



August 22, 2019 - via email and FedEx Express

John White
Environmental Consultant
Florida Department of Environmental Protection
3319 Maguire Boulevard Suite 232
Orlando, Florida 32803
Email: john.white@dep.state.fl.us

RE: WARNING LETTER

Dear Mr. White,

We are in receipt of the Florida Department of Environmental Protection's ("DEP") August 12, 2019 Warning Letter from Aaron Watkins, Director, Central District.

FedEx Ground met with DEP on August 14, 2018. During that meeting, FedEx Ground explained its operations and detailed how its facilities are not unpermitted hazardous waste storage facilities.

As a nationwide common carrier, FedEx Ground's transportation functions are regulated by, and must comply with, the federal Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101-5127. Pursuant to the HMTA, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), which is an agency of the U.S. Department of Transportation ("USDOT"), has promulgated Hazardous Materials Regulations ("HMR") with which FedEx Ground's transportation functions must also comply. The HMR are located at 49 C.F.R. Part 105-180. Together, the HMTA and HMR establish the framework with which FedEx Ground's transportation of hazardous materials must comply.

The HMR "apply to transportation of a hazardous material in commerce" and to persons who perform certain pre-transportation functions with respect to the transportation of hazardous materials. 49 C.F.R. § 171.1(b), (c). For purposes of the HMR, "transportation" includes, among other things, movement, loading and unloading incidental to movement, and storage incidental to movement. 49 C.F.R. § 171.1(c)(1)-(4). Furthermore, "transportation" under the HMR "begins when a carrier takes physical possession of the hazardous material for the purpose of transporting it and *continues until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium . . .*" *Id.* § 171.1(c) (emphasis added).

Occasionally, although rarely, a package containing hazardous materials may become damaged or it may be defective. In accordance with the HMR, FedEx Ground has established procedures to ensure that packages containing hazardous materials that are discovered in transit to be damaged or defective are managed in a manner that is compliant with the requirements of the HMR and that protect public health and the environment. When FedEx Ground discovers at a station facility that a package is damaged or defective, its personnel assess the package to determine whether there exists a potential immediate threat of harm to personnel, public health, or the environment. If a threat of harm exists, FedEx Ground staff are required to call a 24-hour emergency response vendor to appropriately handle the package. *See* 49 C.F.R. § 177.854(e). If no threat of harm exists, FedEx Ground staff re-pack the individual damaged package into its own USDOT-approved, properly labeled, completely enclosed and sealed “salvage drum.” *See* 49 C.F.R. § 173.3(c) (permitting use of salvage drums for shipping damaged, defective, or leaking packages containing hazardous materials).

In the latter scenario, the damaged package then continues in transportation inside the salvage drum to the recipient, the original shipper, and/or the nearest FedEx Ground hub facility in Florida.¹ *See* 49 C.F.R. § 177.854(c)-(d). Once the salvage drum reaches a FedEx Ground hub, the damaged package inside is evaluated by appropriately-trained staff to determine, among other things, whether the contents of the salvage drum can be recycled or donated or, instead, whether the contents should be managed and disposed of as hazardous waste.

In every case other than the emergency situation described above, packages containing damaged hazardous materials remain in “transportation” in accordance with the HMR. 49 C.F.R. § 177.854(c)-(d).

The HMR contemplates that “transportation” continues “until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium . . .” 49 C.F.R. § 171.1(c). Additionally, “transportation” for purposes of the HMR includes not only “movement of a hazardous material,” *id.* § 171.1(c)(1), but also “loading incidental to movement of a hazardous material,” “unloading incidental to movement of hazardous material” and “storage incidental to movement of a hazardous material,” *id.* § 171.1(c)(2)-(4).

At no point during the process of discovering a damaged or defective package, or re-packing such a package into a salvage drum, has the package yet been delivered to the destination indicated on the relevant shipping documents or is the relevant destination indicated on those documents changed. *See* 49 C.F.R. § 171.1(c)(4). In fact, no such change to the relevant shipping documents is made, if ever, until the evaluation process is completed at a hub facility.

Moreover, in the course of re-packing damaged hazardous material packages in salvage drums for continued transportation to its hub facilities, FedEx Ground is loading, unloading, and storing the hazardous material packages as part of, *i.e.*, “incidental to,” the continued transportation of those packages to FedEx Ground’s hub facilities. Under the HMR, damaged hazardous material

¹ Hubs are registered with the U.S. Environmental Protection Agency as certified hazardous waste generating facilities.

packages transported in individual, USDOT-approved salvage drums from a terminal facility to a hub facility are still in “transportation” under 49 C.F.R. § 171.1(c). Indeed, PHMSA has analyzed an analogous situation. There, PHMSA opined that damaged hazardous materials packages repacked in salvage drums for movement from a “local terminal” to a hub facility remains in “transportation” and, accordingly, governed by the HMR. *See* PHMSA Interpretation No. 12-0155 dated October 25, 2012.²

In addition to noting that the Resource Conservation and Recovery Act (“RCRA”) requires EPA’s hazardous waste regulations to be consistent with the HMR, the PHMSA Guidance Letter indicates that – in evaluating whether RCRA requirements apply to damaged hazardous materials packages – transporters should consider whether a damaged package becomes “discarded” and is therefore “solid waste” for purposes of 40 C.F.R. § 261.2. In cases other than those where a package cannot be “safely and adequately repaired for transportation” as contemplated by 49 C.F.R. § 177.854(e), the package proceeds to the closest hub facility for evaluation to determine, among other things, whether the material is suitable for recycling, donation, or disposal. And, until such time as the *hub facility* determines there is no suitable alternative to disposal, FedEx Ground does not make a decision to discard it. Therefore, the item in question cannot be considered “solid waste” for purposes of RCRA until after the evaluation takes place at the hub facility.

Likewise, until such time as the hub facility determines there is no suitable alternative to disposal, a damaged or defective hazardous materials package discovered at a FedEx Ground station facility does not qualify as solid waste under Florida law. A material must actually be discarded or classified as “garbage, rubbish, refuse or special waste,” and does not include “recovered materials” which are defined as materials which have known recycling potential or can be reused. Fla. Stat. 403.703 (28), (36).

FedEx Ground is looking into the DEP’s suggestion that FedEx Ground may have improperly coded certain wastes. FedEx Ground also believes that its vendor may have overestimated weights of hazardous waste generated at the Ocala hub. FedEx Ground will change Ocala’s status to one of a large quantity generator for the time-being as we continue to investigate. We will be prepared to discuss these issues in more detail at our upcoming meeting.

It is FedEx Ground’s hope that the follow-up meeting that DEP has requested will facilitate a productive conversation and lead to the swift resolution of this matter. Beyond the information provided during the August 2018 meeting and the documents that FedEx Ground produced in September and October 2018 in response to the Order to Comply with Request for Information dated June 11, 2018, FedEx Ground has no additional facts that would assist DEP in determining whether a violation occurred.

² As suggested during our August 14, 2018 meeting, we understand that motor carrier industry representatives have now engaged PHMSA requesting that the agency consider further action related to its interpretation letter.

Please contact me to coordinate dates for our next meeting. As we have mentioned, we believe that our position is well-founded and supported by applicable law. Thank you for your time and we look forward to meeting with you again.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gaylyn Frosini", with a stylized flourish at the end.

Gaylyn Frosini
Manager- Environmental Affairs
FedEx Ground