

Dockets Management System
U. S. Department of Transportation
Room PL 401
400 7th Street SW
Washington, DC 20590-0001

October 24, 2001

Re: Docket No. RSPA-98-4952 (HM-223)

Dear Sir/Madam:

The Northeast Waste Management Officials' Association (NEWMOA) is writing to comment on the DOT-RSPA Regulatory Proposals Regarding the Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage. NEWMOA's member-state hazardous waste regulatory officials find RSPA's latest rulemaking efforts a positive and productive step in clarifying the multi-agency jurisdictional regulatory authority that presently exists. While the NEWMOA states support the overall direction of the proposal they would like to provide some general comments regarding the safe management of hazardous wastes and also recommend that certain key elements of the proposals should be defined and/or further explained.

NEWMOA is a nonprofit, nonpartisan, interstate association that has a membership composed of the hazardous waste, solid waste, waste site cleanup and pollution prevention directors from the environmental agencies in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NEWMOA was established by the Governors of the New England states as an official regional organization to coordinate hazardous waste, solid waste, waste site cleanup, and pollution prevention activities and was formally recognized by the U.S. EPA in 1986. One of NEWMOA's priorities is facilitating communication among its member states and between states and federal agencies concerning regulatory and policy issues involving solid and hazardous waste.

The New England States through NEWMOA have consistently stressed that hazardous wastes require more stringent management and safeguards than hazardous materials because of the uncertain characteristics and negative value inherent with wastes. This view is validated by the Congressional enactment of RCRA, the Federal U.S. Environmental Protection Agency's Hazardous Waste program that the NEWMOA states are currently authorized to implement. Because of the many areas of high population density and environmentally sensitive receptors in the Northeast states, our state leaders have been determined from the outset to use the flexibility granted to states in RCRA to minimize the likelihood that hazardous wastes will be mismanaged in their states. Accordingly, the NEWMOA states have adopted more stringent programs than the base EPA RCRA program, including additional requirements and safeguards for hazardous waste generators, transporters and facilities within their borders.

Most of the NEWMOA states require some form of license and other precautions at facilities where hazardous wastes are temporarily stored and/or transferred from one vehicle to another, regardless of the duration of the storage. Generally, the NEWMOA states believe that these requirements should remain in effect and subject to state oversight unless a preemptive rulemaking is fully as protective as the state requirements that it replaces. Thus, the NEWMOA states are particularly concerned about elements of this proposal that may or may not open state requirements to preemption, depending on RSPA's intention and how the provision would be interpreted.

For the abovementioned reasons, the NEWMOA states recommend that certain key elements should be defined and/or further explained. Examples include the terms “repackaging” and “care and custody” as well as the circumstances where EPA/state and local requirements for the design and operation of hazardous waste storage and transfer facilities would either remain effective or be preempted by the proposed rules. Other concerns include: preventing the commingling of incompatible wastes, ensuring adequate liability insurance coverage for storage and transfer operations and minimizing the likelihood of hazardous waste transfers at locations where such operations could unduly threaten the public and the environment. A conference call between NEWMOA-state regulatory officials and RSPA staff would provide an opportunity to discuss the questions below in order to better understand RSPA’s intent regarding these issues. I will be contacting DOT-RSPA staff in the near future to determine their interest and availability for such a call. The specific issues and questions of concern to NEWMOA state regulatory officials are summarized below.

Repackaging NEWMOA state regulatory officials recommend a detailed definition of the term “repackaging” in order to reduce uncertainty about RSPA’s intent concerning this activity. As you know, the states are very concerned about the risk of commingling dissimilar wastes in the repackaging and consolidation process. EPA and state hazardous waste management regulations and permits emphasize precautions to reduce the higher risk inherent in repackaging wastes or consolidating bulk wastes compared to the precautions that would be required for non-waste commodities. Is it RSPA’s intent to assert, as it has in the past, that repackaging is a "covered subject" under HMTA/HMTUSA and that state regulations pertaining to repackaging that are not substantively the same as corresponding federal regulations are subject to preemption?"

Facility Design and Operation As noted above, RCRA allows states to adopt hazardous waste regulations that are broader in scope and more stringent than federal regulations. Most NEWMOA states require secondary containment and spill prevention/mitigation equipment at loading docks and bulk transfer facilities where hazardous wastes are handled. Training, contingency plans and evidence of financial responsibility are also required. Local authorities may also impose requirements. Does the RSPA proposal intend that these requirements should remain effective at all facilities where hazardous wastes are handled and stored incidental to movement or will they be preempted in some instances?

Storage Incidental to Transportation RSPA should clarify when the proposed regulations will/will not apply to storage at a transfer facility incidental to transportation, assuming that the facility is not the destination listed on the shipping papers. The clarification should explicitly cover whether and how the expectation of repackaging prior to reshipment makes a difference in the applicability of the regulations. This issue is particularly important with respect to hazardous wastes because repackaging of such wastes is so common at transfer facilities.

Liability Insurance DOT currently requires an endorsement on the carrier’s vehicle insurance for environmental restoration (DOT Form MCS-90). However, a review of the endorsement language leads one to conclude that containers that are off-loaded from the insured vehicle for handling and storage incidental to movement would not be covered by this insurance. Would state requirements for liability insurance covering the storage and transfer facility remain effective?

Defining Care Custody and Control In the definitions of loading and unloading incidental to commerce, the proposal states that the regulations apply when the carrier has care and custody of hazardous materials. A definition, clearly establishing the points at which the transfer from or to a carrier occurs, and providing observable/enforceable indicators, would help to avoid ambiguous situations that could undermine enforcement.

Truck to Truck Transfers NEWMOA-state regulatory officials remain concerned that, apparently, truck to truck transfer incidental to movement could occur anywhere, including public rest

areas, near schools or playgrounds and at shopping centers. Would the proposed regulations preempt state requirements/prohibitions regarding transfers on property that is not owned by the carrier?

Coordination With EPA Regulations Several NEWMOA members have commented that the DOT-RSPA proposal should be fully coordinated with EPA because of the overlap in jurisdiction, and potential for inconsistencies and ambiguity concerning which requirements prevail under certain circumstances involving hazardous wastes. Examples include: use of the hazardous waste manifest versus DOT manifest requirements; inconsistency between DOT and EPA definitions of “onsite”; applicability of more stringent state requirements specifically authorized by RCRA, and the need to ensure that DOT-RSPA adequately addresses the unique aspects of hazardous wastes as a sub-category of hazardous materials.

Security The tragic events of September 11 have focused increased public scrutiny on the transportation of hazardous materials. Significant concerns about potential catastrophic impacts on public safety, health, and the environment have developed in the wake of the reported discovery that allegedly, a number of people fraudulently obtained commercial drivers licenses with hazmat endorsements. Fears that some such individuals might gain control of vehicles loaded with hazardous materials and use them as weapons of terror should cause government regulatory agencies to pause and consider these events in the context of any rulemaking affecting the transportation of hazardous materials. Recent events seem to call for more stringent regulation of transportation, not less; and the States, being on the “front line”, would appear to be in the position to play a significant compliance and enforcement role, particularly regarding transportation of hazardous waste.

In closing, NEWMOA’s member-state regulatory officials and staff wish to thank you for this opportunity to comment on this important and worthwhile regulatory development effort. We applaud the good work that you have completed and appreciate the difficulty that you face in addressing the concerns of so many stakeholders. We look forward to working with you to assist your efforts. Please feel free to contact me at 617-367-8558, ext. 301 if you have any questions or I can be of assistance.

Sincerely,

William F. Cass
Executive Director

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