

## **SPECIAL TOPIC**

### **WHEN DOES DOT HAVE JURISDICTION OVER DOE CONTRACTOR TRANSPORTATION ACTIVITIES?**

The question of regulatory jurisdiction is important for DOE contractors to understand. Determination of the DOT's jurisdiction for DOE contractor operations requires examining distinct operating environments. Determining jurisdiction can be tricky, and for a complex situation, it may require a formal interpretation from the regulator. For simple cases, the determination is a two-test process: (1) is the transportation activity in commerce, and (2) is the transportation activity conducted on a public road?

The first test involves the commercial nature of the transportation. The DOT Hazardous Materials Regulations (HMR) and the various modal safety regulations apply whenever transportation occurs in commerce. The DOT has interpreted and enforced **in commerce** to be when the transportation is not conducted wholly by a governmental entity. For example, transporting DOE material in a vehicle operated by a DOE employee (or a DOE contractor that is a state university employee) is not in commerce and not subject to the HMR or the various modal safety requirements. Conversely, a nongovernmental DOE contractor transporting DOE material in a vehicle is operating in commerce. Non-profit and not-for-profit organizations are not considered governmental entities.

It is important to note that although off-site transportation activities performed by DOE contractors that are governmental employees (e.g. employees of a state university) are not considered to be in commerce, DOE Order 460.1B requires that the contractor comply with the DOT regulations to the same extent as if the activity was in commerce. Also, governmental entities are subject to the HMR when they offer hazardous materials to a common or contract carrier.

Once the transportation activity is determined to be in commerce, the second test must be examined. This test applies to the operating environment as it pertains to the public. The HMR applies to the transportation of a hazardous material, in commerce, on a road where the public has unrestricted access. Likewise, a nongovernmental contractor transporting a hazardous material in a vehicle on a road with public access restricted by gates/guards is not subject to the HMR. Such transportation at DOE sites is considered "onsite" transportation. See also DOE Order 460.1B, Section 1.

The HMR do not apply to transportation that is entirely on private property and that is neither on nor crosses a public roadway. Property is regarded as private if there is no general public right of access or if public access is legally and actually restricted from the area where transportation occurs. The use of gates, guards and signage have historically been recognized as a means to restrict public access.

The above discussion applies to the application of the HMR. There must also be consideration for the applicability of the DOT regulations that apply to the transport vehicle and driver. These are found in the DOT Federal Motor Carrier Safety Regulations (FMCSR).

The FMCSR applies whenever a commercial motor vehicle is operated (in commerce) on or across a **public road**. Portions of the FMCSR will be applicable for interstate commerce only, and other portions will apply for both inter- and intra- state commerce. Whether the road is public or not is determined by who owns or leases it, maintains it, and enforces the traffic laws. The FMCSR are generally adopted and incorporated into State law. State laws generally consider a "public highway" as one that allows public access. For example, in Tennessee, a "private road" is one with "private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons".

In summary, a nongovernmental contractor operating a commercial motor vehicle containing hazardous material on an unrestricted federal, state, local, or city public road is subject to the requirements of both the HMR and the FMCSR.

When the DOT does not have jurisdiction, DOE directives and rules apply. As stated above, DOE Order 460.1B includes provisions that require contractors which are governmental in nature (e.g., laboratories run by state universities) to comply with the regulations as if they were operating in commerce. In this case, the regulator and enforcer of the DOT regulation is DOE, not DOT, and it is enforced through the DOE contract.

DOE contractors also need to understand the definitions of the pre-transportation functions covered by the HMR. (See the definitions in 49 CFR Section 171.8 and also Section 171.1 for applicability.) Anyone performing pre-transportation functions is subject to the applicable regulations, regardless that the functions are performed before transport occurs. Section 171.1 states that the HMR applies to the following:

- Persons who transport hazardous materials.
- Persons who cause hazardous materials to be transported in commerce.

Extracted from the April 2008 issue of Dana Willafor's "DOE/Oak Ridge Packaging and Transportation Safety Regulatory Bulletin"

- Persons who manufacture or maintain a package or a component of a package that is authorized for transporting hazardous materials in commerce.
- Persons performing pre-transportation functions, which include:
  - Determining the hazard class.
  - Selecting a hazardous materials packaging.
  - Filling a hazardous materials package.
  - Securing a closure on a filled or partially filled hazardous materials package.
  - Marking a package to indicate it contains a hazardous material.
  - Labeling a package to indicate it contains a hazardous material.
  - Preparing shipping papers.
  - Providing and maintaining emergency response information.
  - Reviewing a shipping paper to verify compliance with the HMR.

DOE contractors meet the definition of person under the regulations, and the functions listed above are typical of those performed by DOE contractors that package and transport hazardous materials in support of DOE's missions.

The applicability of the HMR and FMCSR to DOE contractors has extensive legal precedence. As early as 1990, interpretations were issued [DOT Chief Counsel to DOE Transportation Program (then EM-50)] to DOE from DOT concerning the applicability of the regulations to DOE contractor transportation activities. Since that time, DOT (both PHMSA and FMCSA) has consistently interpreted and applied their jurisdictional authority. A number of enforcement cases have been made by DOT against DOE contractors since the 1990's. A discussion of this regulatory history, including letters from DOT to DOE is also provided in Section II and Attachments 1-3 of DOE G 460.1-1.

With changes in contracts and personnel, some of this institutional knowledge and experience may have been lost--- both for the Federal and Contractor staff. As part of regular oversight activities, it would be worthwhile to include a review of onsite/offsite transportation operations to ensure DOT compliance is being appropriately required and met for the applicable transportation activities on and around our DOE sites. Additionally, it is important to recognize that reindustrialization efforts at many sites may alter onsite roads that previously had controlled public access. Many of these sites now, or in the future, will have portions of the site that are open campuses or industrial parks. This may cause "onsite" hazardous material transfers to meet DOT requirements, where previously they did not.

DOT interpretations can be found at the following websites:

**PHMSA interpretations:**

<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.592e107d80e9067580cd871067c27789/?vgnextoid=0f0b143389d8c010VgnVCM1000008049a8c0RCRD&vgnnextchannel=0f0b143389d8c010VgnVCM1000008049a8c0RCRD&vgnnextfmt=print>

**FMCSR interpretations:**

[http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp?section\\_type=A](http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp?section_type=A)

Some of the more popular recent interpretations relevant to DOE operations are available at the links below:

<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=067b91b2c43b7110VgnVCM1000001ecb7898RCRD&vgnnextchannel=56acd3c1af814110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>

<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=06cac0515d544110VgnVCM1000009ed07898RCRD&vgnnextchannel=56acd3c1af814110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>

<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=823bd0c55bcd4110VgnVCM1000009ed07898RCRD&vgnnextchannel=56acd3c1af814110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>