



U.S. Department
of Transportation
**Research and
Special Programs
Administration**

FEB 17 2005

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

Mr. Peter B. O'Connell
Attorney At Law
130 Washington Avenue
Albany, New York 12210

Ref. No. 04-0265

Dear Mr. O'Connell:

This responds to your letter to Mr. James Simmons, Federal Motor Carrier Safety Administration (FMCSA), regarding the Material of Trade (MOTS) exceptions under the Hazardous Materials Regulations (HMR; 49 Parts 171-180) as they apply to towing companies providing roadside services to motorists. Your letter was referred to this office for response.

You said that many towing companies (particularly those that participate in motor clubs) provide roadside services to motorists. As part of these services, towing companies are often required to transport gasoline in containers of less than 8 gallons for the purpose of refueling their customers' vehicles. The gasoline may be transported by tow trucks of over 10,000 pounds Gross Vehicle Weight Rating (GVWR) or by service vehicles (i.e., pickup trucks, vans, SUVs) of less than 10,000 pounds GVWR. The gasoline may either be sold or given to the customer as part of a service contract. Assuming that the operators of the transport vehicles are aware of the presence of a hazardous material and that the gasoline containers are properly secured, you asked questions as follows:

- Q1. Does gasoline that is transported in a commercial vehicle for the purpose of refueling a customer's vehicle qualify as MOTS?
- A1. Yes. In accordance with §171.8, a material of trade is a hazardous material carried on a motor vehicle by a private motor carrier in direct support of a principal business that is other than transportation by motor vehicle.
- Q2. Does a fuel can that meets the requirements of ASTM F852-99 satisfy the packaging requirements in §173.6?
- A2. Shippers must package gasoline shipped under the MOTS exception in packagings that conform to either the Occupational Safety and Health Administration's (OSHA) requirements in 29 CFR §§1910.106(d)(2) or 1926.152(a)(1), or to the requirements of the HMR (See §173.6(b)(4)). Neither the OSHA standards nor the HMR reference ASTM F852-99.
- Q3. As an alternative to question 2, is there a list of fuel cans that have been approved by the FMCSA and/or OSHA?



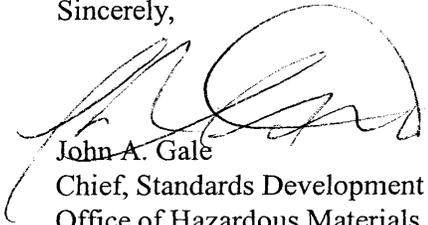
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173.6

- A3. Under the HMR, non-bulk packagings authorized for the transportation of gasoline are specified in §173.202. Packagings authorized for limited quantity shipments of gasoline are specified in §173.150(b). Questions concerning packagings authorized under the OSHA standards should be directed to OSHA.
- Q4. Is the driver of a vehicle that is transporting gasoline in intrastate commerce under the MOTS exception required to carry a medical card if the transport vehicle is over 10,000 pounds GVWR or under 10,000 pounds GVWR?
- A4. The Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) is the agency responsible for compliance with regulations governing qualifications for commercial drivers. The driver qualification requirements in 49 CFR Part 391 do not apply to intrastate commerce; note, however, that the State in which you operate may have similar requirements. You may contact the FMCSA's Hazardous Materials Division at (202) 366-6121 for information on this issue.

I hope this satisfies your inquiry. If we can be of further assistance, please contact us

Sincerely,



John A. Gale
Chief, Standards Development
Office of Hazardous Materials Standards

cc: Bill Quade, FMCSA

PETER B. O'CONNELL
ATTORNEY AT LAW

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Engrum
§173.6
Material of Trade
04-0265

October 8, 2004

James Simmons
Federal Motor Carrier Safety Administration
400 7th Street S.W.
Room 8310 MC-ECH
Washington, D.C. 20590

RE: MATERIALS OF TRADE

Dear Mr. Simmons:

I am counsel to the Towing and Recovery Association of America (TRAA), Empire State Towing and Recovery Association (ESTRA) and the Conference of Northeastern Towing Associations (CNTA). Last week, you referred me to a HAZ MAT website in response to several questions that I posed concerning the Materials of Trade (MOT) exemption for hazardous materials. I did not find a satisfactory explanation on the site and now ask that you forward this letter to the appropriate parties for an official opinion on the questions that I posed.

As you are undoubtedly aware, many towing companies (particularly those that participate in motor clubs) provide roadside services to motorists. As part of these services, they are often required to transport gasoline in containers of less than 8 gallons for the purpose of refueling their customers' vehicles. The gasoline may be transported by tow trucks of over 10,000 pounds GVWR or by service vehicles (i.e., pickup trucks vans, SUVs) of less than 10,000 pounds GVWR. It may either be sold to the customer or given to the customer as part of a service contract.

Assuming that the operators of the transporting vehicles are aware of the presence of a hazardous material and that the gasoline containers are properly secured, the questions presented are:

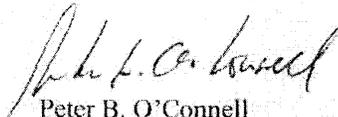
1. Does gasoline that is transported in a commercial vehicle for the purpose of refueling a customer's vehicle qualify as a material of trade?
2. Does a fuel can that has been classified by Underwriters Laboratories as satisfying the requirements of ASTM F852-99 conform to FMCSA or OSHA requirements?

3. As an alternative to question 2, is there a list of fuel cans that have been approved by FMCSA and/or OSHA?
4. Is the driver of a vehicle that is transporting gasoline in *intrastate* commerce under the above circumstances required to carry a medical card (a) if the transporting vehicle is over 10,000 pounds GVWR or (b) under 10,000 pounds GVWR?

As I mentioned in our previous telephone conversation, these are not hypothetical questions, as there are certain law enforcement agencies in New York State (and possibly elsewhere) that interpret Federal law as: (1) not considering gasoline that is given or sold to a third party as a MOT; (2) not recognizing fuel cans that have been classified by Underwriters Laboratories, and (3) requiring a driver of a vehicle that contains *any* amount of a hazardous material to carry a medical card. A prompt response would, therefore, be appreciated.

Thank you for your courtesy and consideration in this matter, and please do not hesitate to contact me if you require additional information with respect to this request.

Sincerely,



Peter B. O'Connell

cc: T/Sgt Ray Weiss (NYS State Police)
Sgt. Tom Fuller (NYS State Police)
John Connolly (NYS DOT)
Kevin O'Brien (NYS DMV)
Brian Temperine (FMSCA, NY Div. Adm'r)
Lawrence Minor (FMSCA)
TRAA, ESTRA, CNTA Boards of Directors

Questions

1. Does gasoline that is transported in a commercial vehicle for the purpose of refueling a customer's vehicle qualify as a material of trade?
 - a. RSPA interpretation
2. Does a fuel can that has been classified by UL as satisfying the requirements of ASTM F852-99 conform to FMCSA (should be RSPA) or OSHA requirements?
 - a. RSPA/OSHA interpretation
3. Is there a list of fuel cans that have been approved by FMCSA (should be RSPA) and/or OSHA?
 - a. RSPA/OSHA interpretation
4. Is the driver of a vehicle that is transporting gasoline in *intrastate* commerce under the above circumstances required to carry a medical card:
 - i. If the transporting vehicle is over 10,000 pounds GVW? or
 - ii. If the transporting vehicle is under 10,000 pounds GVW?
 - a. 49 CFR 391.41 does not apply to intrastate commerce; therefore FMCSA does not require a medical examiner's certification be carried, in this case. However, the state in which these companies operate may have a requirement similar to the federal code stated above.

Material of Trade:

- Means a Hazardous Material, other than Hazardous Waste, that is carried on a motor vehicle –
 - (3) By a private motor carrier in direct support of a principal business that is other than transportation by motor vehicle.
- Gasoline, UN 1203, Class 3, PG II
 - Special Provisions – 139 – NA
 - Exceptions – 150 – NA
 - Non-bulk Packaging – 202
- Exceptions - §173.6
 - (a)(1)(ii) A material of trade is limited to the following: Class 3 material contained in a package having a capacity less than 30L (8 Gallons)
 - (b)(4) A package must be made of metal or plastic and conform to the requirements of this subchapter or to the requirements of 29 CFR 1910.106(d)(2) or 1926.152(a)(1)
 - (c)(4) The operator of a motor vehicle that contains a material of trade must be informed of the presence of the Hazardous Material
- Non-Bulk Packaging Requirements - § 173.202
 - Steel jerrican: 3A1 or 3A2
 - Plastic jerrican: 3H1 or 3H2
 - Aluminum jerrican: 3B1 or 3B2
- **49 CFR 390.5:** Definition of Commercial Motor Vehicle: A motor vehicle that has any of the following characteristics:
 - A GVW >10,000 lbs; or
 - Designed to or used to carry >8 passengers for compensation; or
 - Designed to or used to carry > 15 passengers, not for compensation; or
 - Used in the transportation of placardable amounts of Hazardous Materials
- **49 CFR 391.41(a):** A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and, except as provided in § 391.67 (farm vehicles), has on his/her person the original, or a photographic copy, of a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle.
- **29 CFR 1910.106(d)(2):** Design, construction, and capacity of containers--(i) General. Only approved containers and portable tanks shall be used. Metal containers and portable tanks meeting the requirements of and containing products authorized by chapter I, title 49 of the Code of Federal Regulations (regulations issued by the Hazardous Materials Regulations Board, Department of Transportation), shall be deemed to be acceptable.
 - (iii) Size. Flammable and combustible liquid containers shall be in accordance with Table H-12, except that glass or plastic containers of no more than 1-gallon capacity may be used for a Class IA or IB flammable liquid if:
 - (a)(1) Such liquid either would be rendered unfit for its intended use by contact with metal or would excessively corrode a metal container so as to create a leakage hazard; and
 - (2) The user's process either would require more than 1 pint of a Class IA liquid or more than 1 quart of a Class IB liquid of a single assay lot to be used at one time, or would require the maintenance of an analytical

standard liquid of a quality which is not met by the specified standards of liquids available, and the quantity of the analytical standard liquid required to be used in any one control process exceeds one-sixteenth the capacity of the container allowed under Table H-12 for the class of liquid; or

- (b) The containers are intended for direct export outside the United States.

Container Type	Flammable Liquids			Combustible Liquids	
	Class IA	Class IB	Class IC	Class II	Class III
Glass or approved plastic	1 pt	1 qt	1 gal	1 gal	1 gal
Metal (other than DOT drums)	1 gal	5 gal	5 gal	5 gal	5 gal
Safety cans	2 gal	5 gal	5 gal	5 gal	5 gal
Metal drums (DOT specifications)	60 gal	60 gal	60 gal	60 gal	60 gal
Approved portable tanks	660 gal	660 gal	660 gal	660 gal	660 gal

Note: Container exemptions: (a) Medicines, beverages, foodstuffs, cosmetics, and other common consumer items, when packaged according to commonly accepted practices, shall be exempt from the requirements of Sec. 1910.106(d)(2) (i) and (ii).

29 CFR 1926.152: Flammable and combustible liquids.

- (a) General requirements. (1) Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved safety cans or Department of Transportation approved containers shall be used for the handling and use of flammable liquids in quantities of 5 gallons or less, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, the original container may be used, for storage, use and handling of flammable liquids.

Flammability	OSHA Flammable Liquid Class	Flash Point	Boiling Point
Flammable	IA	<73° F	< 100°F
	IB	<73° F	≥100°F
	IC	73°F ≤100°F	>100°F
Combustible	II	100°F ≤140°F	
	IIIA	140°F ≤200°F	
	IIIB	≥200°F	