RECORD #38

TITLE: ... Applicability of DOT Regulations to NRC-Licensed State or Federal Entities

FICHE: 67819-146

F. Cleaning Item

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 16, 1985

MEMORANDUM FOR: See attached list

FROM: Leonard I. Cobb, Chief
Safeguards and Materials Programs Branch, IE

SUBJECT: APPLICATION OF 10 CDR 71 AND ASSOCIATED DOT REGULATIONS TO NRC-LICENSED GOVERNMENTAL AGENCIES

The University of Missouri raised the question with Region III as to whether it was exempt from NRC requirements for transportation of radioactive material. As you know, 10 CFR 71 incorporates DOT regulations for transportation of radioactive material by reference to certain specific sections of 49 CFR Parts 171, 172, 173, 174, and 176.

On a number of occasions DOT has stated that its regulations did not apply to purely governmental, non-business activities. However, the NRC legal staff has given us the enclosed opinion which states, among other things, that federal, state, and other governmental entities transporting NRC-licensed material are subject to 10 CFR 71.5(b). That section identifies the specific DOT rules that apply to the NRC licensees.

Len Cobb

Leonard I. Cobb, Chief
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cc w/enclosures:
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

APR 11 1985

MEMORANDUM FOR: Leonard I. Cobb, Chief
Safeguards and Materials Program Branch
Office of Inspection and Enforcement

FROM: William J. Olmstead
Director and Chief Counsel, Regulations Division
Office of the Executive Legal Director

SUBJECT: REQUEST FOR INTERPRETATION OF APPLICABILITY OF DOT REGULATIONS (49 CFR/10 CFR PART 71) TO NRC-LICENSED STATE OR FEDERAL ENTITIES

This is in response to your March 4, 1985, memorandum to James Lieberman concerning the above-captioned subject.

The document received by Jim Lynch of Region III from the University of Missouri, a copy of which was appended to his February 11, 1985, note to Al Grella, was published in the Federal Register on November 23, 1977 (42 FR 60078). The document, designated as "Notice No. 77-9," consists of formal interpretations of Federal Motor Carrier Safety Regulations by the Federal Highway Administration. Paragraph 14 of Chapter I of the notice provides:

> Government vehicles. Vehicles operated by agencies of the Federal Government, the States, counties, and cities in carrying out their governmental and civic functions, are not considered to be subject to any regulation under the DOT Act. (42 FR 60080)

In his January 11, 1980, response to the State of Connecticut's request for an exemption from the requirements of 49 CFR 173.395, Mr. Alan I. Roberts of the Materials Transportation Bureau of the DOT stated this same proposition as follows:

> [The DOT does not] consider the Hazardous Materials Regulations to apply to purely governmental, non-business activities. Those regulations would apply to any offer to, or transportation by, a common, contract or private carrier engaged in interstate commerce when employed by the State ... to carry hazardous materials. However, so long as the State manages and effects its own transportation, using State vehicles and State employees acting within the scope of their duties, the Hazardous Materials Regulations do not apply. [Emphasis added.]

In an effort to ascertain the current DOT position on this issue, on March 28, 1985, one of the attorneys on my staff, Eric Jakel, conferred by telephone with George Tenley, Acting Chief Counsel, Research and Special Programs

Administration, DOT. Mr. Tenley indicated that the interpretation in Chapter I, paragraph 14 of Notice No. 77-9 was still an accurate indication of DOT's position with regard to regulation of governmental entities. Mr. Tenley went on to state that the DOT did not intend for its Hazardous Materials Regulations to apply to a governmental entity transporting hazardous materials (including radioactive material) so long as the governmental entity manages and effects its own transportation, using its own vehicles and its employees acting within the scope of their duties. He explained that because of the DOT's adherence to a narrow construction of the term "commerce" and the manner in which the term "person" is statutorily defined, 1/ a governmental entity transporting hazardous materials could not be considered to be a "person engaged in commerce" -- not intrastate nor interstate nor foreign. Finally, Mr. Tenley indicated that in the specific situation addressed by the Region III memo of February 11, 1985, the University of Missouri would not be subject to any direct regulation by the DOT.

Having established the fact that, under certain specific circumstances, governmental entities transporting hazardous materials (including radioactive material) are not subject to regulation by the DOT, we now need to assess the NRC's regulatory authority over these entities pursuant to 10 CFR 71.5. Over the past decade, §71.5, "Transportation of licensed material," has been significantly amended on two occasions. Prior to December 1979, 10 CFR 71.5 provided as follows:

> §71.5 Transportation of licensed material.
>
> (a) No licensee shall transport any licensed material outside of the confines of his plant or other place of use, or deliver any licensed material to a carrier for transport, unless the licensee complies with the applicable requirements of the regulations appropriate to the mode of transport, of the Department of Transportation in 49 CFR Parts 170-189, 14 CFR Part 103, 46 CFR Part 146, and the U.S. Postal Service . . . insofar as such regulations relate to the packaging of byproduct, source, or special nuclear material, marking and labeling of the packages, loading and storage of packages, placarding of the transportation vehicle, monitoring requirements and accident reporting.
>
> (b) When Department of Transportation regulations are not applicable to shipments of licensed material by rail, highway, or water because the shipment or the transportation of the shipment is not in interstate or foreign commerce, or to shipments of licensed material by

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1/ 49 USCA §1(3)(a) defines the term "person" as "an individual, firm, copartnership, corporation, company, association, or joint-stock association; and [any] trustee, receiver, assignee, or personal representative thereof." Thus, it appears that for purposes of regulation by the DOT, a governmental entity is not a "person."

air because the shipment is not transported in civil aircraft, the licensee shall conform to the standards and requirements of the Department of Transportation specified in paragraph (a) of this section, to the same extent as if the shipment or transportation were in interstate or foreign commerce or in civil aircraft. Any requests for modifications, waivers, or exemptions from those requirements, and any notifications referred to in those requirements shall be filed with, or made to, the Nuclear Regulatory Commission.

(c) Paragraph (a) of this section shall not apply to the transportation of licensed material, or to the delivery of licensed material to a carrier for transport, where such transportation is subject to the regulations of the Department of Transportation or the U.S. Postal Service.

Paragraph (a) references the DOT regulations relating to the packaging of radioactive material, marking and labeling of the packages, loading and storage of packages, placarding of the transportation vehicle, monitoring requirements, and accident reporting. Paragraph (b) provides that if the DOT regulations are not applicable to a shipment of licensed radioactive material, then the NRC regulations in §71.5(a) referencing the DOT requirements apply to the shipment. Finally, paragraph (c) provides that if the transportation is subject directly to the DOT regulations, then whatever regulatory authority the NRC may have had under paragraphs (a) and (b) becomes nonexistent.

Effective December 3, 1979, the Commission amended §71.5 by deleting the reference to 14 CFR Part 103 and 46 CFR Part 146 from paragraph (a) and deleting the reference to "the Department of Transportation" in paragraph (c). The net effect of these changes was to make the DOT requirements referenced in §71.5(a) applicable by NRC regulation to all shipments of NRC-licensed material regardless of whether DOT regulations apply directly to the transportation.

The second significant change to §71.5 occurred when the NRC revised 10 CFR Part 71 in its entirety (48 FR 35600). The revision, which became effective September 6, 1983, left paragraph (b) essentially unchanged. However, paragraph (c) was deleted, and paragraph (a) was completely revised to specify in detail (without purporting to be all inclusive) DOT requirements applicable by NRC regulations to the transportation of NRC-licensed material. At present §71.5(a) provides as follows:

§71.5 Transportation of licensed material.

(a) Each licensee who transports licensed material outside of the confines of its plant or other place of use, or who delivers licensed material to a carrier for transport, shall comply with the

applicable requirements of the regulations appropriate to the mode of transport of DOT in 49 CFR Parts 170 through 189.

(1) The licensee shall particularly note DOT regulations in the following areas:

(i) Packaging--49 CFR Part 173, Subparts A and B and §§173.401-173.478.

(ii) Marking and labeling--49 CFR Part 172, Subpart D and §§172.400-172.407; 172.436-172.440.

(iii) Placarding--49 CFR Part [sic] 172.500-172.519,172.556 and Appendices B and C.

(iv) Monitoring--49 CFR Part 172, Subpart C.

(v) Accident reporting--49 CFR Part [sic] 171.15 and 171.16.

(vi) Shipping papers--49 CFR Part 172, Subpart C.

(2) The licensee shall also note DOT regulations pertaining to the following modes of transportation:

(i) Rail--49 CFR Part 174, Subparts A-D and K.

(ii) Air--49 CFR Part 176, Subparts A-D and M. [sic] 2/

(iii) Vessel--49 CFR Part 176, Subparts A-D and M.

(iv) Public Highway--49 CFR Part 177.

* * * * *

There remains one area which has not been addressed -- transportation of Agreement State-licensed material by a governmental entity. Subsection 274b. of the Atomic Energy Act of 1954, as amended, authorizes the Commission to enter into agreements with the individual States providing for the discontinuance of the regulatory authority of the Commission under chapters 6, 7, and 8, and section 161 of the Act with respect to byproduct, source, and special nuclear material in quantities not sufficient to form a critical mass.

The U.S. Department of Health and Human Services publishes (and periodically updates) a document entitled "Suggested State Regulations for Control of Radiation" (hereinafter "SSRCR"). The most recent (1982) edition of the SSRCR has been endorsed by the Executive Board of the Conference of Radiation Control Program Directors, the U.S. Nuclear Regulatory Commission, the National Center

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2/ Regulations pertaining to air transport are contained in 49 CFR Part 175.

for Devices and Radiological Health, the FDA, and the U.S. Environmental Protection Agency. The specific provisions of the SSRCR applicable to the transportation of radioactive material are appended to this memorandum. Most, if not all, of the Agreement States have adopted the suggested transportation regulations as a matter of compatability. Generally, most of the 50 States have adopted these or similar transportation regulations (patterned after those of the DOT) for use within the State.

Section A.2, "Definitions," of the SSRCR defines the term "person" to include a "political subdivision of this State, any other State or political subdivision or agency thereof, and any legal successor, representative, agent, or agency of the foregoing." Section C.100 of the SSCRC provides as follows:

> Sec. C.100 Transportation of Radioactive Material. No person shall deliver radioactive material to a carrier for transport or transport radioactive material except as authorized in a general or specific license issued by the [appropriate State] Agency or as exempted in C.101.

Since a government entity transporting radioactive material is a person, as defined in Section A.2, it is subject to Section C.100 unless it is exempted by Section C.101. (See Appendix.) Since the government entity is not a common or contract carrier, paragraph C.101(a) does not apply. Nor does the government entity qualify for an exemption under paragraphs C.101(b) or (c). Again, since the government entity is not a common or contract carrier, paragraph C.102(a) does not apply. No material is being delivered to a carrier for transport, so Section C.103 should not apply. However, when one concludes that a government entity using its own vehicle and employees is acting as a private carrier -- a logical but somewhat anomalous conclusion -- then paragraph C.102(b) applies by its terms to the transport and Section C.103 applies by virtue of footnote 15 on page C65. Thus, we have established the authority of the States to regulate governmental transportation of radioactive material by applying DOT requirements.

In conclusion, since Federal, state, and other governmental entities transporting NRC-licensed material are not regulated by the DOT, they are subject to 10 CFR 71.5(b). The provisions of §71.5(b) require these governmental entities to "conform to the standards and requirements of the DOT" referenced in §71.5(a). Where NRC-licensed material is involved, the Office of Inspection and Enforcement has the authority pursuant to 10 CFR 71.5 to require that governmental entities comply with the provisions of

§71.5(a). Where the licensed material involved is Agreement State licensed material, the regulatory authority appears to be vested in the various states.

William J. Olmstead

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Appendix: As stated

EXCERPTED FROM "SUGGESTED
STATE REGULATIONS FOR CONTROL OF RADIATION"

Transportation —

Sec. C.100 Transportation of Radioactive Material. No person shall deliver radioactive material to a carrier for transport or transport radioactive material except as authorized in a general or specific license issued by the Agency or as exempted in C.101.

Sec. C.101 Exemptions.

(a) Common and contract carriers, freight forwarders, and warehousemen who are subject to the requirements of the U.S. Department of Transportation in 49 CFR 170 through 189 or the U.S. Postal Service in the Postal Service Manual (Domestic Mail Manual), Section 124.3 incorporated by reference, 39 CFR 111.11 (1974), are exempt from these regulations to the extent that they transport or store radioactive material in the regular course of their carriage for another or storage incident thereto. Common and contract carriers who are not subject to the requirements of the U.S. Department of Transportation or U.S. Postal Service are subject to C.100 and other applicable sections of these regulations.

(b) Any licensee is exempt from C.100 to the extent that he delivers to a carrier for transport packages each of which contains radioactive material having a specific activity less than, or equal to, 0.002 microcurie (74 Bq) per gram.

(c) Any licensee who delivers radioactive material to a carrier for transport, where such transport is subject to the regulations of the U.S. Postal Service, is exempt from the provisions of C.100.

C.102 General Licenses for Carriers

(a) A general license is hereby issued to any common or contract carrier not exempt under C.101 to receive, possess, transport, and store radioactive material in the regular course of their carriage for another or storage incident thereto, provided the transportation and storage is in accordance with the applicable requirements, appropriate to the mode of transport, of the U.S. Department of Transportation insofar as such requirements relate to the loading and storage of packages, placarding of the transporting vehicle, and incident reporting.14/

(b) A general license is hereby issued to any private carrier to transport radioactive material, provided the transportation is in accordance with the applicable requirements, appropriate to the mode of transport, of the U.S. Department of Transportation insofar as such requirements relate to the loading and storage of packages, placarding of the transporting vehicle, and incident reporting.14/

(c) Persons who transport radioactive material pursuant to the general licenses in C.102(a) or (b) are exempt from the requirements of Parts D and J of these regulations to the extent that they transport radioactive material.

Sec. C.103 General License for Delivery of Radioactive Material to a Carrier for Transport. A general license is hereby issued to deliver radioactive material to a carrier15/ for transport provided that:

(a) The licensee complies with the applicable requirements, appropriate to the mode of transport, of the U.S. Department of Transportation insofar as such requirements relate to the packaging of radioactive material, and to the monitoring, marking, and labeling of those packages;

(b) The licensee has established procedures for safely opening and closing packages in which radioactive material is transported and to assure that, prior to the delivery to a carrier for transport, each package is properly closed for transport; and

(c) Prior to delivery of a package to a carrier for transport, the licensee shall assure that any special instructions needed to safely open the package are sent to or have been made available to the consignee.

14/ Any notification of incidents referred to in those U.S. Department of Transportation requirements shall be filed with, or made to, the Agency.

15/ For the purpose of this regulation, a licensee who transports his own licensed material as a private carrier is considered to have delivered such material to a carrier for transport.

Sec. C.104 Advance Notification of Transport of Nuclear Waste

(a) Prior to the transport of any nuclear waste outside of the confines of the licensee's facility or other place of use or storage, or prior to the delivery of any nuclear waste to a carrier for transport, each licensee shall provide advance notification of such transport to the governor, or governor's designee, 16/ of each State through which the waste will be transported. For the purpose of C.104, "nuclear waste" means any large quantity of source, byproduct, or special nuclear material required to be in Type B packaging while transported to, through, or across State boundaries to a disposal site, or to a collection point for transport to a disposal site.

(b) Each advance notification required by C.104(a) shall contain the following information:

(1) the name, address, and telephone number of the shipper, carrier, and receiver of the shipment;

(2) a description of the nuclear waste contained in the shipment as required by the regulations of the U.S. Department of Transportation, 49 CFR 172.202 and 172.203(d);

(3) the point of origin of the shipment and the 7-day period during which departure of the shipment is estimated to occur;

(4) the 7-day period during which arrival of the shipment at State boundaries is estimated to occur;

(5) the destination of the shipment, and the 7-day period during which arrival of the shipment is estimated to occur; and

(6) a point of contact with a telephone number for current shipment information.

(c) The notification required by C.104(a) shall be made in writing to the office of each appropriate governor or governor's designee and to the Agency. A notification delivered by mail must be postmarked at least 7 days before the beginning of the 7-day period during which departure of the shipment is estimated to occur. A notification delivered by messenger must reach the office of the governor, or governor's designee, at least 4 days before the beginning of the 7-day period during which departure of the shipment is estimated to occur. A copy of the notification shall be retained by the licensee for 1 year.

(d) The licensee shall notify each appropriate governor, or governor's designee, and the Agency of any changes to schedule information provided pursuant to C.104(a). Such notification shall be by telephone to a

16/ A list of the mailing addresses of the governors and governors' designees is available upon request from the Director, Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

responsible individual in the office of the governor, or governor's designee, of the appropriate State or States. The licensee shall maintain for 1 year a record of the name of the individual contacted.

(e) Each licensee who cancels a nuclear waste shipment, for which advance notification has been sent, shall send a cancellation notice to the governor, or governor's designee, of each appropriate State and to the Agency. A copy of the notice shall be retained by the licensee for 1 year.