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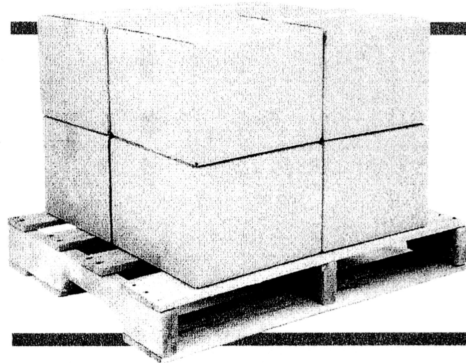

U.S. Ban On Greater-Volume, "Non-Bulk" Packaging Faces A Challenge

By Jerry W. Cox, Esq.

Federal regulators appear ready for a court challenge to a 1991 ban on certain U.N. standard packaging, despite claims that the Pipeline and Hazardous Materials Safety Administration ("PHMSA") acted unlawfully and violated the agency's congressional mandate.

According to Acting Chief Counsel Sherri Pappas, PHMSA prohibits certain packagings with a capacity for solid hazmat greater than 450 L because it does not fit within the regulatory definition of "non-bulk packaging." U.N. Recommendations allow 400 kg shipments of solid hazmat in boxes of various types and sizes, but the U.S. Hazardous Materials Regulations ("HMRs") generally permit such packaging only if it has "a maximum capacity of 450 L."

Critics say the agency violated federal law because it gave shippers no advance notice or opportunity to comment on the restriction. Moreover, PHMSA's refusal to harmonize with international requirements contradicts its statutory mandate by disadvantaging American manufacturers with no corresponding safety benefit.

It has been apparent for years that something was wrong with PHMSA's definitions of "bulk" and "non-bulk" packaging (see sidebar). For solids, the agency defines "bulk packaging" to include only containers designed to hold hazmat that weighs more than 400 kg and exceeds 450 L volume. PHMSA has consistently held that no packaging is "bulk" unless it can handle a shipment that exceeds *both* limits. At the same time, the agency has repeatedly insisted that no packaging can qualify as "non-bulk" unless it is designed for a shipment that (1) weighs no more than 400 kg *and* (2) can handle no more than 450 L. In other words, if a packaging's capabilities are over one limit but not the other, it cannot be considered either "bulk" or "non-bulk."

The disconnect is especially obvious for a U.N. 4G box that could weigh 400 kg but hold more than 450 L. It could meet international standards but, because it is neither "bulk" nor "non-bulk," as defined in the HMRs, it generally could not be used to ship solids from a manufacturing plant to a customer inside the United States.

Research into the regulatory history of these crucial, threshold definitions reveals a simple explanation for this bizarre result. The agency made a sloppy mistake.

Before PHMSA's predecessor adopted "performance-oriented packaging" ("POP") rules, there was a 400 kg weight limit but no separate volume limit. In 1990, however, the United States established POP standards for "non-bulk" shipments, defined for solids to include packaging with "a capacity of 400 kg or less *or* an internal volume of 450 L or less." This definition – adopted after eight years of notice-and-comment rulemaking proceedings in which affected industries filed thousands of pages of comments – allowed packaging with a volume more than 450 L if the weight was at or under the U.N.'s established limit of 400 kg.

When finally published in the *Federal Register*, the POP final rule was riddled with errors. PHMSA's predecessor agency, the Research and Special Programs Administration ("RSPA"), published what it called "editorial and technical corrections" in 1991. RSPA's lengthy new final rule flipped the definition of "non-bulk packaging" on its head by removing the disjunctive word – "or" – in the 1990 rule and replacing it with the conjunctive – "and" – thereby rendering illegal certain greater-volume U.N. packaging that was legal the day before the new rule went into effect. Industry submitted no comments on the costs of such a change because RSPA never proposed it; they just adopted it out of the blue. In fact, the agency seemed to go out of its way to lull shippers and packaging manufacturers by promising in the preamble that the changes "impose no new regulatory burden on any person."

Someone, however, must have noticed that RSPA's statement was flatly untrue, that making the legal, illegal might be considered a "new regulatory burden." Months later, it published yet another final rule, again without any notice or opportunity for comment, promising this time to restore the key disjunctive ("or") language in the non-bulk packaging definition that kept the HMRs consistent with international standards by permitting the use of certain greater-volume packagings. More specifically, the agency said, "the definition of non-bulk packaging is revised to clarify that . . . for solids the maximum net mass of the packaging must be less than 400 kg *or* a maximum capacity of less than 450 L."

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The intended correction – restoration of the definition adopted in 1990 after notice and comment – never appeared in the U.S. Code of Federal Regulations for one simple reason. The agency neglected to follow through. The word "or" was promised in the preamble, but nobody bothered to replace the word "and" in the language RSPA sent to the Government Printing Office. Now, 18 years later, the agency still refuses to admit its mistake and insists, contrary to its own statement in the 1992 "technical revision," that it actually *intended* to make greater-volume packaging neither fish nor fowl and thereby *meant* to create a conflict between the HMRs and international provisions.

The practical result is a "swimming rock" around the necks of American manufacturers of certain types of hazmats, who struggle every day against foreign competition. Fluffy, low-density materials take up a great deal of space before their weight adds up to 400 kg, the limit for UN 4G boxes. The unfortunate result of PHMSA's intransigence is that American shippers must pay for millions of unnecessarily low-volume shipments, which in turn require larger numbers of packages.

For its part, PHMSA insists in recent correspondence that its summary ban on greater-volume packaging in 1991 complied with the federal Administrative Procedure Act because it was "part of the rulemaking in Docket No. HM-181, in which RSPA issued a Notice of Proposed Rulemaking." PHMSA neglects to mention, however, a line of federal judicial decisions nullifying agency action when, as here, rules affecting substantive rights were adopted without ever having been proposed and when the agency's stated justification for a 180-degree turn was exactly opposite what the agency actually did.

There is, however, a more fundamental problem with PHMSA's unlawfully adopted ban on greater-volume packaging. Congress gave the agency two important, but sometimes competing jobs. One is to facilitate efficient transportation of hazardous materials. The second, equally important, job is to maximize public safety during such transportation. The "non-bulk packaging" definition that appears in the C.F.R. contradicts both elements of PHMSA's mission. Rather than helping American manufacturers, it gives foreigners a competitive advantage. At the same time, the restriction has absolutely no impact on safety.

The unlawfully adopted requirement that American manufacturers of low-density hazmat must use larger numbers of packages drives up the cost of their products. For many such products, the most efficient volume for a package weighing under 400 kg will exceed three cubic meters. Accordingly, the rule PHMSA adopted in February, 2010, permitting shipments in newly defined "large packaging," solves nothing.

It is especially galling that this economic burden falls uniquely on *American* manufacturers. For example, PHMSA insists it is illegal for an American company to ship 400 kg of a low-hazard product in a 460 L box, even though it meets all worldwide safety tests and standards. The HMRs, however, allow a competitor – in China, for example – to import into the United States exactly the same hazardous material in exactly the same box and sell it at a correspondingly reduced price at every Home Depot in America. That's because the HMRs make an exception for shipments "transported to, from or within the United States ... in accordance with the International Maritime Dangerous Goods (IMDG) Code." IMDG provides for the use of U.N. 4G packaging for 400 kg shipments in packaging with volumes greater than 450 L.

The only conceivable justification would be if the volume limitation were conducive to safety. The exception for foreign imports proves that the disputed restriction has nothing to do with safety. A U.N. 4G box with a 460 L capacity is no more or less safe because it came from China on a cargo ship before a truck took it to Home Depot. While PHMSA makes the import shipment legal, it makes exactly the same shipment in exactly the same packaging illegal if it got loaded on a truck at an American factory for delivery to the same Home Depot. In reality, the safety of both shipments can be assured by the packaging manufacturer's compliance with testing requirements for U.N. 4G packaging.

PHMSA's purported volume limitation adds nothing other than dead-weight bureaucratic cost on American factories. The agency should admit its mistake and do what it set out to do in the 1992 "correction" rule. It should let industry know that the only lawfully adopted definition of "non-bulk packaging" is the language in PHMSA's 1990 rule, which does not conflict with international standards or unduly burden American hazmat manufacturers. ◻

PREVIOUS REPORTS ON LARGE PACKAGING FROM *The Journal of HazMat Transportation*

The Journal of HazMat Transporation (formerly HazMat Packager & Shipper) published three reports on problems with PHMSA's definition of "non-bulk packaging" in the September/October 2005 issue. Senior Technical Advisor Andy Altemos asked, "Must the Definition of Non-Bulk Packaging Be Revisited?" (p. 28) and laid out "A Concise History of DOT's Bulk and Non-Bulk Packaging Definitions" (p.30). Senior Technical Advisor Frits Wybenga specifically addressed PHMSA's "450 Liter Package Limit" (p. 32).

Correspondence with PHMSA concerning the disputed "non-bulk packaging" definition, including citations to key legal and regulatory sources, can be found online at *The Journal of HazMat Transportation's* website at www.hazmatship.com, U.S. Department of Transportation, Packaging along with this report.

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