



U.S. Department  
of Transportation

**Research and  
Special Programs  
Administration**

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Commissioner D.O. Helmick  
Department of California Highway Patrol  
P.O. Box 942898  
Sacramento, CA 94298-0001

CHP File No. 1.A08926.062.3-1-0404

Dear Commissioner Helmick:

Thank you for your June 23, 2003 letter to Delmer Billings of the Research and Special Programs Administration's Office of Hazardous Materials Standards. This responds to your question whether provisions in 49 U.S.C. § 5125 (a part of the Federal hazardous material transportation law), would preempt a State requirement that a motor vehicle transporting a hazardous material must be equipped with global positioning system (GPS) technology.

As I believe you already understand, RSPA does not have sufficient resources to conduct thorough reviews of State and local requirements outside of the preemption determination process set forth in subpart C of 49 C.F.R. Part 107 (beginning at § 107.201). Moreover, our review of proposed or draft requirements cannot consider the manner in which the requirements would actually be "applied or enforced," a factor on which a determination of preemption often depends. 49 U.S.C. § 5125(a)(2). Informal reviews are also hindered by the absence of the public input that occurs in the formal determination process established in 49 U.S.C. § 5125(d)(1).

Nonetheless, at your request, I am providing you with my personal, informal, and unofficial comments on a possible State requirement for GPS vehicle tracking technology. I also refer you to the most recent index and summary of administrative determinations and court decisions on hazardous materials preemption at our website: <http://rspa-atty.dot.gov> (click on "Preemption" and then "Preemption of State & Local Laws on Hazardous Materials Transportation").

Both the Department of Transportation (DOT) and the Department of Homeland Security (DHS) are taking actions to improve the safety and security of hazardous materials in transportation

including, specifically, en route security. Under RSPA's final rule published in the Federal Register on March 25, 2003, shippers and carriers of certain types and quantities of hazardous materials must develop and implement a security plan that addresses, among other matters, "the assessed security risks of shipments of hazardous materials . . . en route from origin to destination, including shipments stored incidental to movement." 49 C.F.R. § 172.802(a)(3), added at 68 Fed. Reg. 14521. We are also considering additional specific requirements to enhance en route security, such as vehicle tracking, escorts, pre-notification, and anti-theft devices, in a rulemaking proceeding initiated last July. See our advance notice of proposed rulemaking published on July 16, 2002, at 67 Fed. Reg. 46622.

RSPA coordinates its rulemakings with other Federal agencies that also have responsibility for improving the security of hazardous materials in transportation. In this regard, on May 5, 2003, the Transportation Security Administration (TSA) established security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a commercial driver's license (CDL). 68 Fed. Reg. 23852. On the same day, DOT's Federal Motor Carrier Safety Administration (FMCSA) issued its interim final rule prohibiting a State from issuing a CDL with a hazardous materials endorsement unless TSA has first determined that the applicant does not pose a security risk based on a background records check, and RSPA issued a companion rule requiring shippers and carriers to comply with the TSA and FMCSA requirements. 68 Fed. Reg. 23844, 23832.

A State requirement for GPS technology on any motor vehicle transporting a hazardous material would appear to present at least two possible "obstacles" to accomplishing and carrying out Federal hazardous material transportation law, a regulation issued under that law, or a DHS hazardous materials transportation security regulation and, thus, would be preempted under 49 U.S.C. § 5125(a)(2), as amended by § 1711(b) of the Homeland Security Act (HSA), Pub. L. 107-296, 116 Stat. 2320 (Nov. 25, 2002).


First, a State requirement for GPS technology may conflict with future requirements issued by DOT or DHS that specifically allow or require other methods for "real-time" tracking of a motor vehicle transporting hazardous materials – or a determination by DOT and DHS that such "real-time" tracking is not necessary. The principles of "conflict" preemption in 49 U.S.C. § 5125 apply when a State or local requirement differs from a Federal requirement and also when a Federal agency "has decided that no such requirement should be imposed at all." Ray v. Atlantic Richfield Co., 435 U.S. 151, 171-72 (1978). Under these principles, a State vehicle tracking requirement would also be preempted under § 5125(a)(1), as amended by HSA § 1711(b), if it became impossible to comply with the State requirement and a future Federal regulation on the same subject.

Second, President Bush has directed all Federal agencies to follow the policy set forth in Section 1(b)(8) of E.O. 12866 that Federal requirements should "to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." A State requirement that prescribes use of a specific vehicle

tracking technology creates a greater potential for conflict with different technologies prescribed by other States or local jurisdictions as well as the goals and purposes of Federal hazardous materials safety and security regulations that are expressed in terms of performance objectives whenever possible.

I hope that these comments are helpful. If you need further information, you may contact me or Frazer Hilder of my staff at the above address, by telephone at 202-366-4400, or by fax at 202-366-7041.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy E. Machado", with a large, stylized initial "N" and a long, sweeping underline.

Nancy E. Machado  
Assistant Chief Counsel for  
Hazardous Materials Safety and  
Research and Technology Law