



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

400 Seventh Street, S.W.
Room 8407
Washington, D.C. 20590

Phone: (202) 366-4400
Fax: (202) 366-7041

JAN 14 2004

Mr. Wesley Throop
Project Engineer
Forest Service
U.S. Department of Agriculture
Missoula Technology & Development Center
5785 Highway 10 West
Missoula, MT 59808-9361

Dear Mr. Throop

Thank you for your December 3, 2003 memorandum to our office in which you asked for clarification whether State requirements on the transportation of hazardous materials apply to United States government agencies and their personnel. In further telephone conversations with Frazer Hilder of my staff, you have stated that the general policy of the Forest Service is to comply with the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, when your agency's employees transport hazardous materials, but that there are occasions when compliance with the HMR is impractical. You also advised that representatives of the California Highway Patrol have taken the position that, when the Forest Service is not in compliance with the HMR, it must comply with the California requirements (which must be consistent with the HMR), unless the Forest Service holds an DOT exemption that contains alternative requirements.

We agree with your general understanding that a governmental agency and its employees are not "persons" subject to the Federal hazardous material transportation law (49 U.S.C. § 5101 et seq.) and the HMR when they transport hazardous materials for a government (non-commercial) purpose. This principle applies to all levels of government, Federal, State, and local. It follows from the definition of a "person" in 49 U.S.C. § 5102(9) and 49 C.F.R. § 171.8. For this reason, it is unnecessary for the Forest Service or any other governmental agency to obtain an exemption from the HMR in order to transport hazardous materials (for a government purpose) in a manner different than prescribed in the HMR.

We also conclude that a State may not subject a Federal agency or its employees to State requirements on the transportation of hazardous materials when the Federal agency and its employees are not subject to the HMR. The application of State requirements to a Federal agency, when it is not subject to the Federal hazardous material transportation law or the HMR,

would be an "obstacle" to accomplishing and carrying out the Federal hazardous material transportation law and the HMR. As enforced or applied to a Federal agency and its employees, the State requirement would be preempted by 49 U.S.C. § 5125(a)(2) -- or § 5125(b)(1) if the State requirement concerns one of the subjects listed in the latter section. However, these same considerations may not exist in the event that a State wishes to make its own agencies and their employees subject to State requirements for transporting hazardous materials.

You have also indicated that you understand that the Federal hazardous material transportation law and the HMR apply to the transportation of hazardous materials by a government contractor, even when the government contractor uses a government-owned vehicle to perform that transportation. See 49 U.S.C. § 5126(a) and 49 C.F.R. § 171.2(b). In that situation, a government contractor is also subject to State requirements that do not conflict with the Federal hazardous material transportation law and the HMR. Of course, a government contractor is entitled to transport hazardous materials in compliance with any exceptions in the HMR (including the provisions in 49 C.F.R. § 173.6 on materials of trade) and any DOT exemption to which the contractor is a party.

I hope that this information is helpful. If you have further questions, you may contact me or Mr. Hilder at the above address, by telephone at 202-366-4400, or by fax at 202-366-7041.

Sincerely,



Joseph Solomey
Assistant Chief Counsel for
Hazardous Materials Safety and
Emergency Transportation Law

cc: Mr. Paul Horgan
California Highway Patrol