



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
Chief Counsel

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

OCT 20 1995

Mr. Richard W. Collins
Director
Waste Management Administration
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Mr. Collins:

I am responding to your August 15, 1995 letter addressed to Alan I. Roberts, Associate Administrator for Hazardous Materials Safety of the Department's Research and Special Programs Administration (RSPA). Your letter requested comments on draft regulations that would require certain facilities that handle hazardous materials to obtain a permit from the Maryland Department of the Environment. These draft regulations include procedural and substantive requirements, beyond payment of a required fee, for obtaining and maintaining the permit.

As I believe you already understand, RSPA does not have adequate resources to conduct thorough reviews of State and local requirements outside of the preemption determination process set forth in 49 C.F.R. § 107.201 et seq. Moreover, our review of draft requirements cannot consider the manner in which the requirements are actually "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 the Federal hazardous material transportation law, at 49 U.S.C. § 5125(d)(1).

Nonetheless, at your request, I have briefly reviewed the draft regulations provided with your letter, and I am providing you with my personal, informal, and unofficial comments addressed to whether these regulations are preempted by Federal hazardous material transportation law, 49 U.S.C. § 5101 et seq. I also enclose the most recent index and summary of preemption determinations and inconsistency rulings issued by RSPA. The Office of the Chief Counsel for the Federal Railroad Administration has advised me that these draft regulations do not appear to raise issues of preemption under the Federal Railroad Safety Act, 45 U.S.C. § 421 et seq.

By their terms, the draft regulations appear to apply only to a facility at which, during a calendar year, 100,000 lbs. or more of a single hazardous material are transferred "from one mode of transportation to another," and they do not apply to hazardous materials that are "already in transportation." Mr. Gietka of your staff has advised that the intention of this language is to cover facilities that receive hazardous materials in a rail tank car for further distribution and from which, following some period of storage, the hazardous materials are loaded into cargo tank motor vehicles for transportation to the ultimate user. Mr. Gietka has stated that the rail carrier that delivers the hazardous materials to the intermediate storage facility is a different entity than the owner of that facility, and that the rail tank car is not under active shipping papers while it is at the intermediate storage facility.

Although the specific language of the draft regulations is not limited to the situation described by Mr. Gietka, I assume that the draft regulations would not apply to the unloading of hazardous materials from a cargo tank motor vehicle into a rail tank car. In that case, it would appear that the hazardous materials are "already in transportation" and any intermediate storage would appear to be in the course of, and incident to, consolidation and onward transportation (rather than distribution). As a result, I understand that the condition that makes the permit requirement applicable to a facility is the act (or series of acts) of loading hazardous material into a transportation vehicle or container, for onward transportation, from another transportation vehicle that has been used for intermediate storage (that was not incidental to, or in the course of, transportation).

Federal hazardous material transportation law and the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, apply to the transportation of hazardous materials in commerce.

"Transportation" means "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. § 5102(12). At present, the HMR do not apply to intrastate carriers by motor vehicle, and their shippers, so long as the hazardous material being transported is not a flammable cryogenic liquid in a cargo or portable tank, a hazardous waste, hazardous substance or marine pollutant. 49 U.S.C. § 171.1(a)(3). However, RSPA has proposed to extend the coverage of the HMR to all intrastate transportation, in HM-200 (58 Fed. Reg. 36920, July 9, 1993; correction, 58 Fed. Reg. 38111, July 15, 1993).

RSPA has consistently considered that movements of hazardous materials solely within private property are not "transportation in commerce." As explained in the preamble to RSPA's recent determinations concerning California and Los Angeles

Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials, PD-8(R) - PD-11(R), 60 Fed. Reg. 8774, 8777 (Feb. 15, 1995), Federal hazardous material transportation law and the HMR do not apply to

the movement of hazardous material exclusively at a consignee's facility. On the other hand, Federal hazmat law and the HMR regulate certain specific carrier and consignee handling of hazardous materials, including unloading of railroad tank cars, incidental to transportation in commerce, even when that unloading takes place exclusively at a consignee's facility.

For the same reasons, Federal hazardous materials transportation law and the HMR apply to the loading of material from a storage container into a vehicle or container for transportation, even when that loading takes place exclusively at a consignor's facility.

As summarized in the enclosed index, in prior inconsistency rulings and preemption determinations, RSPA has found that non-Federal permits for transportation of hazardous materials are not per se preempted. Rather, preemption depends upon the underlying requirements for obtaining the permit. The following requirements in the draft regulations for obtaining and maintaining a permit appear to raise issues of preemption under 49 U.S.C. § 5125:

-the posting of "appropriate warnings," to the extent that these differ from the requirements in the HMR for marking, labeling and placarding hazardous material in transportation. See § 5125(b)(1)(B). Note also the requirements of the Occupational Safety and Health Administration concerning retention of DOT hazardous materials markings, labels and placards until a packaging is sufficiently cleaned of residue and purged of vapors to remove any potential hazards. 29 C.F.R. §§ 1910.1201, 1915.100, 1917.29, 1918.100, and 1926.61.

-the maintenance of a log or summary of all incidents involving hazardous materials, to the extent that this either differs from, or is redundant with, the HMR's requirements concerning the written notification, recording, and reporting of the unintentional release in transportation of hazardous materials (including loading). See § 5125(b)(1)(D).

-the requirement for maintaining evidence of financial ability and evidence of financial assurance, which are not required by the HMR as a condition for offering hazardous materials for transportation (as opposed to the on-site handling or storage of hazardous materials that are not in transportation).

-the permit fees, to the extent that these fees are not used exclusively "for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(g)(1).

I have not considered whether certain of the grounds set forth in the draft regulations, for denial, suspension, or revocation of a permit, would satisfy due process requirements, such as the commission of any violation concerning any hazardous material (no matter how slight) or the submission of false information (regardless of its materiality).

I hope this information is helpful. I apologize for the delay in responding to your letter, which I hope has not caused any hardship for you and your staff. Please feel free to contact Frazer Hilder of my staff at the above address, or by telephone at 202-366-4400, if you wish to discuss any of these matters further.

Sincerely,



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

Enclosure