



U.S. Department  
of Transportation

Research and  
Special Programs  
Administration

Office of the  
Chief Counsel

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

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Michael Shepard, Esquire  
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California Environmental Protection Agency  
Department of Toxic Substances Control  
400 P Street, 4th Floor  
P.O. Box 806  
Sacramento, CA 95812-0806

Re: Application of Federal Hazardous Material Transportation  
Law to the University of California

Dear Mr. Shepard:

In your August 25, 1994 letter to Research and Special Programs Administration Chief Counsel Judith Kaleta, the California Environmental Protection Agency, Department of Toxic Substances Control (CaDTSC), requests guidance on whether the Hazardous Materials Transportation Act (HMTA) applies to the University of California when it transports hazardous waste from one location to another on its campuses. Ms. Elyse Axell, University Counsel, has submitted the University's views in a September 1, 1994 letter, a copy of which she has mailed to you.

On July 5, 1994, the President signed H.R. 1758 into law, thereby codifying the former HMTA. Formerly at 49 App. U.S.C. §§ 1801 et seq., the provisions of Federal hazardous material transportation law (Federal hazmat law) now appear at 49 U.S.C. §§ 5101-5127.

Hazardous material transportation by a governmental body is subject to Federal hazmat law if it meets two criteria. First, the transportation must be in commerce. 49 U.S.C. § 5103(a), (b). Second, it must be "to further a commercial enterprise." 49 U.S.C. § 5102(9). As the CaDTSC correctly cites this office's prior interpretations, government transportation is not to further a commercial enterprise if it is conducted (1) by governmental personnel and (2) for a governmental purpose. The CaDTSC and the University specify that the transportation in question is transportation in commerce, that is, on roads of

general public access. You further specify that transport is carried out by University personnel. Accordingly, the applicability of Federal hazmat law turns on whether the University's hazardous waste transportation is for a governmental purpose.

The CaDTSC contends that transportation is not for a governmental purpose when it is pursuant to a commercial enterprise, and that an enterprise is commercial if it is in competition with the private sector. It asserts that the University is engaged in the "major commercial activity of higher education," in competition with private universities, and therefore is engaged in a commercial enterprise.

The University responds that it is not engaged in a commercial enterprise. It points to the University's status as a branch of State government created by constitution to carry out the "basic sovereign function of public education." It contends that competition with the private sector is not determinative of a commercial purpose, and that even if it were, private universities are not in competition with the University: while private universities offer "education," the University of California offers "public education."

As this office has indicated previously, the sphere of "governmental purpose" cannot be delineated in the abstract. That the University system is established in the State Constitution as a branch of State government with a not-for-profit mission is strong evidence of a governmental purpose. In our view, competition with the private sector, in the sense that both private and public institutions seek students from among the same universe of individuals, does not in itself make the California university system a commercial enterprise. If the university system is established by constitution for the pursuit of a legitimate, fundamental public good -- for instance, to make higher education available to all citizens -- the University's activity within the scope of its constitutional mandate is a governmental purpose.

On the basis of the general facts provided, we conclude that the University's transportation of its own hazardous waste, by its own personnel, is not to further a commercial enterprise and, therefore, is not subject to Federal hazmat law. The CaDTSC suggests that risks from hazardous waste transportation by the University are equivalent to those from transportation by private universities, and accordingly that the two should be regulated to the same extent. The Federal statute, however, directs that they shall be regulated differently, and we cannot ignore that command.

