



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
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Mr. Dave W. Wergin
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AUG 12 1999

Dear Mr. Wergin:

Thank you for your August 2, 1999 letter to Mr. Delmer Billings, Chief, Standards Development, Research Special Programs Administration, in which you requested an interpretation of the applicability of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, to six scenarios. I am responding to your request. This response addresses only Federal issues and not the possible applicability of Colorado law or regulations adopting standards similar to the Federal HMR.

In general, any person who transports hazardous material in commerce or causes hazardous material to be transported in commerce is subject to Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. §§ 5101-5127, and the HMR. 49 U.S.C. § 5103(b). A "person" includes: "a government, Indian tribe, or authority of a government or tribe offering hazardous material for transportation in commerce or transporting hazardous material to further a commercial enterprise" 49 U.S.C. § 5102(9); see also 49 C.F.R. § 171.8.

Therefore, the University of Colorado (University) is not subject to the HMR as a carrier unless it transports hazardous material in commerce in furtherance of a commercial enterprise. Transportation is not in furtherance of a commercial enterprise if it is carried out: (1) by government personnel and (2) for a governmental purpose. University employees are government personnel, but contractors are not. Ownership (government or non-government) of the vehicle being used to transport the hazardous material does not affect the applicability of the HMR.

The University's transportation is not in furtherance of a commercial enterprise if it is for a governmental purpose. The scope of governmental purpose is difficult to define in the abstract. Nevertheless, an activity is likely to fall within the domain of governmental purpose when it is constitutionally mandated or authorized, when it is a traditional "sovereign" activity, when it falls within the government's police powers, or when its benefits accrue to the public as a whole. The

activity is more apt to be deemed for a non-governmental purpose if there is a conscious purpose to generate a profit or if the activity competes with, or displaces, the private sector.

Even if a contractor or other non-government employee transports a hazardous material, the HMR would only apply if the transportation is in commerce. The term "commerce" means transportation that is or affects interstate trade or traffic. 49 U.S.C. § 5102(1). Consequently, the HMR do not apply to transportation that is entirely on private property and neither follows nor crosses a public way. Property is regarded as private if public access is legally and actually restricted from the area where transportation occurs.

Applying these general principles to your scenarios leads to the following results:

Scenario 1: Do the DOT regulations apply if a University employee transports University-owned hazardous waste while driving a University vehicle solely on University roads and property which have restricted public access? Analysis: No, the HMR do not apply if the transportation does not further a commercial enterprise. The HMR do not apply to transportation by a government employee for a governmental purpose.

Scenario 2: Do the DOT regulations apply if a University employee transports University-owned hazardous waste while driving a University vehicle on unrestricted public roads? Analysis: No, the HMR do not apply if the transportation does not further a commercial enterprise. The HMR do not apply to transportation by a government employee for a governmental purpose.

Scenario 3: Do the DOT regulations apply if a non-University employee contract worker transports University-owned hazardous waste while driving a University vehicle solely on University roads and property which have restricted public access? Analysis: No, the HMR do not apply if the public is legally and actually restricted from the area where transportation occurs.

Scenario 4: Do the DOT regulations apply if a non-University employee contract worker transports University-owned hazardous waste while driving a University vehicle on unrestricted public roads? Analysis: Yes, the HMR do apply because the hazardous material is being transported by a non-government employee in an area where the public has either legal or actual access.

Scenario 5: Do the DOT regulations apply if a non-University employee contract worker transports University-owned hazardous waste while driving a non-University vehicle solely on University roads and property which have restricted public access? Analysis: No, the HMR do not apply if the public is legally and actually restricted from the area where transportation occurs.

Scenario 6: Do the DOT regulations apply if a non-University employee contract worker transports University-owned hazardous waste while driving a non-University vehicle on unrestricted public roads? Analysis: Yes, the HMR do apply because the hazardous material is being transported by a non-government employee in an area where the public has either legal or actual access.

I hope that this guidance is of assistance to you. If you need further clarification concerning this matter, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "E. H. Bonekemper, III". The signature is written in a cursive style with a long, sweeping flourish at the end.

Edward H. Bonekemper, III
Assistant Chief Counsel
Hazardous Materials Safety and
Research & Technology Law