



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

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

OCT 10 2006

Mr. Frits Wybenga
Technical Director
Dangerous Goods Advisory Council
Suite 740
1100 H Street, N.W.
Washington, DC 20005

Ref. No.: 06-0123

Dear Mr. Wybenga:

This is in response to your April 18, 2006 letter regarding closure notification requirements in § 178.2(c)(1) of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you ask this office to reconsider the interpretation in our March 4, 2005 letter to Ms. Rebecca Cernick of Bayer MaterialScience LLC (Bayer) regarding packaging closure notification requirements.

In your letter you state your view that an offeror of a hazardous material in a package is never required to provide closure notification instructions to the person to whom the shipment is delivered, apparently based on your understanding that the offeror is distributing a package rather than a "packaging" as referred to in § 178.2(c)(1). Your understanding is incorrect. In the scenario provided, Bayer supplies a hazardous material to its customer in a bulk package (specifically, an intermediate bulk container or "IBC") which is to be returned, containing the residue of the material, by the customer to Bayer. A package, as defined in 49 CFR 171.8, "means a packaging plus its contents". In this scenario, Bayer not only offers a package for transportation but also distributes a packaging to its customer for return shipment to Bayer containing its hazardous material residue and, therefore, is subject to the notification provisions of § 178.2(c)(1). If, in the scenario described in Ms. Cernick's letter, the IBCs were to be cleaned and purged prior to their return to Bayer, no notification would have been required.

You suggest that, as a result of our March 4, 2005 letter, consignees could be faced with the dilemma of having to re-close



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178.2(c)(1)

emptied packages from different suppliers in different ways. We agree that such complications do exist for offerors of empty packagings; however, these complications result from the offering of multiple package designs. Such complications are not a result of our interpretation of the unique scenario described in Bayer's letter. This same scenario exists for offerors of full packagings.

You indicate you see no apparent safety benefit in a supplier such as Bayer providing notification of closure requirements to its customers who will return packages. We disagree. Ensuring that a package is closed in a manner which precludes the release of a hazardous material is essential to safe transportation, regardless of whether the package is filled or contains only a residue. In accordance with § 173.29, an empty packaging containing only the residue of a hazardous material must be offered for transportation and transported in the same manner as when it previously contained a greater quantity of that hazardous material. This includes properly closing the packaging for transportation.

It remains our opinion that, in the scenario described in Ms. Cernick's letter, Bayer provides its customers with IBCs for return shipment containing residue and therefore must provide the written notification required under § 178.2(c)(1). Considering the apparent misunderstanding of this requirement, we will try to provide clarification in future rulemaking action. If your association has recommendations for change, please let us know. If you have further questions, please do not hesitate to contact this office.

Sincerely,



Edward T. Mazzullo

Director, Office of Hazardous Materials Standards



Dangerous Goods Advisory Council

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Dollack
178.2(c)(1)
Applicability
06-0123

April 18, 2006

Dr. Robert A. McGuire
Associate Administrator for Hazardous Materials Safety
Pipeline and Hazardous Materials Safety Administration
U. S. Department of Transportation
Washington, DC 20590

Dear Dr. McGuire:

We appreciate your responding to our letter of October 14, 2005 concerning the applicability of the 49 CFR 178.2(c) requirements to provide notification of information necessary to complete a packaging. However, we are concerned about the conclusion drawn in your response and ask that you once again reconsider your interpretation.

This issue now involves several communications (a file of relevant letters is attached). In a letter dated March 4, 2005, addressed to Ms. Rebecca Cernick of Bayer Materials Science LLC, Ms. Mitchell stated Bayer Materials Science LLC, an offeror, must provide its customers with a written notification conveying information described in § 178.2(c)(1). In DGAC's letter of October 14, 2005, we pointed out that the notification requirement in § 178.2(c)(1) applies to manufacturers and subsequent distributors of a packaging. We noted that based on the definitions of *packaging* and *receptacle* provided in § 171.8, packagings are unfilled and contain no hazardous materials. A filled receptacle is a package. A hazardous material offeror is not a distributor of a packaging and is therefore not required to provide customers with the information in § 178.2(c)(1). In PHMSA's response of November 30, 2005, Ms. Mitchell expressed the view that a packaging could contain a hazardous material but acknowledged that an offeror need not in all circumstances forward closure information. She also stated that since Bayer was instructing its customer to return the emptied package to Bayer, it was transferring a packaging to the consignee and was subject to the notification requirement in 178.2(c)(1).

On the basis of Ms. Mitchell's comments, we conclude that DOT believes there are circumstances when an offeror (of a filled packaging) is a provider of both a package and a packaging. This is an unreasonable position in our view, and one not contemplated by or accounted for in the HMR. Our position is that an offeror of a hazardous material in a package is never required to provide closure instructions to an emptier.

In addition, the DOT interpretation creates practical problems for consignees. A single company receiving hazardous material packages of identical design type from two different offerors could be faced with the dilemma of having to reclose the emptied packages differently if one offeror instructed the company to transfer the empty packages and the other did not. Requiring certain empty packages to be closed in accordance with closure instructions and others not complicates the management of the process for sending packages for recycling or reuse.

There is no apparent safety benefit for the PHMSA interpretation. The vast majority of empty packages offered for transportation (e.g., those sent for reconditioning) are not subject to a proviso instructing the consignee to return the empty packages to the offeror or to ship them to another specified location. These packages are tightly closed but not necessarily in strict accordance with the original closure instructions. This practice has been followed for many years and has proven to be safe. Further, most empty packages contain small amounts of materials that are permitted to be transported as limited quantities, to which closure instructions are not applicable. There is no apparent safety benefit gained in closing empty packages in accordance with the original closure instructions which, in any event, are intended to ensure new or reconditioned packages are properly closed after initially being filled.

We therefore ask that you reconsider your previous interpretation.

Sincerely,



Frits Wybenga
Technical Director

Cc: Bob Richard