



# KAPLAN KIRSCH ROCKWELL

November 14, 2008

Ms. Susan Gorsky, Acting Chief  
Standards Development  
Office of Hazardous Materials Standards  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590

Dear Ms. Gorsky:

We are counsel for the City of Alexandria, Virginia, and have received a copy of your November 7, 2008 letter to Mr. Lawrence Bierlein (your reference number 08-0232). After reviewing that letter, we are writing to seek further clarification of the applicability of 49 C.F.R. § 174.304 to certain shipments of hazardous materials by rail.

Your letter responded to an email from Mr. Bierlein dated September 24, 2008, requesting clarification of the applicability of 49 C.F.R. § 174.304 of the Hazardous Materials Regulations (HMR; 49 C.F.R. Parts 171-180) to a "transloading facility" located on the property of a rail carrier where lading is loaded from rail cars to other packaging, *e.g.*, tank trucks, for further transportation to its "final destination." Your response was that 49 C.F.R. § 174.304 does not apply to such an operation because it:

is intended to apply to unloading operations at the facility that is the final destination for the material. The conditions established in § 174.304 are not applicable to operations of a transloading facility on the property of a rail carrier where the material is transferred to other packaging for further transportation to the final destination.

Because this guidance regarding the applicability of 49 C.F.R. § 174.304 is framed very broadly and presupposes that the activity being performed meets the regulatory definition of "transloading," I am writing to seek further clarification of the applicability of 49 C.F.R. § 174.304 to a transfer operation being conducted by a railroad in a way that may affect the applicability of Section 174.304.

49 C.F.R. §174.304 provides as follows:

A tank car containing a Class 3 (flammable liquid) material . . . *may not be transported by rail* unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is to be delivered and unloaded . . . or to a party using railroad siding facilities which are equipped for *pipng the liquid from the tank car to permanent storage tanks* of sufficient capacity to receive the entire contents of the car.

49 C.F.R. § 174.304 (emphasis added).

The facility that is the focus of my inquiry is located in Alexandria, Virginia, known as the Van Dorn Yard, and is adjacent to the lines of, and served by, the Norfolk Southern Railway Company ("NSRC"). NSRC owns the property on which the facility is located. Lading arrives by rail at the facility. The lading is identified by waybills on which the only destination listed is the address of the Alexandria facility. At this facility, the lading is consigned to another entity by the shipper, therefore the waybills specify that the lading is to be delivered to the facility "care of" the consignees. The lading—a Class 3 flammable liquid—is transferred at the facility from rail cars into waiting tank trucks using portable pumps. Those tank trucks then transport the lading to another destination, with no further involvement from NSRC.

It appears that the operation described above does not comply with 49 C.F.R. § 174.304. By its terms, Section 174.304 applies regardless of whether an activity is considered "unloading incidental to movement," "transloading" or arrival at a "final destination"; it applies simply to the "transport" of Class 3 flammable materials by rail. The provision unambiguously permits the transport of a Class 3 flammable material by rail *only* if one of two conditions is met: 1) the rail car containing the material is transferred to a party with private track, or 2) it is piped into a stationary storage tank. There is no private track here – the facility is owned by the railroad, and operated for it by a third party contractor. There is no piping at this facility and, to the best of my knowledge, no storage tank that would permit NSRC to satisfy the second alternative.

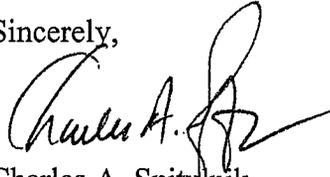
Moreover, even if the final destination of the commodities that move through the Alexandria transload facility is somewhere other than that facility (although the information on the waybills would cause one to believe that this facility *is* the final destination), the movement still violates the requirements of Section 174.304. At the facilities to which this product is destined, there is no private track used for unloading the commodity – it arrives on a truck. In addition, to the best of our knowledge, it is not piped from a rail car into a stationary storage tank – again, it arrives by truck.

In this circumstance, please provide guidance regarding the applicability of 49 C.F.R. § 174.304 to the Alexandria facility. It seems that if your November 7 opinion letter is correct in that Section 174.304 does not apply to such an operation, that any shipper could readily evade the safety measures mandated in Section 174.304 simply by arranging for a transload en route to

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the final destination. We do not believe you intended such a result and write to seek further clarification.

Sincerely,



Charles A. Spitulnik  
Kaplan Kirsch & Rockwell, LLP

cc: Ignacio B. Pessoa, Esq., Office of the City Attorney ✓  
Christopher P. Spera, Esq., Office of the City Attorney

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