



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

SEP 21 2007

1200 New Jersey Avenue, SE
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Mr. Steve R. Tekosky
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660 S. Figueroa Street, Suite 1450
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Ref. No. 07-0116

Dear Mr. Tekosky:

This responds to your June 11, 2007 letter requesting clarification of requirements applicable to pre-transportation functions under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you ask whether registration, security planning, and training requirements in the HMR apply to a third-party consultant providing guidance and advice on the performance of pre-transportation functions.

Generally, the HMR apply to any person who offers for transportation or transports a hazardous material in commerce. The HMR define "person who offers" or "offeror" to mean any person who performs or is responsible for performing a pre-transportation function required under the HMR for transportation of a hazardous material in commerce or who tenders or makes a hazardous material available to a carrier for transportation in commerce (see § 171.8). Further, each person who performs a function covered by the HMR must do so in accordance with the HMR (see § 171.2(a)). Pre-transportation functions are functions specified in the HMR that are required to assure the safe transportation of a hazardous material in commerce and include, but are not limited to:

- (1) Determining the hazard class of a hazardous material.
- (2) Selecting a hazardous materials packaging.
- (3) Filling a hazardous materials packaging, including a bulk packaging.
- (4) Securing a closure on a filled or partially filled hazardous materials package or container or on a package or container containing a residue of a hazardous material.
- (5) Marking a package to indicate that it contains a hazardous material.
- (6) Labeling a package to indicate that it contains a hazardous material.
- (7) Preparing a shipping paper.
- (8) Providing and maintaining emergency response information.
- (9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.
- (10) For each person importing a hazardous material into the United States, providing the shipper with timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States.
- (11) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.



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- (12) Loading, blocking, and bracing a hazardous materials package in a freight container or transport vehicle.
- (13) Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo.
- (14) Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it contains a hazardous material (§ 171.1(b)).

The registration requirements in Subpart G of Part 107 of the HMR apply to any person who offers for transportation or transports one or more of the hazardous materials listed in § 107.601(a). The security plan requirements in Subpart I of Part 172 of the HMR apply to any person who offers for transportation or transports one or more of the hazardous materials listed in § 172.800(b). A third-party consultant who performs instructional or advisory functions concerning the performance of pre-transportation or transportation functions does not meet the definition of a “person who offers” or “offeror” and, therefore, is not subject to the registration requirements or the security plan requirements of the HMR.

A third-party consultant who performs pre-transportation functions on behalf of, as an agent of, or under contract to a shipper, carrier, or other entity meets the definition of a “person who offers” or “offeror” and must perform those functions in accordance with all applicable HMR requirements. A third-party consultant who performs or contracts to perform pre-transportation functions such as determining the hazard class of a material, selecting an appropriate packaging, preparing a shipping paper, providing and maintaining emergency response information, selecting appropriate placards for a freight container or transport vehicle, or performing any other pre-transportation function related to the hazardous materials listed in § 107.601(a) is subject to the registration requirements.

A third-party consultant who performs or contracts to perform pre-transportation functions such as determining the hazard class of a material, selecting an appropriate packaging, preparing a shipping paper, providing and maintaining emergency response information, selecting appropriate placards for a freight container or transport vehicle, or performing any other pre-transportation function related to the hazardous materials listed in § 172.800(b) is also subject to the security plan requirements. Furthermore, the security plan requirements apply to any person who performs or is responsible for performing a pre-transportation function, even if that person does not handle, store, maintain, control, or transport the hazardous material. In addition to personnel security, the security plan must address unauthorized access and en route security (see § 172.802(a)) to the extent necessary to demonstrate that each aspect of security has been considered.

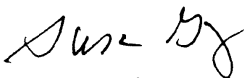
The third-party consultant and its employees and staff who perform pre-transportation functions on behalf of, as an agent for, or under contract to a shipper, carrier, or other entity could be covered by the contracting entity’s security plan and registration, if the contracting entity has accepted full responsibility for the actions of the consultant. If the contracting entity has not accepted full responsibility for all functions performed by the consultant (or if the terms are unclear), then the consultant must independently comply with the registration and security plan requirements, as applicable.

All hazmat employees must be trained in accordance with the requirements in Subpart H of Part 172 of the HMR. Generally, a "hazmat employee" is any person who is employed on a full-time, part-time, or temporary basis and who in the course of such employment directly affects hazardous materials safety. (See § 171.8 for the complete definitions of "hazmat employee" and "hazmat employer.") A third-party consultant or its employees or staff who perform instructional or advisory functions are not hazmat employees and, therefore, are not subject to the training requirements.

For those who are not self-employed, a "hazmat employer" is one who employs a hazmat employee and who (1) transports a hazardous material in commerce; (2) causes hazardous materials to be transported in commerce; or (3) designs, manufactures, inspects, repairs, or tests packaging that is marked, sold or certified as qualified for use in transporting hazardous materials in commerce. While not specifically defined in the HMR, a person who "causes hazardous materials to be transported in commerce" includes one who performs the functions of a "person who offers" or "offeror." Functions of a "person who offers" or "offeror" include, but are not limited to the functions (i.e., pre-transportation functions) listed above. Therefore, a company that performs these functions is a hazmat employer and is subject to the training requirements. A third-party consultant and its employees or staff who perform pre-transportation functions on behalf of, as an agent for, or under contract to a hazmat employer must be trained in accordance with applicable HMR requirements. Additionally, a third-party consultant and its employees and staff who perform pre-transportation functions related to the hazardous materials listed in § 172.800(b) are subject to the in-depth security training requirements (§ 172.704(a)(5)) even though the third-party consultant may not necessarily develop his or her own security plan. It is the responsibility of the hazmat employer to ensure that all hazmat employees are trained. The issue of who performs the training must be determined between the third-party consultant and its client(s).

I hope this information is helpful. Please contact us if you require additional assistance.

Sincerely,



Susan Gorsky
Regulations Officer
Office of Hazardous Materials Standards

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June 11, 2007

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Pipeline and Hazardous Materials Safety Administration
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Re: Interpretation of HazMat Regulations

Dear Mr. Mazzullo:

We write to seek interpretation and clarification of certain pre-transportation regulations at 49 CFR Part 171. Specifically, the situation in question involves a third-party consultant that will provide advice and guidance to hazardous material ("HazMat" or "hazmat") handlers/offerors and their carriers regarding assorted pre-transportation and transportation activities. Additionally, and by virtue of the breadth of the definition of the term "pre-transportation function,"¹ from time to time the consultant will perform some pre-transportation functions. The foregoing notwithstanding, the consultant will not at any time physically handle, store, mark, label, maintain, control or transport hazardous material.

A. Questions Posed

Under the various circumstances set forth in Section B of this letter, we wish to know whether such a third-party consultant is required to:

1. Create a Security Plan and train/certify its personnel on that security plan, despite the fact that the consultant's facility(ies) do not contain hazmat (other than standard office and janitorial supplies in quantities normally found in comparably-sized offices) and despite the fact that no employee, agent, contractor or subcontractor of the consultant actually

¹ See definition of "pre-transportation function" at 49 CFR section 171.8.

handles hazmat at any location;

2. Register with the DOT as "a person who offers hazardous materials;"
3. Provide Hazmat employee training, testing and certification.

B. Assumed Facts and Circumstances

It is our understanding, consistent with 70 Federal Register 20018 (April 15, 2005), that in order to be classified as "pre-transportation functions" the functions must be "performed in advance to prepare hazardous materials for transportation." For purposes of this request for guidance only, please assume that the consultant will perform some or all of the following instruction/advisory functions:

-- generally instructs hazmat offerors and transporters regarding the proper ways "to prepare hazardous materials for transportation;"

-- reviews hazmat offerors' and/or transporters' procedures for preparing hazmat for transportation and offers findings/suggestions regarding such operations as well as providing general guidance as to future operations;

-- offers training in non-bulk hazmat shipping, including shipping classification, packaging, labeling, marking, shipping paper completion and placarding requirements;

-- identifies hazmat contractors and carriers on behalf of hazmat offerors and, if directed by the offeror to do so, facilitates retention of the contractors and carriers as well as communication of information among those offerors, contractors and carriers;² and

-- provides advice regarding proper emergency response in the event of hazmat spills at the

² This activity may include dispatch of a professional Emergency Response ("ER") company, and may involve contacting an appropriate ER firm and coordinating the response through transportation of the resulting hazardous waste. All classification, packaging, marking, labeling, shipping paper preparation, and transport will be managed either by the generator or the ER contractor. Potential DOT 5800.1 reporting notification would not be performed by the consultant, but rather by the generator or the ER company. Please note, however, that the reporting of a hazardous substance spill greater than a Reportable Quantity may be performed by the consultant. In addition the consultant may submit reports (where appropriate) based on the requirements of 49 CFR 171.15 (closure of a major roadway > 1 hr. or spill of infectious materials, etc.) or if a spill requires an immediate report to the National Response Center (including spills that occur in transport).

hazmat offerors' sites and during transportation, including guidance regarding reporting requirements.

Additionally, from time to time, the consultant will perform some or all of the following pre-transportation functions listed, in pertinent part, under 49 CFR section 171.8, although the consultant does not physically handle, mark, label, store, maintain, control or transport hazmat:

- (1) Determining the hazard class of a hazardous material;
- (2) Selecting a hazardous materials packaging;
- ...
- (7) Preparing a shipping paper;
- (8) Providing and maintaining emergency response information;
- (9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents;
- ...
- (14) Selecting proper placards for a freight container or transport vehicle to indicate that it contains a hazardous material.³

The third-party consultant does not perform the pre-transportation functions of “[m]arking [or labeling] a package to indicate that it contains a hazardous material.” See “pre-transportation functions” (5) and (6) at 49 CFR section 171.8. On occasion, however, the consultant makes a determination of the proper marking and/or labeling of a package to indicate that it contains a hazardous material.

C. Requests for Interpretation

1. Based on information from Ms. Susan Gorsky of your agency that has been communicated orally to us by her staff, we understand that the HazMat regulations do not apply and are not implicated where the third-party contractor provides advice and guidance alone to its clients and where the third-party contractor does not make any binding determinations governing any pre-transportation or transportation functions. We also understand based on information from Ms. Gorsky that the HazMat security plan regulations [49 CFR section 172.800 *et seq.* and 172.704(a)(5)] are inapplicable to third-party contractors who do not handle, store, maintain, control or transport hazardous materials but who do engage in activities such as filling out a shipping paper or making a placarding determination in connection with the transportation by

³ See 49 CFR section 171.8.

others of hazardous materials. Please confirm our understanding regarding both of these situations.

2.

(a) In addition to seeking your confirmation of Ms. Gorsky's interpretations as set forth above, we have an additional request for clarification that we did not discuss with Ms. Gorsky's staff. The logical implication of the information imparted by Ms. Gorsky's staff regarding the inapplicability of the security plan regulations to those who do not handle, store, maintain, control or transport hazardous materials, but who do fill out shipping papers or make placarding determinations, leads us to understand -- and seek your clarification -- that, similarly, the security plan regulations do not apply those who do not handle, store, maintain, control or transport hazardous material, but merely perform one or more of the following tasks: i) determine the hazard class of a hazardous material; ii) select a hazardous materials packaging; iii) determine the marking and/or labeling for a package to indicate that it contains a hazardous material; iv) provide and maintain emergency response information; and v) review a shipping paper to verify compliance with the HMR or international equivalents.

(b) Ms. Gorsky's staff also suggested that, irrespective of whether or not one actually handled, stored, maintained, controlled or transported hazardous material, anyone who fell under section 171.8's definition of "person who offers" is required to adhere to the hazardous materials regulation's registration requirement. *See* 49 CFR section 171.2(c). Please confirm this interpretation.

(c) Finally, we understand from Ms. Gorsky's staff that except for the in-depth security training requirements set forth in section 172.704(a)(5) (which requirements, as discussed above, we are informed are inapplicable to those who do not handle, store, maintain, control or transport hazardous material), the general training requirements set forth in 49 CFR Part 172 *et seq.* are applicable to all hazmat employees.⁴ Please confirm this understanding.

⁴ The definition of "hazmat employee" includes anyone **employed by a hazmat employer** who in the course of their "full time, part time or temporary employment directly affects hazardous materials transportation safety." Section 171.8. The definition of "hazmat employer" (for those who are not self-employed) is one who employs at least one hazmat employee **and who:** transports hazardous materials in commerce; causes hazardous materials to be transported in commerce; designs, manufactures, inspects, repairs or tests containers or packaging that is marked, certified, or sold by that person as qualified for use in transporting hazardous materials in commerce. *Id.* As the elements of "transporting hazardous materials," "causing the transportation of hazardous materials" and "person who offers" are separate terms, the fact that section 171.8's definition of hazmat employer references transporting hazardous materials ((1)(i)) and causing hazardous materials to be transported ((1)(ii)), while omitting "person who offers" might suggest that an employer who falls within the definition of a "person who offers" in the context of section 171.8, but who does not transport, or cause the transportation of, hazardous materials, is not a hazmat employer. As a hazmat employee, by definition, works for

Mr. Edward Mazzullo
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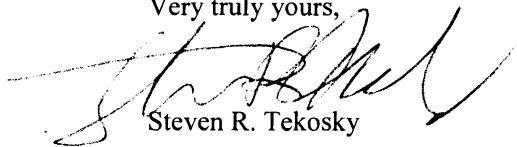
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3. Additionally, as suggested by footnote 4, we seek clarification of the following question: Are employees who work for an employer who is a person who "offers" by virtue of that employer's performance of pre-transportation functions hazmat employees requiring Subpart H training if such an employer is not a hazmat employer because the employer does not transport or cause the transportation of hazardous materials?

Given these assumed facts, we request your guidance and interpretation as to whether the hazmat security plan, registration and/or training requirements apply in the situations set forth in this letter in Sections C.1, C.2(a), (b) and (c), and C.3.

Thank you for your consideration of this request.

Very truly yours,



Steven R. Tekosky

a hazmat employer, if an employee is a person who "offers," but whose employer is not a hazmat employer (because the employer neither transports, nor causes the transportation of, hazardous materials), such an employee cannot be a hazmat employee. Finally, as the Subpart H Training requirements are prescribed for "training hazmat employees" (section 172.700(a), (b); 172.702(a)(b); 172.704(a)), it follows that if one is, by definition, not a hazmat employee, then such training requirements are inapplicable to such an employee -- even if such an employee engages in certain pre-transportation functions.