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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 7, 1996

Mr. Charles Dickhut, Chairman
Association of Waste Hazardous Materials Transporters
2200 Mill Road
Alexandria, Virginia 22314

Dear Mr. Dickhut:

I am pleased to respond to your October 12, 1995, letter, in which you request clarification of federal policy on several issues related to the use of the hazardous waste manifest by hazardous waste transporters.

Transfer Facilities and the Manifest

First, your letter asks me to clarify when an operator of a "transfer facility" must sign either the transporter blocks of the manifest, or the corresponding blocks on the manifest continuation sheet. This issue appears to have arisen from conflicting interpretations of the transporter signature requirements offered by two RCRA authorized states. According to your letter, one state requires operators of transfer facilities to sign a transporter block only in those cases where the operator also is involved in transporting the waste to or from the transfer facility. The other state, however, requires that the operator of the transfer facility sign a transporter block of the manifest to reflect the handling of the waste at the transfer facility, even though that transporter may have already signed another transporter block in connection with transporting the waste to or from the transfer facility. Thus, in the example of the second state, the same transporter company may be required to sign multiple transporter blocks, to reflect its various transport and transfer operations.

RCRA regulations generally require consistency in the use of the hazardous waste manifest, particularly with respect to the entry of federally required information. Indeed, consistency in the use of the manifest is one of the exceptional areas in RCRA

where the usual rule acknowledging the States' latitude to operate more stringent programs must at times yield to the interests of national uniformity in the transportation of hazardous materials. EPA explained the balancing of the "state stringency" and "consistency" interests when it promulgated jointly with DOT the Uniform Manifest as a final rule on March 20, 1984. See 49 FR 10490 at 10492 et seq. In addition, the federal hazardous materials transportation laws include express authority under which the DOT may preempt State laws which touch upon the preparation, content and use of shipping papers used in conjunction with the transportation of hazardous materials in commerce, unless the State laws are "substantively the same" as the federal requirements. 49 U.S.C. 5125(b)(1). DOT has ruled that state manifest requirements that vary from the joint EPA/DOT regulations prescribing the manifest system are subject to its HMTA preemption scrutiny, and such state laws are preempted when they "significantly alter the information supplied on the manifest." See 60 FR 62528 at 62537 (December 6, 1995). In the December 6, 1995, notice, DOT's Research and Special Programs Administration issued a preemption decision that invalidated a state regulation that required the use of a second transporter block to record the transfer of waste from one vehicle to another at a transfer facility. Id. at 62538. Our response which follows addresses only the issue of federal EPA policy on the use of the manifest transporter blocks. Since your letter raises an issue similar to the one addressed in the recent preemption decision, you may also wish to consult with DOT to determine whether these particular state requirements pose issues under their statutes and regulations.

The federal manifest regulations currently do not require the use of a transporter block (a federally required data element) to record the handling of hazardous wastes at facilities meeting the definition of a transfer facility. Rather, the instructions in the Appendix to Part 262 clarify that the transporter blocks (Items 5 and 7) should be used to identify the company names of transporters "who will transport the waste." Further, the provisions in section 263.20 dealing with obtaining transporter signatures emphasize that it is the delivery of a shipment of hazardous waste from one transporter to another that is the event triggering the next transporter's obligation to sign the manifest. These requirements illustrate that the overarching purpose of requiring handler IDs and signatures on the manifest is to demonstrate custody of and accountability for the hazardous waste

at any point in time during its shipment.

By definition, transfer facilities described in 40 CFR section 263.12 must be owned or operated by transporter companies. Because they are owned or operated by transporter companies, they may be required to be identified on a transporter block (and sign a transporter's acknowledgment of delivery) when their receipt of a hazardous waste shipment reflects an actual change in the custody of the shipment. Thus, where a transfer facility is required to be identified on a transporter block, it is because there is a delivery (with a shift of custody) to a new transporter, and not merely because that transporter engages in transfer activities.

If, however, the transporter who in fact transports hazardous waste to a transfer facility is understood to retain responsibility for the waste while it is stored at a transfer facility, there is no change in custody at the time the waste is placed in temporary storage at the transfer facility. In this case, the transfer facility operator should not be identified on an additional transporter company block (block 5 or 7), nor should it sign a transporter acknowledgment (blocks 17 or 18) when the waste is received at the facility. Likewise, it is unnecessary to identify a transporter company on multiple transporter blocks (e.g., 1 block for a transporting segment and a 2nd block for transfer activities) if the same transporter company conducts the activities, and there is no interruption in that company's custody and control. In this case, the same transporter company is still conducting transportation related activities throughout the period of its handling the waste shipment, and it would serve no purpose to require signatures to reflect a transfer of custody to itself.

This clarification is consistent with transfer facility guidance issued by Sylvia Lowrance on October 30, 1992. In that detailed guidance, the Office of Solid Waste explained that the entities and identification numbers that must appear on the manifest correspond to the "generator of the waste, all of the transporters who transport the waste, and the designated facility." As explained then, when a transporter company transports waste to and from a transfer facility which it operates, and the waste remains under the control of the transporter, no separate entry specific to the transfer facility must appear on the manifest. Thus, today's guidance expands on the 1992 guidance slightly, by clarifying that a transfer facility

should be identified as a transporter on the manifest only when it is accepting custody and control of the shipment from another transporter company that delivered the shipment to the transfer facility.

We recommend that state programs follow this guidance to minimize confusion and foster greater consistency under the circumstances which you identified in your letter. I emphasize, however, that authorized State programs generally have latitude to impose more stringent requirements, and I am not making specific RCRA consistency findings regarding the particular state programs which you reference in your letter, since I do not have sufficient information in hand about the statutes, regulations, or interpretations affecting those states.

Transporter Requirements and Imports

Your letter also suggests that there is a potential conflict in the transporter regulations that address imports of hazardous waste into the U.S. As you point out, the import regulations (Subpart F of Part 262) impose requirements on importers to comply generally with the Part 262 generator standards, as well as more specific directions for completing the manifest for the imported wastes. See 40 CFR section 262.60(a) and (b). The latter directions require the importer to substitute its name, address, and EPA ID number, as well as the name and address of the foreign generator, for the generator information normally entered on the manifest for a domestic shipment. On the other hand, in the transporter standards of Part 263 (and also on the printed manifest instructions), there is the direction that a transporter of hazardous waste must assume a generator's responsibilities under Part 262 (such as originating the manifest), when it transports hazardous waste into the United States from abroad. 40 CFR section 263.10(c)(1).

EPA does not believe that there is a conflict between the generator requirements and the transporter requirements with respect to shipments of hazardous waste from abroad. Section 263.10(c) requires transporters that transport hazardous waste from abroad into the United States to comply with the relevant generator requirements, i.e., the importer requirements at section 262.60. Section 263.10(c) basically serves to cross reference section 262.60 requirements and is intended to indicate that a transporter that meets section 263.10(c) conditions may be subject

to "importer" obligations.

Section 262.60 imposes certain generator requirements on "any person who imports hazardous waste from a foreign country into the United States." EPA has not defined "importer," but has interpreted the term broadly to potentially include numerous parties such as hazardous waste brokers, TSD facilities, or transporters, among others, depending on the situation. There could possibly be several different "importers" involved in a particular shipment. As EPA explained in a June 25, 1985, memorandum (attached), where there is more than one importer involved with a shipment, EPA requires only one of the parties to perform the section 262.60 importer duties. Therefore, in such cases, the parties can agree among themselves (e.g., through a contractual agreement) as to who will perform the importer duties. (As the 1985 memo notes, however, if the designated entity fails to perform the importer duties, all of the parties could be subject to EPA enforcement for the failure to comply).

With respect to your Association's members, where the transporter is one of several parties who may be importers of a shipment, it may be helpful to have the transporter arrange with the other parties to assume the importer responsibilities for the entire group. This arrangement would avoid unnecessary and duplicative compliance activities by the transporter and other parties.

Expedited Consent to Alternate Cosignees in Canada

Third, you raise a concern that there may be some irregularities occurring with respect to rejection by Canadian consignees of shipments of hazardous waste originating in the U.S. According to your letter, the rejected shipments are frequently rerouted to other Canadian consignee facilities, upon the U.S. generator and Canadian facility obtaining permission from Environment Canada. Your letter appears to agree that this is an expedient response to the rejection, but out of concern for potential liabilities, you ask whether the practice conforms with EPA's export regulations. The regulations provide that alternate arrangements for an exported shipment shall not proceed (except in circumstances not relevant here), until there has been renotification to EPA of the proposed changes, and the exporter has obtained an Acknowledgment of Consent to the changes from the import country. 40 CFR section 262.53(c).

While this regulation provides the general standard for exported shipments, transboundary movements between the United States and Canada are governed by a specific bilateral agreement that was executed in 1986, and amended in 1992. The 1986 agreement enables Environment Canada, under its domestic laws, to agree to changes in the terms of a transboundary shipment, without invoking the more formal, diplomatic process described in the above regulation. EPA believes that this expedited form of "consent" from Environment Canada would, as a practical matter, satisfy the general requirements in section 262.53(c) that an exporter obtain "consent" to proposed changes from the importing country. Thus, the rerouting to alternate consignee facilities in Canada, under the consent process described in your letter, does not violate U.S. law or policy. I note, however, that the U.S. exporter must still provide renotification to EPA of the proposed changes, notwithstanding any expedited "consent" from Environment Canada to the changes. We assume that these two communications would ordinarily occur simultaneously, to avoid unnecessary delay.

Your additional comments on the North American Manifest concept, and the ongoing efforts to reduce the burden of the manifest system, are acknowledged and appreciated.

Thank you for your continuing interest in the RCRA generator and transporter regulations. Should you need more information on these issues, please contact Richard LaShier on 202-260-4669.

Sincerely yours,

Michael Shapiro, Director
Office of Solid Waste

cc: Richard LaShier
Ann Codrington

Attachment

ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS
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(703) 838-1703
Fax (703) 549-9570

October 12, 1995

Michael Shapiro
Director
Office of Solid Waste
Mail Code - 5304
U.S. Environmental Protection Agency
401 "M" St., SW
Washington, DC 20460

Dear Mr. Shapiro:

I am writing on behalf of the Association of Waste Hazardous Materials Transporters to request your interpretation of rules concerning the Uniform Manifest.

The AWHMT is affiliated with the American Trucking Associations federation. The AWHMT represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in North America. The Association is a not-for-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

All members of the Association transport shipments required to be accompanied by the Uniform Manifest. Recently, several practices involving the processing of the Uniform Manifest and related issues have come to our attention. Some of these practices are potentially burdensome. Others appear to be contradictory. Your clarification of federal EPA policy on these matters would be most appreciated.

When, if ever, must an operator of a transfer facility sign the Uniform Manifest?

At least two states are rendering different opinions about the duty of transfer facility operators to sign the Uniform Manifest. Texas does not want operators of transfer facilities to sign the Uniform Manifest unless the operator also provides a transportation segment to or from the facility, or both. In this case, the signature would appear in item 17 or 18 of the Uniform Manifest (or item 33 or 34 of the continuation sheet).(See footnote 1) However, the signature would not be intended to indicate that waste had been held in temporary, in-transit storage. Rather, the sole purpose of the signature would be to indicate the identity of the entity providing the actual transportation of the waste. On the other hand, Louisiana contends that the operator of a transfer facility must sign the Uniform Manifest in item 17 or 18 (or item 33 or 34 of the continuation sheet)(see footnote 2) even if the facility operator is or will be the transporter of record listed on the Uniform Manifest because the facility operator provides either the transportation segment to the facility or from the facility. This practice could result in the same company being listed on the Uniform Manifest three times as transporter 1, for bringing the hazardous waste to the transfer facility, as transporter 2, for holding the waste at the transfer facility, and as transporter 3, for moving the waste from the transfer facility.

We believe that the signature of the transfer facility operator is not necessary if the operator is already listed as a transporter on the Uniform Manifest because the facility operator also provides the transportation segment that delivered the hazardous waste to the transfer facility or will provide the transportation segment removing the hazardous waste from the facility, or both. In all cases, the Uniform Manifest chain of custody is preserved. Conversely, we believe that the signature of the transfer facility operator is required by federal rules on the Uniform Manifest if the operator performs no on-vehicle movement of the waste. In support of our position we note that the ability to store manifested shipments of hazardous waste at transfer facilities for periods of ten days or less is reserved to transporters.(See footnote 3) Transporters are prohibited from delivering hazardous waste to anyone but another transporter when the waste has not reached its designated destination.(See footnote 4) Beyond the letter of the law we believe the spirit of the law

demands a demonstrated chain of custody of all entities assuming control of the waste from the point of generation to the receipt at destination.(See footnote 5)

Who is to be listed as the "generator" on the Uniform Manifest when hazardous waste is imported into the United States?

EPA's rules applicable to transporters provide that "[a] transporter of hazardous waste must also comply with 40 CFR 262, Standards Applicable to Generators of hazardous Waste, if he transporters hazardous waste into the United States from abroad."(See footnote 6) The Association has always interpreted this regulation to require the transporter providing the first segment of travel in the United States to be listed as the "generator," completing items 1, 2, 4 and 16 of the Uniform Manifest, as well as being listed as "Transporter 1" in items 7, 8 and 17.

We have always felt this policy was unfair to transporters and attempted to raise our concerns about the equity and merit of requiring a transporter to assume generator status simply because travel involved a cross-border movement during the RCRA Manifest Regulatory Negotiation (Reg/Neg). Nothing said by EPA during these negotiations suggested an interpretation of the rules other than that which appears above. Regrettably, the Reg/Neg came to closure without resolution of this matter. Rather, the final Reg/Neg agreement provides that "[a] definition of importer will be addressed by EPA in its work on the Basel convention, and thus the issues raised in the manifest reg neg may be addressed in that forum."(See footnote 7)

On the other hand, it was recently brought to our attention that EPA rules at 40 CFR 262.60 appear to contradict the requirement that the transporter assume generator status for imports. This rule provides that:

"[w]hen importing hazardous waste, a person must meet all the requirements of §262.20(a) for the manifest except that: (1) In place of the generator's name, address and EPA identification number, the name and address of the foreign generator and the importer's name, address and EPA identification number must be used. (2) In place of the generator's signature on the certification statement, the U.S. importer or his agent must sign and date the certification and obtain the signature of the initial

transporter."(See footnote 8)

It may be in some cases that a transporter is indeed the importer. However, in cases where the transporter is not the importer, we do not believe the transporter should have to sign the Uniform Manifest as implied in 40 CFR 263.10.

May exported loads which are rejected by the designated TSDF be received by another TSDF without modification of the Intent to Export Notification?

As in the United States, shipments of hazardous waste are rejected at foreign-based TSDFS for a variety of reasons. If such rejection occurs in the United States, the U.S. generator is given as option of redesignating another TSDF to receive the waste. However, the ability of a U.S. generator to redesignate alternate foreign-based TSDFS without providing EPA with a renotification of the change and obtaining the receiving country's approval appears to be prohibited. Although the Intent to Export Notification allows the U.S. generator to designate an "alternative consignee," if such alternative consignee is not designated, the EPA rules provide that:

"the primary exporter must provide EPA with a written renotification of the changes. The shipment cannot take place until consent of the receiving country to the changes ... has been obtained and the primary exporter receives an EPA Acknowledgment of Consent reflecting the receiving country's consent to the changes."(See footnote 9)

It has recently come to our attention that rejected shipments of U.S. exported hazardous waste at facilities located in Canada are frequently rerouted to other Canadian-based facilities after the Canadian TSDF with the U.S. generator obtain permission from Environment Canada. Typically, renotification of U.S. authorities is not made because the time delay would not be tolerable in a transportation setting. If a renotification is the only option for the foreign delivery of rejected shipments, these shipments would simply be returned to the United States. Such unnecessary transportation incurs its own environmental impacts. However, unless EPA is able to clarify its policy to allow redesignation of TSDFs without renotification, more return transportation will be the result. Not only must a transporter and generator be concerned about possible enforcement by states with manifest

programs when discrepancies between the TSDF listed on the Uniform Manifest and the TSDF listed on the Intent to Export Notification are compared, but what enforcement action might be expected from federal EPA as well.

North American Manifest

Inasmuch as this letter is devoted to Uniform Manifest issues, we would also like to bring directly to your attention our strong support for a North American Manifest form and system. We believe such international cooperation is well within the spirit of NAFTA and would surely reduce regulatory burdens on those involved in the transboundary movement of hazardous waste.

Manifest Burden Reduction

We hear much these days about the "burden" of the Uniform Manifest and the possible advantages of converting manifest information to EDI format. While it may be technically feasible to reduce the Uniform Manifest to EDI transmissions, we are not wholly convinced of the merit of such proposals. We believe a tremendous regulatory burden would be eliminated simply by eliminating the option for states to require their own version of the Uniform Manifest form. At minimum, EPA manifest rules must accomplish three objectives: establish chain of custody, provide on-vehicle hard-copy U.S. Department of Transportation-required information, and prohibit non-federal jurisdictions from imposing duplicative, different or additional manifesting requirements. We hope these are principles that you can support.

Conclusion

These questions together with one we submitted to your staff on August 21, 1995 concerning the definition of "transporter" for purposes of completing the Uniform Manifest represent Uniform Manifest issues that have been brought to our attention in recent months. Members of our Association do not want to be at odds with EPA policy and rules. Your written interpretation of policy concerning the issues raised above will be most appreciated.

Thank you for your attention to these matters. We look forward to your reply.

Sincerely,

Charles Dickhut
Chairman

1 By extension, information of the signatory would have appear in items 5 through 8 or the Uniform Manifest or items 24 through 27 of the continuation sheet.

2 By extension, information of the signatory would have to appear in items 5 through 8 or the Uniform Manifest or items 24 through 27 of the continuation sheet.

3 40 CFR 263.12.

4 40 CFR 263.21.

5 In an interpretation, EPA notes that in situations where,

"one company transports waste to and from a transfer facility it operates, and the waste remains under the control of the transporter, no separate EPA ID number need be entered on the manifest specific to the transfer facility. However, ... waste must remain under the control of a transporter as designated on the manifest while at a transfer facility."

It could be inferred from this statement that if the waste at a transfer facility does not remain under the control of the transporter which delivered or removed the waste from the site that another transfer who has control of the waste at the transfer facility must enter its EPA identification number.

Memorandum from Sylvia Lowrance, Office of Solid Waste, EPA, to David Ullrich, Waste Management Division, EPA, October 30, 1990, page 3.

6 40 CFR 263.10(c)(1).

7 RCRA Manifest Regulatory Negotiation, Final Agreement, page 3, item 1.3.4.

8 40 CFR 262.60(b).

9 40 CFR 262.53(c).