U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

AUG 21 2006

Mr. Robert Gomez
Supervisor, Transport Oversight Unit
State of New Jersey
Department of Environmental Protection
300 Horizon Center
Trenton, NJ 08625-0407

Ref. No. 06-0146

Dear Mr. Gomez:

This is in response to your June 20, 2006 letter requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you seek guidance on reporting of hazardous materials incidents, the general packaging requirements and the use of sift proof, closed bulk containers. You provided several scenarios and questions based on these scenarios. The scenarios and your questions are paraphrased and answered as follows:

A carrier transports hazardous waste via truck to a transloading facility. The hazardous waste is transferred to a lined rail car for transport to a disposal facility designated on the hazardous waste manifest.

Scenario A: A carrier transports contaminated soils described as "RQ Hazardous waste, solid, n.o.s., (cadmium, lead), 9, NA3077, PG III" via truck in a non DOT specification sift-proof closed vehicle or a non DOT specification closed bulk bin to a transloading facility. Upon arrival at the transloading facility the driver discovers what appears to be a release of hazardous waste from the rear dump gate.

Q1: Does this release require an incident report under § 171.16? If an incident report is required, who is responsible for completing and submitting the incident report?

A1: The shipment appears to be in transportation when it arrives at the transloading facility and during the transfer from the truck to the lined rail car. Provided the material observed is hazardous waste leaking from the package this incident must be reported in accordance with § 171.16. As specified in § 171.16(a)(2), each person in physical possession of a hazardous material when an unintentional release of a hazardous material or the discharge of any quantity of hazardous waste occurs must submit a Hazardous Materials Incident Report on DOT Form F5800.1 within 30 days of the discovery of the incident.

171.1
171.16

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Q2: Does the non-DOT specification closed transport vehicle or freight container meet the general packaging requirements of § 173.24 despite an apparent release of hazardous waste?

A2: You did not provide sufficient information about the condition of the closed transport vehicle or freight container for us to determine how the hazardous waste was released. However, it is the shipper's responsibility to ensure that the packaging provides sift-proof containment for contaminated soil at the time of shipment and will continue to provide that containment until the package reaches its final destination.

Scenario B: The "RQ Hazardous waste, solid, n.o.s., (cadmium, lead), 9, NA3077, PG III" is transloaded via gravity from an authorized non-DOT specification transport vehicle or freight container into a lined rail car. In your letter, you state that during the transloading process, hazardous waste splashed onto the inside walls of the transfer building and onto the paved surface directly under the transport vehicle or freight container. Further, air blowing through the building during the transloading operation may carry hazardous waste particulates and dust beyond the confines of the rail car and beyond the confines of the transfer building. In your letter, you note carrier personnel are present and participated in the transloading operation.

Q3: Does this release require an incident report under § 171.16? If an incident report is required, who is responsible for completing and submitting the incident report?

A3: Transloading operations occurring at a truck-to-rail transfer facility are in transportation and are functions subject to regulation under the HMR (see § 171.1(c)). A release of hazardous waste that occurs during a transloading operation requires an incident report under § 171.16. A hazardous materials incident that occurs while the carrier that transported the material is observing or participating in the transloading operation must be reported by the carrier, because the carrier is deemed to be in possession of the hazardous waste at that point.

Q4: Would hazardous waste particulate matter observed exiting the transfer building require a Hazardous Materials Incident Report on DOT Form F5800.1? If a Hazardous Materials Incident Report is required, who is responsible for completing and submitting the incident report?

A4: An incident report is required for an unintentional release of hazardous material or the discharge of any quantity of hazardous waste during transportation (see answer 1). A hazardous materials incident that occurs while the carrier that transported the material is observing or participating in the transloading operation must be reported by the carrier because the carrier is deemed to be in possession of the hazardous waste at that point (see answer 3).

Scenario C: According to your letter, once the lined rail car is filled, the liner is closed and secured by tying. You note the rail car is not covered with a tarp and weep holes remain open to allow rainwater to exit the rail car. You further note sharp rocks or other objects

falling into the lined rail car may damage the liner in the rail car and affect its integrity. You have provided video evidence showing a patch of unknown brown material directly under the rail car.

Q5: Because it is impossible to determine if the liner inside the rail car has been punctured, should the rail car be covered with a tarp and the weep holes closed to ensure compliance with § 173.24?

A5: In accordance with § 173.22, it is the shipper's responsibility to ensure that the package provides sift-proof containment at the time of shipment and will continue to provide that containment until the package reaches its final destination. A shipper may utilize any appropriate method to ensure compliance with § 173.24.

Q6: Based on a review of the available evidence, please provide advice of the compliance status of the lined rail car with applicable sections of the HMR.

A6: The evidence you provided does not permit us to render an opinion on the compliance status of the lined rail car. You have not provided evidence that a release of hazardous waste occurred, nor have you provided definitive evidence that the rail car fails to meet the requirements of §§ 173.24 or 173.240.

Q7: A patch of brown material is observed directly under an open weep hole of the loaded rail car. Does this observation constitute an incident requiring a hazardous materials incident report? If an incident report is required, who is responsible for completing and submitting the report?

A7: Provided the material observed under the rail car is hazardous waste leaking from the package, a Hazardous Materials Incident Report on DOT Form F5800.1 is required to be submitted within 30 days (see answer 1). If the incident occurs while the carrier that delivered the hazardous material is observing or participating in the transloading operation the carrier is deemed to be in possession of the hazardous material at that point and accordingly, must report the incident (see answer 3).

I hope this information is helpful. Please contact us if you require additional assistance.

Sincerely,

Edward T. Mazzullo
Director
Office of Hazardous Materials Standards

Jon S. Corzine
Governor

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Lisa P. Jackson
Commissioner

Leary
§171.16
§171.1
Tank Cars
06-0146

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7005 0390 0001 8555 4569

June 20, 2006

Susan Gorsky, Regulations Officer
Office of Hazardous Materials Safety
PHH-10
400 7th Street, S.W.
Washington, DC 20590-0001

Re: Regulatory Guidance

Dear Ms. Gorsky:

I am seeking formal regulatory guidance in the following areas: (1) release reporting, pursuant to 49 C.F.R. 171.16; (2) closed & sift-proof non-specification packages authorized at 49 C.F.R. 173.240; and (3) general packaging standards pursuant to 49 C.F.R. 173.24. This request is based on observations during a joint inspection of a truck to rail transfer facility conducted by New Jersey Department of Environmental Protection ("NJDEP") and an inspector from the United States Department of Transportation ("USDOT"), Pipeline and Hazardous Materials Safety Administration ("PHMSA"). As you are probably aware, NJDEP is currently in litigation in federal court for the District of New Jersey with NYSW regarding this facility, Civil Action No. 05-4010 (KSH). To assist your review, I have attached photographs (referred to as "Photo No.") and video clips (referred to as "Video No.") that were taken during a recent joint inspection of the facility.

As context for the questions that follow, please be advised of the following pertinent background information. Also, throughout this letter, "hazardous waste," "waste," and "hazardous material" are used interchangeably.

The first is a description of the relevant parties during the actual physical transfer of the hazardous waste. Typically, and on the date of the inspection, a truck transporter ("Trucker") picks up the hazardous waste from the Generator and arrives at the facility, where the hazardous material is transferred to the rail transporter ("Rail Carrier") for transport to the disposal destination designated on the hazardous waste manifest. Upon arrival at the facility, Trucker is met by the shipper of the waste ("Shipper"), whose name appears on the waybills, who receives the freight bills for the rail shipments, and who has contracted with Rail Carrier to ship materials

through and has exclusive use of the facility; and the designated loading entity ("Loader") at the facility, whom Rail Carrier hired to perform loading services and other administrative duties. The actual physical transfer of the waste from truck to the open rail car, i.e., when the waste is free-falling into the rail car, is overseen by Trucker, Shipper and/or Loader.

The second relates to the actual transfer itself. The soils received at the facility during the joint inspection were DOT/RCRA regulated contaminated soils described as a "RQ, Hazardous Waste, Solid, N.O.S. (Cadmium & Lead), 9, NA3077, PGIII." The soils were transferred from a non-Specification dump truck into a lined rail gondola. To aid in the transfer, plastic sheeting lined the dump truck, but did not fully contain the waste during the transfer.

Scenario A:

Trucker, via a non-specification sift-proof closed vehicle (dump truck), or sift-proof non-DOT specification closed bulk bin (intermodal or rolloff container) arrived at the transloading facility. As the driver exited his vehicle with his hazardous waste manifest in hand to confirm arrival at the facility, he noticed what appeared to be a minor release of hazardous waste that had seeped out of the rear dump gate in the parking lot. See Photo Nos. DSC00062, DSC00063, and DSC00064.

Question #1:
Does the hazardous material observed under the dump gate on the dump truck constitute a reportable incident, pursuant to 49 C.F.R. 171.16? If yes, if it is not the responsibility of Trucker to file the necessary report, whose responsibility is it?

Question #2:
Does the non-DOT specification dump truck identified in Photo Nos. DSC00062, DSC00063, and DSC00064, meet the general packaging standards under 49 C.F.R. 173.24 and requirement of being a sift-proof, closed vehicle, 49 C.F.R. 173.240(b), even though some waste material has seeped out?

Scenario B:

The authorized non-specification dump truck, intermodal or rolloff container, 49 C.F.R. 173.240, backed up the ramp above the rail gondola. See Photo No. DSC00076. Shipper and/or Loader was present during the transfer and helped control the rate at which the waste was transferred from the vehicle into the lined rail gondola by gesturing to the vehicle driver, Trucker, to alert the driver when it was okay to dump the load and when the driver should slow the dump. See Video MOV01810.

At times during the transfer, as the hazardous material was falling out of the dump truck, intermodal or rolloff container, the hazardous material splashed onto the inside walls of the transfer building, see Photo Nos. DSC01776, DSC01781, and DSC01779; the outside of the rail gondola, see Photo Nos. DSC00096 and DSC01794, where the black tarp is splattered with mud and/or waste; and on the paved surface directly under the dump truck, intermodal or rolloff container, see Photo Nos. DSC00091 and DSC00094. At the time of these photographs, Shipper

and/or Loader had already begun hosing the waste on the paved surface into the steel chute above the rail gondola and into the rail gondola.

Question #3:
Are the releases of waste identified in the photographs referenced above in scenario B, reportable incidents under 49 C.F.R. 171.16? If yes, (a) who is deemed to have physical possession of the hazardous material?; and (b) who is responsible for reporting the incident(s): Trucker, Shipper, Loader and/or Rail Carrier?

Scenario C:

The design of the building is such that the transfer of waste from the vehicle into the rail gondola occurs within seven to ten feet from the one end of the building. There are plastic freezer strips that are used as a doorway along both ends of the building, and a large opening where the vehicle backs slightly into to dump its load. See Photo No. DSC00076 to view where the truck and rail gondola are in relation to each other, and Video Nos. MOV01815 & MOV01810 to see how air blowing through the building can carry hazardous waste particulate and/or dust out beyond the confines of the rail gondola.

Question #4:
During the transfer of waste from the vehicle to the rail gondola, visible hazardous material particulate and/or dust is observed exiting the building. Would this emission, whether due to dry waste being carried by wind blowing through the building or by a draft created from waste material falling into the rail gondola, constitute a reportable incident under 49 C.F.R. 171.16? If yes, (a) who is deemed to have physical position of the hazardous material?; and (b) who is responsible for reporting the release(s): Trucker, Shipper, Loader and/or Rail Carrier?

Scenario D:

Once the lined rail gondola, i.e., a non-specification package, has been filled with the contents from several truckloads of waste, the liner is closed up like a burrito and tied shut. See Photo No. DSC01792. The rail gondola is not covered with a tarp and has open weep holes because there is no mechanism at the receiving facility to address accumulated rainwater. The closed burrito-style bag of waste in the rail gondola is supposed to be a sealed package, so if rainwater passes over it, no contamination is released as the rainwater exits the gondola on to the ground through open weep holes.

The concern is that during loading, the integrity of the non-Specification liner along the bottom of the rail gondola becomes compromised due to sharp rocks or objects falling from a height of approximately eight feet. See Video No. MOV01810, which allows you to hear hard objects falling into the rail gondola; at the one minute, eight second mark, a large slug of waste falls out of the truck into the gondola hard enough to cause the rail gondolas to rock side to side. See Photo No. DSC00093, which shows how sharp some of the rocks are that have fallen into and against the liner in the gondola. The rail carrier is unable to confirm that waste containing sharp

rocks and objects, falling from a height of approximately eight feet, has not damaged the liner in the rail gondola.

Evidence that the liner in the gondola has been punctured is seen in Video Nos. MOV01796 and MOV01797. Directly located under the open weep hole on the macadam surface is a patch of brown material that looks like soil. The only place in the area of the gondola where soil-like material was seen was directly under the open weep hole.

Question #5:
Because there is no way of determining whether the liner in the rail gondola becomes punctured, should the gondola be required to be tarped or, at least, to have the weep holes closed in order to comply with the general packaging requirements, 49 C.F.R. 173.24, and ensure the burrito style package is sift-proof and closed?

Question #6:
Based on your review of Video Nos. MOV01796 and MOV01797, please advise of the compliance status of this rail gondola with 49 C.F.R. 174.3, 49 C.F.R. 173.240(a), and/or any other HMR's.

Question #7:
Is what appears to be a release from the rail gondola a reportable incident under 49 C.F.R. 171.16? If yes, (a) who is deemed to have physical possession of the hazardous material; and (b) who is responsible for filing the report: Trucker, Shipper, Loader and/or Rail Carrier?

Your prompt attention to this request for written guidance would be greatly appreciated.

If you have any questions or require clarification on any of the items contained in this request, please contact me at (609) 584-4227.

Sincerely,

Robert Gomez, Supervisor
Transportation Oversight Unit

Attachments enclosed (compact disk)
c. Regulatory file

bc Kevin Auerbacher, DAG w/o compact disk
Harley Williams, DAG w/o compact disk
Jung Kim, DAG w/o compact disk
Wolf Skacel, Asst. Commissioner w/o compact disk
John Castner, PE, Director w/o compact disk
Anthony Lima, USDOT, PHMSA w/o compact disk (copied via e-mail)