

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 104

FIRE DEPARTMENTS - Responsibilities of fire service organizations in responding to hazardous materials incidents;

FIRE MARSHAL - Rulemaking authority concerning the responsibilities of fire service organizations in responding to hazardous materials incidents;

HAZARDOUS WASTE - Responsibilities of fire service organizations in responding to hazardous materials incidents;

ADMINISTRATIVE RULES OF MONTANA - Section 23.7.111(1);
MONTANA CODE ANNOTATED - Sections 7-33-2104, 7-33-2202, 7-33-4104, 10-3-105(4)(a), (b), (j), (k), 10-3-301, 10-3-302(1), 10-3-401, 50-3-102(2), 50-3-103, 75-10-701 to 75-10-715, 75-10-701(5), 75-10-702, 75-10-711;

UNITED STATES CODE - 42 U.S.C. §§ 11001 to 11050, 42 U.S.C. § 11003(c)(2), 42 U.S.C. § 11003(e).

- HELD: 1. Any fire service organization may be assigned to respond to hazardous materials incidents if the supervising entity instructs the organization to so respond.
2. Designation of fire service organizations as first responders to hazardous materials incidents is a matter to be included in the state and local disaster and emergency plans.
3. The State Fire Marshal does not have authority to promulgate regulations on the subject of which fire service organizations should respond to hazardous materials incidents and when such responses should occur.

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9 August 1988

Ray E. Blehm Jr.
State Fire Marshal
Room 371, Scott Hart Building
303 North Roberts
Helena MT 59620

Dear Mr. Blehm:

You have requested my opinion on three questions which I have phrased as follows:

1. What types of fire service organizations may be assigned to respond to hazardous materials incidents?
2. Who is responsible for designation of fire service organizations as first responders to hazardous materials incidents?
3. May the State Fire Marshal, through use of his rulemaking authority, direct which fire service organizations should respond to hazardous materials incidents?

The State's fire protection laws are found in Title 7, chapter 33, and Title 50, chapter 3, MCA. The method of administering a fire service organization is controlled by statute and depends upon the type of organization. See 16A McQuillin, Municipal Corporations §§ 45.04, 45.05 (3d ed. 1984). For example, rural fire districts are operated either by the board of county commissioners or by a fire district board, while municipal fire departments are administered by the chief of the fire department. §§ 7-33-2104, 7-33-4104, MCA. Similarly, the control of a volunteer fire service organization depends upon what type of organization it is. In a municipality, the volunteer fire department serves under the supervision of the chief of the fire department. § 7-33-4109(5), MCA. County or district rural fire chiefs appointed by the governing body direct the operation of volunteer rural fire control crews. § 7-33-2202, MCA.

The fire protection statutes do not specify the duties of firefighters, whether volunteers or paid employees. Basically, the duties of firefighters consist of following the instructions of their supervisors when these instructions relate to fire protection and prevention. Firefighters' responsibilities include

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inspection of sites where combustible or hazardous materials are located. Rosenbauer, Introduction to Fire Protection Law 81-82 (1978). Moreover, the Uniform Fire Code, adopted by the State Fire Marshal pursuant to section 50-3-103(4), MCA, and section 23.7.111(1), ARM, gives the supervisor at a fire scene the authority to direct the investigation of hazardous conditions in addition to the extinguishment of fires. Unif. Fire Code, art. 10, div. 1, sec. 10.101. Accordingly, unless otherwise provided by law, the decision to order a firefighter to respond to or investigate a hazardous materials incident is within the discretion of the supervising entity of each fire service organization.

With respect to your second question, the responsibility for designation of fire service organizations as first responders to hazardous materials incidents depends upon the terms of any plans or agreements entered into by the supervising entities of the participating fire service organizations. In this regard, it is necessary to consider other statutes which may impinge upon the role of fire service organizations in responding to hazardous materials incidents.

Sections 75-10-701 to 715, MCA, authorize the Montana Department of Health and Environmental Sciences (the Department of Health) to "take remedial action to prevent or alleviate release of hazardous or deleterious substances into the environment." 1985 Mont. Laws, ch. 711. "'Remedial action' includes all investigation, monitoring, cleanup, restoration, abatement, removal, replacement, and other actions necessary or appropriate to respond to a release" of a hazardous substance. § 75-10-701(5), MCA. The Department of Health is authorized to adopt rules for implementing its responsibilities in this area. § 75-10-702, MCA.

Disaster and emergency services are the subject of Title 10, chapter 3, MCA, much of which was enacted as the Montana Disaster Act of 1977. The 1977 Act contemplates the preparation of a comprehensive disaster and emergency plan which provides for cooperation and coordination with local jurisdictions. § 10-3-301, MCA. The comprehensive state plan is to be prepared and carried out by the Division of Disaster and Emergency Services (the Division), which is a part of the Department of Military Affairs and is responsible to the Governor. §§ 10-3-302(1), 10-3-303(1), MCA. The Division has the responsibility for coordinating all local emergency plans and directing all response activities as authorized by the Governor. § 10-3-105(4)(a), (b), (j), (k), MCA.

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Local jurisdictions must also prepare disaster and emergency plans in accordance with and in support of the State's plan. These local plans must set forth the emergency responsibilities of all local agencies, as well as the disaster chain of command. § 10-3-401, MCA.

In addition, local plans for handling emergencies and disasters involving hazardous materials must be prepared by local emergency response commissions pursuant to a federal law, commonly referred to as the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 to 11050. These plans must include the methods and procedures to be followed for responding to the release of hazardous substances. 42 U.S.C. § 11003(c)(2).

All of these areas of the law are relevant to your inquiry. A "hazardous materials incident," as that phrase is used in your opinion request, may fit the descriptions of a "release" of a hazardous material under sections 75-10-701 to 715, MCA, and the federal Emergency Planning and Community Right-to-Know Act of 1986, as well as a "disaster" under Title 10, chapter 3, MCA. Thus, these statutes must be kept in mind when considering the role of fire service organizations in responding to hazardous materials incidents. The plans for designating first responders to such incidents would necessarily require coordination and consistency among the various plans, all of which contemplate review and direction by the State. See §§ 75-10-711, 10-3-105(4)(a), (j), (k), MCA; 42 U.S.C. § 11003(e). The plans must also be consistent with any rules promulgated by the State Fire Marshal under section 50-3-103, MCA.

An Attorney General's Opinion is obviously not the proper vehicle for determining which fire service organizations should be designated as first responders to hazardous materials incidents, since that question will depend upon the provisions of the many emergency plans formulated by state and local governments.

Your third question concerns whether the State Fire Marshal may, through rulemaking, prescribe which fire service organizations should respond to hazardous materials incidents. The statutes do not give the Fire Marshal express rulemaking authority on this specific subject, although he is given general rulemaking authority in the areas of fire prevention and use and storage of hazardous chemicals. See §§ 50-3-102(2), 50-3-103, MCA.

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Administrative rules must be strictly confined within applicable legislative guidelines. Bick v. State, Dept. of Justice, Div. of Motor Vehicles, 43 St. Rptr. 2331, 2332, 730 P.2d 418, 420 (1986). While the Fire Marshal has general rulemaking authority under section 50-3-103, MCA, the subject of which fire service organizations should respond and when such responses should occur is one within the authority of the supervising entity, to be addressed in state and local disaster and emergency plans, as discussed above.

THEREFORE, IT IS MY OPINION:

1. Any fire service organization may be assigned to respond to hazardous materials incidents if the supervising entity instructs the organization to so respond.
2. Designation of fire service organizations as first responders to hazardous materials incidents is a matter to be included in the state and local disaster and emergency plans.
3. The State Fire Marshal does not have authority to promulgate regulations on the subject of which fire service organizations should respond to hazardous materials incidents and when such responses should occur.

Very truly yours,

MIKE GREELY
Attorney General