



U.S. Department  
of Transportation

**Research and  
Special Programs  
Administration**

Office of the  
Chief Counsel

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

FCH

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Mr. Bill Keffer  
Senior Engineering Advisor  
Emergency Response and Removal Program  
U.S. Environmental Protection Agency  
Region 7  
25 Funston Road  
Kansas City, KS 66115

Dear Mr. Keffer:

This responds to your May 23 letter and follows up on our conversation at the COHMED conference in Tampa, concerning the applicability of the Hazardous Materials Regulations (HMR, 49 C.F.R. Parts 171-180) to activities of the Environmental Protection Agency (EPA).

You describe two situations in which EPA is involved in the transportation of hazardous materials (which may include EPA-regulated hazardous wastes): (1) sending or conveying samples of hazardous materials for analysis, and (2) removing hazardous materials that have been released (either during transportation or at a fixed facility) as part of "cleanup" efforts.

First, the applicability of the HMR to these activities is governed by the definition of a "person" subject to the HMR. As explained in Howard Wilson's May 26, 1994 memo (which you enclosed with your letter), a governmental agency or instrumentality must comply with the HMR when it: (1) offers hazardous materials for transportation in commerce, or (2) transports hazardous materials in furtherance of a commercial enterprise. See 49 U.S.C. § 5102(9) and 49 C.F.R. § 171.8.

Second, as also noted in Mr. Wilson's memo, government contractors are subject to the HMR just as any private person or enterprise. See 49 U.S.C. § 5126(a) and 49 C.F.R. § 171.1(c).

Third, RSPA considers that transportation is not "in commerce," and therefore not subject to the HMR, when it occurs entirely within (1) private property or (2) governmental property to which the public does not have general access. On the other hand, transportation is considered "in commerce" whenever it takes place on a public highway. This would include crossing a public road to travel between two parts of a government installation.

This means that the HMR (including requirements for training of "hazmat employees") apply when:

1. EPA offers (or ships) samples or "cleanup" materials for transportation by any non-governmental carrier (e.g., Federal Express, United Parcel Service, Consolidated Freightways, or a government contractor).
2. EPA's contractors ship or transport hazardous materials.

RSPA considers that the HMR do not apply when:

1. EPA's own employees transport hazardous materials themselves.
2. EPA's contractors remain on government property to which there is no general public access or on private property.

At the same time, RSPA encourages full compliance with the HMR by governmental agencies that need not follow the HMR's requirements because they are excluded from the definition of a "person." Mr. Wilson's memo indicates that, in an EPA Order, EPA requires compliance with the Federal hazardous materials transportation law and the HMR. Your June 24, 1994 memo also contains strong arguments in favor of governmental compliance with the HMR in all situations, including those when compliance is not required. However, the strong preemption provisions in the Federal law governing the transportation of hazardous materials, at 49 U.S.C. § 5125, would likely preclude State enforcement of State requirements, applicable to the transportation of hazardous materials, in those situations when a governmental agency is not required to comply with the HMR.

I hope this information is helpful. If you have additional questions, you may contact me at 202-366-4400.

Sincerely,



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cc: Howard Wilson, Chief  
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