

Bob



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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David G. Dales, Esquire  
Nebraska Public Power District  
Office of the General Counsel  
P.O. Box 499  
Columbus, NE 68601

Dear Mr. Dales:

Research and Special Programs Administration (RSPA) Chief Counsel Judith Kaleta has asked me to respond to your inquiry concerning the applicability of the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. §§51201 et seq., and its implementing regulations to transportation by the Nebraska Public Power District (NPPD). Specifically, you ask whether the HMTA and its regulations apply to NPPD transportation of hazardous materials, in its own vehicles, both within Nebraska and elsewhere.

The HMTA applies to "any person" who transports hazardous materials in commerce. 49 App. U.S.C. § 1804(a)(3). The term "person" includes any:

5102(8)

government or Indian tribe when it offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise.

5102(9)

Id. at § 1802(11). Hazardous materials transportation by a Federal, State or local government agency or an Indian tribe, then, is subject to regulation under the HMTA when that transportation is "in furtherance of a commercial enterprise." RSPA interprets this term to except governmental transportation from the HMTA when it is carried out (1) by governmental personnel and (2) for a governmental purpose.

Your correspondence indicates that the NPPD is a subdivision of Nebraska State Government. It is a public corporation with a publicly elected Board of Directors and powers set forth in and limited by statute. Accordingly, the NPPD is a State agency within the meaning of 49 App. U.S.C. § 1804(a)(3).

5102(9)

The NPPD generates, transmits and distributes electric power, which it sells wholesale and retail through an interstate power pool. The bond refinancing offering statement included with your letter states that there are no investor-owned utilities providing retail electric service in Nebraska. By statute, the NPPD sets its rates at a level that will:

confer upon and distribute among users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation.

Neb. Rev. Stat. § 70-655. From this language, I infer that revenues from NPPD operations are retained by the NPPD and directed solely to corporate purposes authorized by statute, and that there is no distribution of profits to private parties.

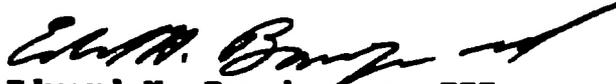
Whether hazardous materials transportation by a government agency is for a governmental purpose depends on the facts of the case. On the facts as related, hazardous materials transportation by NPPD employees within the scope of NPPD authority is for a governmental purpose. This conclusion rests on a combination of factors: (1) that the NPPD is governed by a publicly elected Board of Directors; (2) that the activities in which the NPPD may engage are specifically limited by statute; (2) that the NPPD does not distribute profits; and (4) that it does not significantly compete with private, investor-owned utilities.

You indicate that the NPPD uses its own vehicles in hazardous materials transportation. Use of privately owned vehicles would not subject the NPPD to HMTA jurisdiction, provided that the NPPD controlled the operation of those vehicles. On the other hand, if the NPPD were to employ private contractor personnel in hazardous materials transportation, that transportation would be subject to the HMTA to the same extent as if undertaken by a private person. 49 App. U.S.C. § 1010.

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I trust this response is helpful to you. If you have further questions, please feel free to telephone me or Charles Holtman of my staff at (202) 366-4400.

Sincerely,



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