



U.S. Department of Transportation  
**Pipeline and Hazardous Materials  
Safety Administration**

1200 New Jersey Ave, SE  
Washington, D.C. 20590

MAR 18 2011

Mr. Fred Nachman  
Thunderbird Cylinder, Inc.  
4209 E. University Drive  
Phoenix, AZ 85034

Ref. No. 10-0212

Dear Mr. Nachman:

This responds to your October 4, 2010 email regarding requirements for cylinders under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you request clarification of the applicability of the HMR to cylinders used and transported by government agencies for non-commercial purposes. Your questions are paraphrased and answered as follows:

Q1. Does § 171.1(d)(5) of the HMR exempt a government agency from being subject to the requirements of the HMR?

A1. Section 171.1(d)(5) clarifies that the transportation of a hazardous material in a transport vehicle operated by government personnel for non-commercial purposes is an activity to which the HMR do not apply. However, this may not fully except a government agency from being subject to the HMR. The statutory definition of a “person” under 49 U.S.C § 5102(9) includes a government, Indian tribe, or authority of a government or tribe that (1) offers hazardous material for transport in commerce; (2) transports hazardous material to further a commercial enterprise; or (3) 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. Thus, if condition (3) is met, a government agency is subject to the HMR pertaining to that activity even if a hazardous material is not offered in commerce or transported in furtherance of a commercial enterprise. See the definition of a “person” subject to the HMR in 49 U.S.C § 5102(9) and 49 CFR 171.8.

Q2. Regarding a letter of interpretation issued on July 1, 2005 (Ref no. 05-0060), does the response contradict § 171.1(d)(5)?

A2. No. The letter of interpretation referenced in your email states that “a cylinder marked to certify that it conforms to HMR requirements must be maintained in accordance with applicable specification requirements whether or not it is in transportation in commerce at any particular time.” This does not contradict § 171.1(d)(5). As noted in A1, § 171.1(d)(5) relates to non-commercial transportation of a hazardous material. A government agency is still subject to the HMR if the agency designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a cylinder that is represented, marked, certified, or sold as qualified for use in

transporting hazardous material in commerce. Thus, a government agency maintaining a cylinder as qualified to a DOT specification for use in transporting a hazardous material in commerce is subject to the maintenance and requalification requirements for that particular cylinder specification, for example.

Q3. What about (1) a self-contained breathing apparatus (SCBA) (e.g., an Air-Pak®) used and transported by fire department vehicles and filled or refilled at the scene of an emergency; (2) an air cylinder on the ladder unit of a fire truck used to supply air to a firefighter; or (3) a DOT cascade storage system on a fire department vehicle used to refill SCBAs at the scene of an emergency? Are these packagings, some constructed to a DOT specification or operated under a Special Permit, and activities exempted from being subject to the HMR?

A3. In a final rule published October 30, 2003 under docket HM-223 (68 FR 61906), the Research and Special Programs Administration (RSPA), the predecessor agency to PHMSA, stated that emergency vehicles (e.g., a fire truck) used to respond to emergencies under the authority of a local government are not subject to the HMR. This is because the government agency treats the vehicles as government-operated vehicles for community emergency response regardless of whether the vehicle is owned or operated by a commercial company (68 FR 61913). Thus, any hazardous material transported on the emergency vehicle used for emergency response under the authority of a local government is not subject to the HMR. However, as noted in A2, cylinders maintained as qualified under the HMR for use in transporting hazardous material are subject to the HMR pertaining to the design, manufacture, fabrication, inspection, marking, maintenance, reconditioning, repair, or testing of the cylinder.

Q4. What about a DOT specification tube trailer or cascade storage system located at a fixed facility and used to fill cylinders. Do the filling systems that utilize cylinders need to be requalified in accordance with the HMR?

A4. If the government agency maintains and certifies that the packagings are qualified for use in transporting hazardous material in accordance with the 49 CFR then the government agency is subject to the HMR relating to those activities. Otherwise, government operations are typically for non-commercial purposes and therefore, not subject to the HMR. Additionally, transportation in commerce does not include PHMSA regulation of fixed storage operations at facilities. See § 171.1(d)(1) and (3).

I hope this information is helpful. If you have further questions, please contact this office.

Sincerely,



Ben Supko  
Acting Chief, Standards Development  
Standards and Rulemaking Division

Der Kinderen  
§ 171.1  
§ 171.2  
§ 171.8  
Applicability  
10-0212

**Drakeford, Carolyn (PHMSA)**

**From:** Betts, Charles (PHMSA)  
**Sent:** Monday, October 04, 2010 2:00 PM  
**To:** Chunephisal, Alisa (PHMSA); Chaney, Wayne (PHMSA)  
**Cc:** Drakeford, Carolyn (PHMSA)  
**Subject:** RE: Any thoughts?

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**From:** Chunephisal, Alisa (PHMSA)  
**Sent:** Monday, October 04, 2010 1:34 PM  
**To:** Chaney, Wayne (PHMSA); Betts, Charles (PHMSA)  
**Subject:** Any thoughts?

**Alisa Chunephisal**  
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**From:** Fred Nachman [mailto:fredn@cylinder.com]  
**Sent:** Monday, October 04, 2010 1:27 PM  
**To:** Chunephisal, Alisa (PHMSA)  
**Cc:** Lehman, Victoria (PHMSA); Posten, Ryan (PHMSA)  
**Subject:** RE:

Ms. Alisa Chunephisal  
DOT, Office of Hazardous Material Standards

Dear Ms. Chunephisal,

Confirming our conversation of this morning, October 4, 2010, do the following references exempt government entities from the HMR's:

- 49CFR171** General Information, Regulations and Definitions
- 49CFR171.1(d)** Functions not subject to the requirements of the HMR.
- 49CFR171.1(d)(5)** *Transportation of a hazardous material in a motor vehicle, aircraft or vessel operated by a Federal, state, or local government employee solely for noncommercial Federal, state or local government purposes.*

I can understand allowing the military to transport cylinders without manifests, bills of lading or hazmat marking in an emergency or hostile situation.

Does the **Interpretation letter No. 05-0060**, paragraph 2 contradict the above... *A cylinder marked to certify that it conforms to HMR requirements must be maintained in accordance with applicable specification requirements whether or not it is in transportation in commerce at any particular time.*

As Ms. Lehman explained, if the DOT Specification remains on the cylinder, it must meet all CFR requirements for manufacturer and requalification.

#### **49CFR105(A) Definitions**

Transports or Transportation means the movement of property and loading, unloading or storage incidental to the movement.

1. What about airpaks used by fire departments that are filled/refilled by the departments either in a fill room or at a scene? They are, then, transported by fire trucks on highways to the fire scene for use, where they may be refilled again and again on sight. They are not in commerce where they had been filled by a corporate enterprise. They are, however, in Transportation being loaded/filled and unloaded/used.
2. What about air cylinders (4500psi) on a ladder unit/aerial fire truck that provide breathing air to firefighters at the top of the ladder? A DOT cascade system on a fire vehicle to refill airpak bottles at a scene? They are operated by a governmental unit; however, they have a DOT Specification or Special Permit on them. They could be changed out to ASME cylinders which do not require recertification.

Fire Departments that want to protect their personnel have airparks requalified when dropped, exposed to heat, with abrasive damage, etc. even if new and recently put into service. They are also free to adhere to best practices of requalifying these cylinders per the CFRs and referenced Special Permits. It seems odd that DOT would allow this exemption, especially if OSHA or other agencies have different requirements.

3. How about a tube trailer delivered over the highway to site in a customer's yard where it is filled on site and, then, used to fill other cylinders without moving from that site? Does it need to be requalified at its periodic DOT Spec date?
4. How about a cascade system that is constantly being filled by a compressor and, then, filling cylinders multiple times a day? These cascade cylinders are constantly being filled to high pressures over and over on a daily basis.

I discussed this with Ms. Victoria Lehman in the DOT Information Center and received the following reference to the 05-0060 Letter of Interpretation from Ms. Susan Gorsky, who has retired.

Thank you for offering to resolve this issue.

Regards,

***Fred Nachman***  
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