



Memorandum

U. S. Department
of Transportation

Pipeline and
Hazardous Materials
Safety Administration

Subject: Applicability of HMR; State Agency
Inspection of Anhydrous Ammonia Nurse Tanks

Date: AUG 4 2010

From: Bizunesh Scott, Chief Counsel
Pipeline and Hazardous Materials Safety Administration

Reply to Ref. No. 10-0114
Attn. of:

To: John Van Steenburg, Director
Office of Enforcement and Compliance
Federal Motor Carrier Safety Administration (MC-EHC)

This responds to your May 19, 2010 request for guidance on the applicability of the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180, to nurse tanks owned by and located on the property of a private motor carrier. You state that your questions arise "over the inspection of nurse tanks by a state enforcement agency that utilizes the regulations of the state's Department of Agriculture that deems nurse tanks to be 'in service' and subject to inspections for compliance with the HMR when filled at or above 15 percent of the capacity of the nurse tank."

Preliminarily, we note that the authority of a state to inspect and regulate packagings containing hazardous materials may be a separate and distinct issue from both the applicability of the HMR and the authority under 49 U.S.C. § 5121(b) & (c) for DOT officials to "inspect and investigate . . . records and property relating to a function" covered by the HMR. As discussed in more detail below, a finding that nurse tanks containing anhydrous ammonia are not "in transportation" does not necessarily resolve whether a nurse tank and its contents are subject to: (a) the HMR, (b) state requirements that are consistent or compatible with requirements in the HMR, or (c) inspection of those nurse tanks by Federal or state officials. We respond to your questions as follows:

Question No. 1: Do the HMR apply to nurse tanks located on the property of a distributor that is also a private motor carrier, not connected to a power unit and prior to a driver of a motor vehicle taking physical possession of the hazardous material for movement in commerce?

Answer: The HMR "govern safety aspects, including security, of the transportation of hazardous material the Secretary [of Transportation] considers appropriate" and apply to any person who:

- (i) transports hazardous material in commerce;
- (ii) causes hazardous material to be transported in commerce;
- (iii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or

- tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce;
- (iv) prepares or accepts hazardous material for transportation in commerce;
- (v) is responsible for the safety of transporting hazardous material in commerce;
- (vi) certifies compliance with any requirement under this chapter; or
- (vii) misrepresents whether such person is engaged in any activity under clause (i) through (vi).

49 U.S.C. § 5103(b)(1)(A) & (B).

A distributor of anhydrous ammonia in nurse tanks may (1) prepare anhydrous ammonia for transportation in commerce, (2) offer anhydrous ammonia for transportation in commerce, (3) transport anhydrous ammonia in commerce, (4) represent, mark, or certify that the nurse tank is qualified for use in transporting anhydrous ammonia in commerce, or, in some other manner, (5) be responsible for the safety of transporting anhydrous ammonia in commerce. To the extent that the distributor performs any of these functions, it must perform those functions in accordance with the requirements in the HMR, and DOT officials may inspect the distributor's nurse tanks used (or to be used) to transport anhydrous ammonia, review documents reflecting the distributor's transportation (or intended transportation) of anhydrous ammonia, and obtain additional information regarding the distributor's performance of functions governed by the HMR.

DOT's authority to "inspect and investigate . . . records and property" relating to the functions specified in 49 U.S.C. § 5103(b)(1), which has been delegated to PHMSA and FMCSA in 49 C.F.R. §§ 1.53(b)(1) and 1.73(d)(1), respectively, is not limited to observing a nurse tank "in transportation" or requiring the carrier to provide records and other information during the course of a shipment that is between origin and destination. Indeed, PHMSA routinely inspects nurse tanks used in anhydrous ammonia service at the distributor's location, when they are not actually moving on the highway. With respect to a nurse tank that appears to have been prepared for transportation of anhydrous ammonia, we have explained that

We will continue to exercise our statutory authority to inspect for compliance with the HMR requirements applicable to pre-transportation functions. We will also continue to exercise our authority to take appropriate enforcement actions when we discover that a pre-transportation function has been performed in a manner that does not comply with the HMR, even if transportation of the hazardous material in commerce has not yet begun (*i.e.*, the carrier has not yet taken possession of the material) or has not been performed at all (*i.e.*, undeclared shipments being offered for transportation). This approach is consistent with our authority under § 5103 of Federal hazmat law to regulate activities that affect the safe and secure transportation of hazardous materials in commerce.

October 30, 2003 final rule (HM-223), 68 Fed. Reg. 61906, 61912.

With respect to a nurse tank that appears to have been used for transportation of anhydrous ammonia, but does not presently meet all the requirements of 49 C.F.R. § 173.315(m), our investigator may attempt to (1) confirm that prior shipments were made based on a delivery ticket, invoice, or other document reflecting that prior shipment, and (2) determine whether the nurse tank

was in the same condition based on questioning the owner or person in possession of the nurse tank. In addition, if there is any evidence that the owner of the nurse tank has in any way represented, marked or certified the nurse tank as qualified for use in transporting anhydrous ammonia, we may take enforcement action for a violation of 49 C.F.R. § 171.2(g):

No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter governing its use in the transportation of a hazardous material in commerce [or the requirements of an exemption, a special permit, approval, or registration issued under this subchapter or subchapter A of this chapter] unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of this subchapter. . . . *The requirements of this paragraph apply whether or not the packaging or container is used or to be used for the transportation of a hazardous material.*

49 C.F.R. § 171.2(g) (emphasis supplied).

In sum, it is not necessary for DOT to actually observe a nurse tank “in transportation” in order to conduct an inspection – and then take enforcement action when there is sufficient evidence that the nurse tank fails to meet all the requirements in § 173.315(m) at the time of the inspection and/or at the time that anhydrous ammonia was transported in commerce.

Question No. 2: Does a state’s agricultural regulation pertaining to a nurse tank that is “in service” provide adequate grounds for agents of the state to enforce the HMR when there is no equivalent provision in the HMR (i.e., a tank filled at or above 15 percent capacity is deemed to be “in service”)?

Answer: A state may adopt and enforce requirements in the HMR as a matter of state law, and we understand that all states have enacted state safety laws and regulations that are compatible with the HMR and the Federal Motor Carrier Safety Regulations, 49 C.F.R. parts 390-397, as a condition of receiving financial assistance under the Motor Carrier Safety Assistance Program. 49 C.F.R. § 350.201. When a state adopts requirements in the HMR, usually by “incorporating by reference” those requirements into a state law or regulation, as a technical matter, the state is enforcing its state law or regulation, rather than directly enforcing the HMR.

That is the case in Minnesota, where we understand the activities are taking place that give rise to your inquiry. Minnesota Statutes 221.033 provides that, with certain exceptions, “no person may transport or offer or accept for transportation within the state of Minnesota a hazardous material, hazardous substance, or hazardous waste except in compliance with” Federal hazardous material transportation law or the HMR, “which are incorporated by reference.”

A state may also adopt additional requirements beyond those in the HMR, or apply specific requirements in the HMR to activities not directly subject to the HMR, so long as such additional or expanded requirements are not preempted by Federal law or the U.S. Constitution. At present we have no information to show that Minnesota’s application of certain requirements in the HMR applicable to nurse tanks filled with anhydrous ammonia to 15% or more of the tank’s capacity – when the nurse tanks are located on the property of the private motor carrier – is in conflict with the

preemption criteria in 49 U.S.C. § 5125(a) or (b)(1) of the Federal hazardous material transportation law, any other Federal law, or the Commerce Clause of the U.S. Constitution.

Of course, the terms of the state law or regulation adopting requirements in the HMR will determine whether "adequate grounds" exist for a state agent to enforce those requirements. While we have reviewed the Minnesota Department of Agriculture Anhydrous Ammonia Service Policy and Vehicle/Equipment Inspection Checklist, we have been unable to confirm that the Minnesota Department of Agriculture has adopted the requirements in the HMR by regulation as those requirements apply to a nurse tank that is located on the property of a private motor carrier and has not been offered or accepted for transportation or actually entered into transportation. PHMSA and its predecessor agencies have declined to find that Federal hazardous material transportation law preempts "an inconsistent or erroneous interpretation of a non-Federal [law or] regulation [which] should be addressed in the appropriate State or local forum, because 'isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent' with Federal hazardous material transportation law." Preemption Determination No. 14(R), Houston, Texas, Fire Code Requirements on the Stowage, Transportation and Handling of Hazardous Materials, 63 Fed. Reg. 67506, 67510 n. 4 (Dec. 7, 1998) (citations omitted), decision on petition for reconsideration, 64 Fed. Reg. 33949 (June 24, 1999).

Question No. 3: Should violations for specification shortages found on nurse tanks during inspections based on state-specific requirements be attributed to specific sections of the HMR?

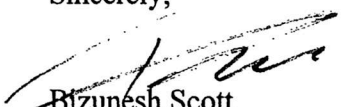
Answer: Technically, we suggest that it would be preferable for a violation of a requirement in the HMR, as adopted in state law or regulation, to refer to the state law or regulation "as incorporating by reference" the specific section of the HMR. However, this would appear to be a matter of form, better left to state law, and not a ground for finding preemption of the state requirement under Federal hazardous material transportation law, another Federal law, or the U.S. Constitution.

Question No. 4: Does the July 7, 2006 letter to Mr. Stephen Cansler (Ref. No. 05-0075) apply in this situation?

Answer: That letter answers questions from Mr. Cansler regarding "will-call" or "over the counter" sales of hazardous materials to a customer and the customer's potential further shipment of those materials by air. In the absence of additional information about the application and enforcement of the Minnesota Department of Agriculture requirements, I do not believe that the July 7, 2006 letter has any relevance to your inquiry regarding a state agency's inspection of nurse tanks used for transportation of anhydrous ammonia, whether or not the nurse tanks are actually "in transportation" at the time of inspection.

I hope this answers your questions. If you need additional assistance, please do not hesitate to contact Mike Hilder of my staff at 202-366-6360.

Sincerely,



Bizunesh Scott
Chief Counsel