

How tomorrow moves



CSX Transportation
500 Water Street, J-275
Jacksonville, FL 32202

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September 13, 2010
NORTHEAST DISTRICT
JACKSONVILLE

Via U.S. Mail and Email (Jenna.D.Perry@dep.state.fl.us)

Ms. Jenna Perry
Florida Department of Environmental Protection
7825 Baymeadows Way, Suite 200B
Jacksonville, FL 32256-7590

CSX Transportation, Inc.
Non-Compliance Letter NCL10-2568HW16NED

Dear Ms. Perry:

This letter responds to Non-Compliance Letter NCL10-2568HW16NED, dated July 1, 2010 and sent by FDEP to CSX Transportation, Inc. ("CSXT"). The purpose of this letter is to present the information discussed in our August 12 meeting at FDEP's Northeast District Office and specifically respond to each of the alleged violations.

We feel it is important to state that CSXT takes its environmental responsibilities very seriously. CSXT has a strong record of commitment to the environment, exhibited by its continued dedication to increase its fuel-efficiency and sustainability. Furthermore, CSXT greatly values its relationship with FDEP, and hopes to work cooperatively with FDEP to resolve these issues.

This letter will first address the applicability of used oil transporter regulations to the railroad, then explain CSXT's current practice of tracking used oil shipments, and finally respond to each of FDEP's alleged violations.

I. APPLICABILITY OF USED OIL TRANSPORTER REGULATIONS

FDEP's used oil regulations, contained in FLA. ADMIN CODE pt. 62-710, govern the management of used oil by used oil handlers, which include used oil transporters and processors. FDEP defines "used oil transporter" as "any person who transports used oil over public highways in shipments of greater than 55 gallons at one time." (FLA. ADMIN. CODE r. 62-710.201(6) (emphasis added)). "Public highway" is a highway controlled and maintained by governmental authorities for general use. (BLACK'S LAW DICTIONARY 747 (8th ed. 2004)). In no sense can a railroad be considered a "public highway," and therefore, FDEP's used oil regulations do not apply to transportation of used oil by a railroad.

The federal regulations for management of used oil define the term “used oil transporter” more broadly. (See 40 C.F.R. § 279.1.) Although FDEP has adopted the federal used oil management regulations, (FLA. ADMIN. CODE r. 62-710.210(2)), FDEP has instructed that the state definition will control if a federal definition is different than the state’s. (See FLA. ADMIN. CODE r. 62-710.210(5).) Therefore, FDEP’s regulations require the application of the state definition of “used oil transporter” to the federal regulations.

Despite the inapplicability of the state regulations to transportation of used oil by railroad, CSXT is willing to provide to FDEP readily available information regarding its used oil shipments. A brief explanation of standard tracking practices is necessary and reiterates our discussion on August 12.

II. INFORMATION AVAILABLE REGARDING USED OIL SHIPMENTS

CSXT is a Class I railroad, and has a rail network of 21,000 route miles that serves 23 states, the District of Columbia, and the Canadian provinces of Ontario and Quebec. Moreover, CSXT transports an average of 20,000 carloads per day, and 7.4 million carloads of products and raw materials each year. Efficiently transporting this volume of products and materials in interstate commerce requires an automated system that can quickly and accurately track key shipment information.

CSXT’s documentation for rail transportation is electronic. After a customer has established a shipping relationship with CSXT and needs to ship a product or material by rail, the customer submits an electronic form that provides basic information such as the customer’s location, car initial and number, hazmat information, load/empty status, and the actual product or materials being shipped. Railroads, including CSXT, classify the products or materials based on the Standard Transportation Commodity Codes (“STCCs”). These STCCs are developed by the Association of American Railroads, and all commodities have a particular STCC code. There are several thousand STCCs.

For example, “used oil” can be shipped as STCC number 4025198 or 4025199. Other commodities may be very similar, but have different STCCs. For example, “petroleum oil mixed load” is 2911987, “petroleum oil residue” is 2911740 and “petroleum oil miscellaneous” is 2911791. Because CSXT has a common carrier obligation to transport any products or materials delivered to them for transportation, CSXT is required to transport used oil.

Used oil, as a non-manifested, non-hazardous material according to 49 C.F.R. pt. 172, is tracked in the same manner as any other commodity.¹ Specifically, CSXT does not

¹ Because the transportation of hazardous materials is strictly regulated by the federal government, CSXT has implemented certain procedures to obtain and retain additional information regarding shipments of hazardous materials. For example, all hazardous materials have an STCC beginning with 49---, and a federally-mandated proper shipping name.

obtain information regarding the quantity, weight, or volume of the non-manifested, non-hazardous commodities that it transports, including used oil. Rather, the applicable unit of measurement is carloads, which may vary in type and size, and may not be filled to capacity. Thus, CSXT does not have any reliable method to provide or estimate how many gallons of used oil that it transports.

Also, CSXT does not handle or pack any of the products or materials loaded into railcars, including used oil. Typically, a customer loads its own products or materials into railcars that the customer owns or leases, located on a railroad spur track adjacent to its facility. A small number of customers use CSXT-owned railcars, but all tank cars that are used to transport used oil are owned by individual customers. After railcars have been loaded and the customer electronically submits its shipping information, a CSXT engine will connect to the loaded railcars for transportation. Depending on their ultimate destination, cars may be switched to other trains at CSXT yards. After delivering railcars to their final destination, CSXT does not unload any products or materials. The entire transportation process is typically completed without any face-to-face or telephone contact with the customer. CSXT merely plays the role of transporter - moving railcars from Point A to Point B.

Finally, CSXT's electronic tracking system can track shipments originating in or delivered to a particular state, but cannot easily track whether shipments have merely passed through a particular state or area. For example, CSXT can obtain information regarding all shipments of used oil (STCCs 4025198 and 4025199) originating in Florida or delivered to a facility in Florida. The electronic tracking system used by CSXT provides searching capabilities for "origin" and "destination." If a shipment originates in New Orleans and then travels across the Florida panhandle and then north into Georgia, however, CSXT cannot easily track such a shipment. The electronic tracking program does not have a search capability for states that a shipment has passed through; rather, CSXT would need to manually input every railroad milepost for the state of Florida, and conduct a search of those mileposts for particular STCCs. This process would be unduly burdensome.

The railroad's role as transporter contrasts with the typical tractor-trailer or truck that transports used oil. In that situation, a single truck driver will pick up a single tanker truck of used oil from a facility. That driver can easily obtain and track all necessary and required information directly from the facility. The same truck driver will then deliver the oil to a specific destination. FDEP's used oil regulations were designed for this situation—the reporting and recordkeeping requirements include information that is readily available to trucking operators.

CSXT, as a railroad that transports millions of carloads in interstate commerce each year, cannot operate in the same manner as a trucking operator. CSXT does not obtain from its customers all of the information that FDEP would require under the used oil regulations; the automated, electronic system that CSXT utilizes to efficiently ship

commodities in interstate commerce does not require such detail for non-hazardous, non-manifested commodities, including used oil. Establishing a system to track such information would require months of development and possibly hundreds of thousands of dollars in capital and operating expenditures, and would present an undue regulatory burden.

Although the plain language of the used oil transporter definition specifically exempts CSXT from compliance, CSXT can, in the interest of accommodating FDEP's information needs, voluntarily provide all readily available information to FDEP regarding used oil shipments to and from Florida.

III. RESPONSE TO ALLEGED VIOLATIONS

a. Violation 1

Rules 62-730.170(2)(e) and 67-710.500(1), FAC: The facility failed to register with the DEP as a hazardous waste transporter for 2010. In addition, the facility has never registered with the DEP as a used oil transporter.

Deny violation.

CSXT originally submitted its hazardous waste registration on May 5, 2010. FDEP responded that CSXT failed to register as a used oil transporter and denied the application.

CSXT reapplied and was rejected by FDEP on August 13, 2010 because it required additional financial responsibility documents. CSXT applied again with additional financial responsibility documents and insurance certifications on September 2, 2010.

For the reasons stated earlier, CSXT is not required to register as a used oil transporter. The definition of used oil transporter specifically excludes transportation by railroad. Moreover, CSXT is not registered as a used oil transporter in any state.

b. Violation 2

Rule 62-710.510(5), FAC: The facility failed to submit an annual report to the DEP for each year that it transported used oil, summarizing its used oil transporting activities.

Deny violation.

As set forth above, CSXT has limited information available regarding its used oil shipments. CSXT can nonetheless provide an annual report to FDEP listing the total

number of tank cars transporting used oil for the following STCCs, which are likely considered "used oil" under FDEP's definition: STCCs 4025198 and 4025199, and any others identified by FDEP.

The annual report form contains space for a transporter to distinguish the quantities of automotive, industrial, and mixed used oil. CSXT cannot provide this information because the STCCs are not specific enough, and there is no way to test, inspect, or otherwise obtain this information.

c. Violation 3

40 CFR 279.46(d): The facility does not keep all used oil shipment records for at least three years.

Deny violation.

CSXT maintains its records electronically for at least 3 years.

d. Violation 4

Rules 62-710.510(1) and 62-710.510(1)(c) and (e), FAC; 40 CFR 279.46(a): The facility does not keep used oil records on DEP Form 62-710.901(2) or on a substantially equivalent form.

The facility's shipping records do not include the following required information: the EPA ID number of the oil provider, the EPA ID number of the receiving facility, the quantity of oil shipped, the signature of the generator, and the signature of the receiving facility. In addition, the facility's shipping records do not include the type of oil shipped and it's [sic] designation or end use.

Deny violation.

CSXT will maintain the following information in its database on a form that is substantially equivalent to FDEP's:

- Number of tank cars carrying used oil for these STCC codes: 4025198 and 4025199
- Origin of the cars
- Destination of the cars
- Date shipped
- Date delivered

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The above represents all of the information obtainable by CSXT without presenting an undue regulatory burden. Despite the inapplicability of the used oil regulations to the railroad, CSXT can voluntarily provide this information upon request in order to cooperate with FDEP. By offering to provide any of the above information, CSXT does not admit or recognize that the FDEP or federal used oil regulations govern CSXT's transportation of used oil by railroad.

Again, CSXT hopes to cooperate with FDEP in resolving its concerns regarding transportation of used oil. Please contact us if you have any questions or would like to discuss further. We look forward to hearing from you.

Sincerely,

A handwritten signature in blue ink that reads "Michael D. Lunsford". The signature is written in a cursive style with a large, stylized initial "M".

Michael D. Lunsford CSP CHMM
Director – Chemical Safety

Cc: Michael Lunsford, CSXT
Jeffrey Styron, CSXT
Ashwin Patel, FDEP
Vicky Valade, FDEP