US Department
of Transportation

**Research and
Special Programs
Administration**

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Washington, D.C. 20555

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Dear Mr. Malsch:

I am responding to your August 26, 1992 letter concerning whether the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. § 1801 et seq., requires Department of Energy (DOE) contractors to comply with Nuclear Regulatory Commission (NRC) packaging and transportation regulations.

The HMTA was amended significantly in 1990 by the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), Pub. L. No. 101-615, 104 Stat. 3244 (1990). A new provision, codified at 49 App. U.S.C. § 1818, states:

> Any person who, under contract with any department . . . of the Federal government, transports, or causes to be transported or shipped, a hazardous material . . . shall be subject to and comply with all provisions of this chapter, all orders and regulations issued under this chapter, and all other substantive and procedural requirements of Federal, State, and local governments and Indian tribes (except any such requirements that have been preempted by this chapter or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

This provision simply denies sovereign immunity to government contractors, and its legislative history indicates that it does not represent a change in the law. As cited in your letter:

> Section [20] adds a new section [120] to the [HMTA]. New section [120] clarifies that contractors with the Federal Government are subject to the same regulations

> governing the transportation of hazardous material as any other shipper or carrier. The Committee firmly states that this amendment is to remove any lingering doubt on this point. It is the Committee's firm position that this simply restates existing law. (H. Rept. No. 101-444 (Part 2), 101 Cong., 2d Sess. 43 (1990))

Therefore, agencies' pre-HMTUSA regulatory prerogatives remain unchanged. This provision requires government contractors to comply with legal requirements applicable to them; however, it does not require them to comply with requirements from which they are excluded or exempted, nor does it require regulatory agencies to apply all their requirements to any or all government contractors.

For example, there are several regulatory exceptions in the Hazardous Materials Regulations (HMR) (49 C.F.R. Parts 171-180) which frequently are used by DOE contractors. Thus, under 49 C.F.R. §§ 173.7(b) and 177.806(b), national security shipments of Class 7 (radioactive) materials made by or under DOE or Department of Defense direction or supervision, and escorted by personnel specifically designated by or under the authority of either agency, are not subject to the HMR.

Similarly, DOE, its contractors, and others are excepted from compliance with certain HMR packaging requirements when they use packagings made by or under DOE's direction for the transportation of Class 7 materials. 49 C.F.R. § 173.7(d). To qualify for this exception, the packagings must be evaluated, approved, and certified by DOE against packaging standards equivalent to those specified in 10 C.F.R. Part 71. These packages also must be marked and prepared for shipment in a manner equivalent to the HMR's requirements for Nuclear Regulatory Commission (NRC)-approved packagings.

Just as the Research and Special Programs Administration is not required by the new statutory provision to apply any or all portions of the HMR to government contractors, the NRC is not required to apply any or all of its regulations to government contractors. For example, NRC need not expand the applicability of its packaging and transportation regulations beyond the certificate holders and licensees now covered by its regulations. 10 C.F.R. § 71.0(c). To the extent government contractors fall within those categories, they are subject to the NRC regulations; however, government contractors which are not certificate holders or licensees need not comply.

In summary, 49 App. U.S.C. 1818 does not require that DOE contractors comply with NRC transportation regulations which are not applicable to them. It only requires that DOE contractors comply with those NRC regulations which are applicable to them. This provision also does not require NRC to change its regulations to apply them to all government contractors.

If you have any questions concerning this matter, please contact me at 202-366-4400.

Sincerely,

Judith S. Kaleta
Chief Counsel