



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 20 2010

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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.

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
Acting Chief Counsel

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.