions. No single commercial act, such as a sale or transfer of ownership, is necessarily determinative of that responsibility.

NTTC's request also recognizes that the earlier Interpretation stated that the key issue in determining regulatory responsibilities under the Hazardous Materials Regulations (HMR), 49 CFR parts 171-179, is determining which parties perform which functions and that this involves a case-by-case determination based on all relevent facts.

Accepting that premise and recognizing that answers to detailed hypothetical questions may not be appropriate or applicable to actual cases occurring in the future, NTTC nevertheless sets forth a series of hypothetical fact patterns and requests answers to questions concerning them.

Many of NTTC's questions seem to assume erroneously that there is only one offeror in any given fact situation. In actuality there may be one or more efferors, jointly and severally responsible for compliance with the HMR, in any transportation scenario—depending upon the details of that scenario.

Interpretation: NTTC's hypothetical fact patterns and related questions are set forth below, and each question is followed by the answer of the Research and Special Program Administration.

Fact Pattern #1

Company is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets". There are no prior or existing agreements, between Company A and Company Z, regarding product ownership or taking title to the product.

Question—For the purposes of applicability of 49 CFR parts 170-179, is Company A the "shipper" (or "offeror")?

Answer—In Fact Pattern #1, absent additional facts, Company A is an offeror of hazardous materials for transportation and, as such, is responsible for compliance for all offeror and shipper responsibilities (e.g., §§ 171.2, 172.3, 173.1, and 173.22). Although there are no facts indicating that Company Z is an offeror, if Company Z loads its own vehicles or issues shipping papers, it would be performing offeror functions and be responsible for doing so in compliance with the HMR. Also, Company Z is a carrier and may not accept for transportation or transport hazardous materials without complying with numerous HMR provisions applicable to those functions (e.g., §§ 171.2 and 177.817).

Fact Pattern #2

Company A is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

By prior contractual agreement, Company A agrees to permit Company Z to load its trucks (at Company A's "facilities") 24 hours a day with no representative of Company A in attendance during the loading operations. Access to Company A's facilities is accomplished by keys and/or electromechanical devices provided by Company A.

Question—For the purposes of applicability of 49 CFR parts 170-179, is Company A the "shipper" (or "offeror")?

Answer—Company A and Company Z are both offerors. Either or both would be responsible for compliance with particular requirements of the HMR. Nothing in the given facts has relieved Company A of its responsibilities to classify the materials, prepare shipping papers, certify the shipment (§ 172.204),

and provide required placards (§ 172.507). However, if Company Z performs offeror functions, § 173.1 requires that it do so in accordance with the HMR. Such functions might include selection of proper packaging (§§ 173.22(a)(2) and 173.24) and loading (§§ 173.30 and 177.834).

The extent of the joint and several responsibility of Companies A and Z as offerors would be determined, in part, by the terms of their contract with each other.

Fact Pattern #3

Company A is engaged in production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, one function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by *Company M.* Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

Company M is engaged in the retail and/or wholesale distribution of petroleum products under the brand names of Company A. By prior agreement between Companies A and M it is agreed that ownership of the product shall pass from Company A to Company M, *prior to* transportation from Company A's facilities. Said "prior agreement" further specifies that Company Z will provide transportation services between Company A's facilities and Company M's facilities.

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—As discussed in the Fact Pattern #1 answer, Company A is an offeror, and Company Z would be responsible for proper performance of any offeror functions which it undertakes. Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials prior to transportation. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance. This issue was discussed in Int. No. 88–1–RSPA:

> No single factor * * * conclusively determines legal responsibility for performance of "offeror" functions under the HMR. For example, transfer of ownership of the hazardous materials from the oil company to the purchaser does not, in itself, absolve the oil company of responsibility under the HMR for performance of "offeror" functions or impose them upon the purchaser.
>
> On the other hand, the oil company's original ownership does not necessarily result in the oil company being responsible under the HMR for performance of all "offeror" functions. The ownership of the hazardous materials before, during or after the transportation of hazardous materials is only one of many relevant factors which must be considered in determining regulatory liability under the HMR.

Fact Pattern #4

Same fact pattern as that described in #3 (above), except that the "prior agreement" stipulates that the transportation will be performed in motor vehicles owned by Company M.

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. On the "offeror" issue, this fact pattern is the same as Fact Pattern #1, and there are no facts indicating that Company M is an offeror. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance.

Fact Pattern #5

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company M will "arrange for transportation."

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. More information would be required concerning Company M's undertaking to "arrange for transportation" in order to determine to what extent, if any, Company M is an offeror. If Company M is contractually or otherwise responsible to perform any of the functions assigned by the HMR to the offeror, it is legally responsible under the HMR for the proper performance of those functions.

Fact Pattern #6

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company A will "arrange for transportation".

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. As in Fact Patterns #3 and #4, there are no facts sufficient to indicate that Company M is an offeror.

Additional Question A

Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of delivery" to Company M's facilities?

Answer—Assuming that this question refers to Fact Pattern #3, Company A remains an offeror, and there is no basis on which to determine that Company M is an offeror.

Additional Question B

Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of loading (or transfer)" into cargo tanks (regardless of ownership of the cargo tanks)?

Answer—Again assuming that this question refers to Fact Pattern #3, Company A remains an offeror. However, Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials at the time of loading or transfer into cargo tanks—a time later than that hypothesized in Fact Pattern #3.

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