U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue SE
Washington, DC 20590

AUG 2 5 2011

Mr. James M. Shuler
Manager, DOE Packaging Certification Program
U.S. Department of Energy
Office of Packaging and Transportation
EM-45, CLOV-2047
1000 Independence Ave., SW
Washington, DC 20585

Ref. No. 11-0040

Dear Mr. Shuler:

This responds to your letter dated February 16, 2011, regarding the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to the Department of Energy's (DOE) National Nuclear Safety Administration (NNSA) response asset teams including, but not limited to, the Radiological Assistance Program (RAP), the Nuclear Radiological Advisory Teams (NRAT), the Accident Response Group (ARG), and the Joint Technical Operations Teams (JTOT), when performing its Nuclear/Radiological Detection, Search and Consequence Management mission (NRDSCM)-directed activities.

In your letter, you state the DOE/NNSA Federal response asset teams are made up of both government and contractor employees who work under the direction of the Lead Federal Agency (LFA) (typically the Department of Homeland Security (DHS) or the Federal Bureau of Investigation (FBI)). Additionally, you state the DOE/NNSA government and contractor personnel, in the performance of their official duties, routinely transport regulated hazardous materials in DOE vehicles, across state lines, and on public or private property or highways. You ask whether the HMR apply differently to DOE/NNSA government personnel and government contractor personnel response asset team activities.

For contract employees, the answer is yes. In general, any person who transports a hazardous material in commerce or causes a hazardous material to be transported in commerce is subject to the Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. §§ 5101-5127, and the HMR. 49 U.S.C. § 5103(b). The term "commerce" means transportation that is or affects interstate trade or traffic. 49 U.S.C. § 5102(l). Thus, a "person" who, under government contract, transports or causes a hazardous material to be transported in commerce is subject to the HMR (see § 171.1(b)). The "[t]ransportation of a hazardous material in a motor vehicle, aircraft, or vessel *operated* by a Federal, state or local *government employee* solely for noncommercial federal, state or

local government purposes" is not subject to the HMR (see § 171.1(d)(5)) (emphasis added).

The HMR do not apply to transportation that is entirely on private property and neither follows, nor crosses, a public way. Property is regarded as private if public access is legally and actually restricted from the area where transportation occurs (see § 171.1(d)(4)). Additionally, transportation of a hazardous material for national security reasons under the conditions specified in § 173.7(b) is not subject to the HMR.

I trust this satisfies your inquiry. Please contact us if we can be of further assistance.

Sincerely,

T. Glenn Foster
Chief, Regulatory Review and Reinvention Branch
Standards and Rulemaking Division

Stevens
§171.1
Applicability
11-0040

Department of Energy
Washington, DC 20585

February 16, 2011

Charles E. Betts, Director
Office of Hazardous Material Standards
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
East Building, Attn: PHH-10
1200 New Jersey Ave. SE
Washington D.C. 20590-0001

Dear Charles Betts

The U.S. Department of Energy (DOE), including the National Nuclear Safety Administration (NNSA), requests an interpretation concerning the applicability of the Hazardous Material Regulations to DOE response asset team activities. The attached "Request for Interpretation on Applicability of Hazardous Materials Regulations to U. S. Department of Energy Federal Response Asset Teams Transportation for Analysis" provides the supporting documentation for this request. This supporting documentation also includes a copy of the Federal Motor Carrier Safety Administration (FMCSA) letter on May 24, 2004 which provided the FMCSA interpretation of a similar DOE request for interpretation.

An electronic copy of this letter and the supporting documentation is being sent to infocntr@dot.gov .

If you have any questions, please feel free to me at 301-903-5513.

Sincerely

James M. Shuler
Manager, DOE Packaging Certification Program
U.S. Department of Energy
Office of Packaging and Transportation
EM-45, CLOV-2047
1000 Independence Ave., SW
Washington, DC 20585

Enclosure

cc: Stephen O'Connor, EM-45

Request for Interpretation on Applicability of the Hazardous Materials Regulations to U.S. Department of Energy Federal Response Asset Teams Transportation of Samples for Analysis

Introduction

The Department of Energy (DOE), including the National Nuclear Safety Administration (NNSA), is seeking a position on the applicability of the Hazardous Materials Regulations to DOE response asset teams within DOE including, but not limited to the Radiological Assistance Program (RAP), the Nuclear Radiological Advisory Teams (NRAT), the Accident Response Group (ARG), and the Joint Technical Operations Teams (JTOT), when performing their Nuclear/Radiological Detection, Search and Consequence Management mission (NRDSCM)-directed activities. The DOE/NNSA Federal response asset teams consist of a blending of both DOE/NNSA employees and DOE/NNSA contractor employees who are under the direction of the Lead Federal Agency (LFA) requesting their assistance, usually the Department of Homeland Security (DHS) and/or the Federal Bureau of Investigation (FBI).

Basis

DOE/NNSA is required to maintain a response capability that currently consists of DOE/NNSA employees and direct contract employees who together make up the DOE technical expert and consequence management asset that supports requests by and under the direction of LFAs in radiological and or nuclear detection search efforts.

In 2004 the DOE approached the Federal Motor Carrier Safety Administration (FMCSA) regarding the operation of Commercial Motor Vehicles for these response assets and the applicability of the FMCSA regulations. In the response from FMCSA, dated May 24, 2004 (attached), it was determined that the DOE teams were covered by the exemption for government transportation under 49 CFR 390.3(f)(2). The rationale was that ..."the contract workers who serve on DOE's emergency response teams are so completely embedded in governmental organizations controlled and managed by Federal personnel that they are functionally indistinguishable from government employees."

Activities

Upon request of an LFA, usually DHS or the FBI, or the Federal Radiological Monitoring and Assessment Center (FRMAC), DOE provides technical experts to the LFA. The DOE technical experts are a mix of DOE and DOE contractors who are deployed representing DOE and are under the direction and control of the LFA and DOE.

In the course of conducting Radiological and/or Nuclear Detection and Search Operations and FRMAC operations, DOE technical experts collect samples of materials that are evidence that must be analyzed as part of their activities.

The DOE response team sampling activities include the collection and movement of samples such as contamination smears, grain, feed, water, soil, vegetation, and discreet suspected items. These samples are then transported back to either a centralized staging area or a mobile field laboratory set up to allow for initial screening and analysis of materials to determine if the initial detection and search missions have been effective in determining the location, and possibly the identification, of radioactive materials. The technical expertise, equipment, and protocol for

taking and handling necessary samples will vary depending on the request, mission, and/or expected response actions.

The response asset teams also move operating nuclear and radiation detection equipment in the conduct of their mission to support an LFA's request for Radiological and/or Nuclear Detection, Search or Consequence Management.

The travel involved in conducting these activities can be to locations where there are no roadways and access is only by off road vehicles, on private roadways, or on public roadways. Under certain circumstances the roadways may be closed to public access by law enforcement or emergency response personnel depending on the type and location of an event.

There are four (4) main activities performed by the Federally directed DOE response asset teams:

Training: Upon request and coordination with an LFA, DOE will prepare radioactive source material and nuclear/radiological detection instrumentation, which are moved either by shipping using commercial carrier or by the DOE asset team in Government vehicles, to an approved location for storage and then later used as part of the training activities. During training activities the radioactive source material may be placed in locations approved by the LFA and DOE to allow for "live" material detection and search training. In conducting detection and search activities some instrumentation that would meet the definition of a hazardous material must be utilized during transportation, unpackaged as part of the operation of the equipment (it is intended to be used while in motion), for the equipment to function properly.

Detection: During a detection mission, the Federally directed DOE response asset teams are generally in a fixed location in the conduct of their activities. In this mode there are times when transportation of instrumentation will need to occur as part of the detection mission. If malicious material is detected and isolated in the field by DOE technical experts, they will securely package the material as directed and agreed upon by the LFA's requirements for preservation of evidence. In conducting this task DOE technical experts will be focused on containment and utilizing appropriate radiological protection to reduce potential dose to as low as reasonably achievable to protect the safety of the immediate workers and public. Once material is packaged, the LFA will direct when and how the material is to be placed into a mode of transport and who will transport the material, under the direction and supervision of the LFA, to a location designated by the LFA.

Search: During a search mission the Federally directed DOE response asset team are not in a fixed location, but rather are moving from one location to another. In this mode they may have to collect evidence samples from different locations and return to a central collection point or mobile laboratory facility to achieve screening of the materials they have collected. In the event a source material is located, it may be necessary for the Federally directed DOE response asset teams to perform initial containment of the material to ensure that immediate personnel and public safety are protected and the material may need to be transported to another location deemed appropriate, by the LFA, to ensure the physical security of the material while preserving the health and safety of the public. At this fixed location, which will vary depending on the geographical location of the discovery, and the resources available to support the retention of the material and ensure its physical security, the material then will be packaged according to the LFA procedures to ensure evidence integrity, and prepared for shipment to a final destination in a compliant packaging. These tasks are usually completed by the DOE technical experts.

Consequence Management: Under Federal direction the DOE response asset team's Consequence Management activities include both the Detection and Search missions above being performed, after an event releases radioactive material to the environment, as part of the mission to determine the extent and location of radioactive material contamination and exposure to the general public. In performing this task, samples of different media must be taken to make accurate public health determinations based on analysis that cannot be performed in the field to the accuracy needed. These include collection of grain, vegetation, water, soil, milk, feces, air and smear samples of surfaces at different locations. These samples may not meet the definition of a hazardous material if taken from an area outside the highest concentrations, but there may be a need to take samples, as directed by the LFA, from an area within in the highest contamination deposition areas. In these cases there is no way to determine accurately in the field if the materials meet the definition of a hazardous material. Samples taken are packaged according to a criteria set forth by the LFA and the Nuclear/Radiological Incident Annex to the National Response Plan (NRP) required by Homeland Security Presidential Directive (HSPD) – 5, which addresses the response of Federal agencies to terrorist incidents involving both nuclear or radioactive materials (Incidents of National Significance), and accidents or incidents involving such material that may or may not rise to the level of an Incident of National Significance.

Authority

These DOE response asset team activities are conducted under the Nuclear/Radiological Incident Annex to the NRP, or under authority of the Home Security Act of 2002, The Post-Katrina Emergency Management Reform Act of 2006, The Captain of the Port Authority (33 CFR 1), U.S. Customs Authority (19 USC), Emergency Federal Law Enforcement Assistance Act, Weapons of Mass Destruction Act 18 U.S.C. Section 2332a, Atomic Energy Act of 1954, Defense Against Weapons of Mass Destruction Act, National Nuclear Security Administration Act of 2000, HSPD-5: Management of Domestic Incidents, HSPD-7: Critical Infrastructure, Prioritization, and Protection, HSPD-8: National Preparedness, HSPD-17/HSPD-4: National Strategy for Combating Weapons of Mass Destruction, NSPD-43/HSPD-14: Domestic Nuclear Detection, NSPD-46/HSPD-15 and its Annexes and Appendices: United States Policy and Strategy for the War on Terror, National Implementation Plan for the War on Terror, National Response Framework, Maritime Operational Threat Response, Aviation Operational Threat Response.

Questions for which DOE Request Interpretation

In general these questions are for the interpretation of 49 CFR 171.1 *Applicability of Hazardous Material Regulations (HMR) to persons and functions* and more specifically to 49 CFR 171.1(d) *Functions not subject to the requirements of the HMR*, and mainly 49 CFR 171(d)(5) concerning Federal and 49 CFR 171.1(d)(6) which address "non-commercial purposes" and how these apply to the activities described above when they are performed by both DOE and DOE contractors under Federal directions.

Q: Are DOE response asset teams mission activities as directed by a Lead Federal Agency non-commercial activities in the context of 49 CFR 171.1(d)(6)?

Q: 49 CFR 171.1(d)(5) excludes movement by Federal, State and Local government employees when moving for Federal, State and Local government purposes. Is this exclusion applicable to DOE response asset teams?

Q: If the DOE response teams are moving material on roadways that are closed to public access by Law Enforcement or Emergency Management Agency personnel, is that movement in commerce?

Q: If the DOE response teams are moving material on roadways that are closed to public access by Law Enforcement or Emergency Management Agency personnel, is that movement non-commercial in the context of 49 CFR 171.1(d)(6)?

Q: If directed by a Federal, State or Local Law Enforcement Officer to move a hazardous material from one location to another, would that movement, when performed by a DOE response asset team, be movement in commerce?

Q: If directed by a Federal, State or Local Law Enforcement Officer to move a hazardous material from one location to another, would that movement, when performed by a DOE response asset team, be non-commercial transportation?

Q: If a DOE response asset team is operating covertly with unmarked vehicles while conducting its response mission under the direction of the Lead Federal Agency, would movement of materials be non-commercial?

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

MAY 24 2004

Refer To: MC-CC

Ms. Ella B. McNeil
Transportation Emergency Management Specialist
Office of Transportation, EM-11
U.S. Department of Energy
19901 Germantown Road
Germantown, MD 20874

Dear Ms. McNeil:

You asked the Federal Motor Carrier Safety Administration whether the vehicles and drivers used by the U.S. Department of Energy's (DOE) Office of Emergency Response are exempt from the Federal Motor Carrier Safety Regulations (FMCSRs), either under 49 C.F.R. 390.3(f)(2), dealing with transportation performed by government, or under § 390.3(f)(5), concerning fire trucks and rescue vehicles.

You reported that DOE maintains several emergency response teams: the Radiological Assistance Program (RAP), Nuclear Radiological Advisory Teams (NRAT), the Accident Response Group (ARG), and Joint Technical Operations Teams (JTOT). These teams are trained to assist Federal, Tribal, State and local authorities during a potential or actual radiological emergency. Among other things, these teams provide monitoring and assessment of the scene and advise on steps that could be taken to minimize hazards. Unless the incident involves materials owned by DOE, a team is dispatched only at the request of Federal, Tribal, State or local officials.

Under a Memorandum of Agreement between the Department of Homeland Security (DHS) and DOE signed on February 28, 2003, DHS will assume operational control of ARG and RAP teams that are summoned to a non-DOE facility in connection with an actual or threatened terrorist attack, major disaster, or other emergency.

The teams are composed of DOE employees and individual contractors, all chosen (or in the case of contractors, hired) for specific kinds of technical expertise. The operational leader of a particular team may be either a DOE employee or a contractor, but all of the teams are controlled and managed by DOE personnel, sometimes under the further supervision of DHS employees.

The trucks operated by the teams usually, though not always, have gross vehicle or combination weight ratings of 10,001 pounds or more. The vehicles are owned by DOE and marked "U.S. Government" and "For Official Use Only" in accordance with 41 C.F.R. 102-34.110. They have U.S. Government license plates. Training accounts for about half of the mileage generated by these vehicles, real responses for the other half. DOE's emergency response teams cross State lines with some frequency.

Each driver has the driver's license required by his or her home State for that type of truck. Some vehicles carry cylinders of compressed oxygen for self-contained breathing apparatus, but not in quantities that require placarding. Only one team operates vehicles subject to 49 C.F.R. Part 383; these drivers hold commercial drivers' licenses and participate in the drug and alcohol testing programs required by 49 C.F.R. Part 382.

In light of this information, we conclude that DOE's emergency response teams are covered by the exemption for government transportation in § 390.3(f)(2). Although the functions of DOE teams are in many ways comparable to those of emergency response vehicles, the more salient fact is that they are simply government teams operating government-owned trucks for governmental purposes. Contractors employed by a Federal or State agency are not necessarily exempt under § 390.3(f)(2), but the contract workers who serve on DOE's emergency response teams are so completely embedded in governmental organizations controlled and managed by Federal personnel that they are functionally indistinguishable from government employees. DOE's emergency response teams – RAP, NRAT, ARG, JTOT and any similar teams that may later be established – are therefore exempt from the FMCSRs under 49 C.F.R. 390.3(f)(2).

I hope this information is helpful. If you need additional information or assistance contact Charles Medalen at 202-366-0834.

Sincerely yours,

Annette M. Sandberg