



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

**1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023**

November 13, 2002

Yan Li, PE, Senior Engineer
Rhode Island Department of Environmental Management (RIDEM)
Office of Waste Management
235 Promenade Street
Providence, RI 02908-5767

Dear Ms. Li:

EPA New England Hazardous Waste Program Unit received your letter dated September 23, 2002 asking our assistance regarding RIDEM's regulatory authority over rail car operations at a permitted TSD facility in Rhode Island. Because the nature of the question raised legal issues, Jeffrey Fowley of our Office of Regional Counsel has provided the response in the attached memorandum.

If you have any questions, please contact Jeffrey Fowley directly at 617-918-1094. Alternately, you may contact Jui-Yu Hsieh of Hazardous Waste Program Unit at 617-918-1646.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marvin Rosenstein".

Marvin Rosenstein, Chief
Chemical Management Branch
Office of Ecosystem Protection

Attachment:

cc: Gary Gosbee, EPA, OEP
Jeffrey Fowley, EPA, ORC
Ken Rota, EPA, OES
Laurie Grandchamp, RIDEM
Stacy Ladner, MEDEP
Peter Marshall, VTDEC
Jim Miller, MADEP
John Duclos, NHDES
Dave Sattler, CTDEP

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 Congress Street, Suite 1100
BOSTON, MA 02114-2023

Memorandum

Date: November 7, 2002

Subj: Regulation of Hazardous Waste Stored in Rail-Car

From: Jeffrey Fowley, Office of Regional Counsel

To: Gary Gosbee, Chief, Hazardous Waste Management Unit

On September 23, 2002, the Rhode Island Department of Environmental Management ("DEM") requested a regulatory interpretation from EPA Region I regarding whether hazardous waste stored in a rail-car at the Chem-Pak facility would be subject to State regulations or whether the State regulations would be preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 et seq. ("HMTA"), administered by the U.S. Department of Transportation ("DOT"). Since the DEM's request raised legal issues, it was assigned to me for response.

The DEM is in the process of reissuing a hazardous waste treatment and storage permit to the Chem-Pak facility. In the permit application, the facility has proposed to load blended waste and oils into a rail-car which will be located on a track at the facility. The permit application states that the loading will be done by Chem-Pak employees and that after the completion of loading, the railroad will be notified to pick up the rail car.

The DEM would like to regulate the rail-car as a storage unit while it is located within the boundaries of the Chem-Pak facility. In particular, the DEM would like to require that there be secondary containment around the rail-car. However, in the permit application, Chem-Pak has indicated that it is proposing to follow only DOT regulations while loading and storing hazardous wastes in the rail-car.

In the circumstances presented, it seems clear that the DEM may regulate the rail-car as a storage unit, including by requiring secondary containment. The State regulations are not preempted while the rail-car is being used for on-site storage by Chem-Pak.

Under HMTA, the DOT regulates the transportation of hazardous waste, including loading and storage "incidental to ... movement." 49 U.S.C. § 5102(12). However, the DOT does not regulate storage at fixed facilities which is not "incidental to movement."

In a recent Federal Register Notice, the DOT stated that, “we agree ... that state and local governments have a legitimate role in the regulation of hazardous materials at fixed facilities and that this role should be accommodated to the extent possible within the context of a nationally uniform hazardous materials transportation safety regulatory program.” 66 Fed. Reg. 32420, 32424 (June 14, 2001). Thus the DOT stated its view that storage of hazardous materials by a fixed facility prior to transportation is “not a pre-transportation activity” subject to exclusive DOT jurisdiction. *Id.* The DOT proposed to adopt a regulation to specify that storage “incidental to movement” begins only when “a carrier takes physical possession of the hazardous material for the purpose of transporting it...” *Id.* at 32445. While this regulation has not yet been adopted in final form, I have confirmed with DOT attorney Nancy Machado, the legal contact listed on the Federal Register Notice, that the Federal Register proposal represents current DOT thinking. That is, the DOT distinguishes between storage by a fixed facility prior to a carrier taking possession of hazardous materials, which is left to State and local regulation, and storage after the carrier is contacted and takes possession, which is subject to DOT regulation.

The storage proposed by Chem-Pak falls within what is subject to State and local regulation. The proposed storage will occur at the Chem-Pak facility, with the loading done by Chem-Pak employees. The railroad will take control only after the loading is complete.

Until the railroad is contacted, the storage will not be “incidental to movement,” even though it is within a rail-car. Thus the preemption provisions of 49 U.S.C. § 5125(b), which rule out more stringent State requirements with respect to certain matters subject to DOT regulation, will not apply.

The preemption provisions of 49 U.S.C. § 5125(a), which rule out State requirements which prevent compliance with or pose obstacles to complying with DOT requirements, could still apply. In regulating the on-site storage, the DEM should be careful not to impose requirements which will interfere with the later transportation of the hazardous waste in the rail-car in conformity with DOT requirements. For example, the DEM should not alter the DOT requirements regarding the specifications applicable to the rail-car itself. But the DEM may impose additional requirements regarding such things as secondary containment, contingency planning and employee training, which do not interfere with compliance with the DOT requirements, and which will be applicable to the on-site storage until the carrier takes control. In the permit, the DEM also should incorporate the various safe-loading requirements taken from the DOT regulations and proposed to be followed by Chem-Pak. This will ensure that all appropriate loading and storage requirements are enforceable, as part of the permit.

Finally, I note that the DOT has a procedure whereby States may seek formal interpretations regarding whether regulations are preempted. See 49 C.F.R. §§ 107.203 et seq. Based on my research, however, seeking such a formal interpretation seems unnecessary, since the lack of preemption seems clear.



RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

235 Promenade Street, Providence, RI 02908-5767

TDD 401-222-4462

September 23, 2002

Jui-Yu Hsieh
EPA Region I, CHW
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Dear Ms. Hsieh

I am writing this letter asking for your assistance regarding our regulatory authority over rail car operations at permitted TSDFs. The facility in question (Chem-Pak) is a permitted TSDFs in Rhode Island. In their permit application, Chem-Pak proposed to use the rail car to transport their blended waste and oils to authorized off-site facilities.

It is our desire to regulate the rail car as a storage unit that must meet RIDEM and EPA requirements while it is located within the boundaries of the facility, especially with regard to secondary containment. Our concern is that if the rail car complies with DOT requirements, both RIDEM and EPA regulations may be subject to preemption as per : **49CFR107.202**. We feel a pivotal issue in the determination of regulatory authority will be whether the waste in the rail car is considered to be waste in transit as per 49 U.S.C. 5102(12) as interpreted by USDOT Research and Special Programs Administration and if the requirements in question would be a covered subject of DOT requirements and therefore subject to additional preemption provisions HMTA as amended in 1990.

Your guidance for this matter is greatly appreciated. Thank you very much for your assistance.

Sincerely yours,

Yan Li, PE, Senior Engineer
Rhode Island Department of Environmental Management
Office of Waste Management

Cc: Laurie, Grandchamp, RIDEM/OWM
Ken Rota, EPA, Region I