



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
Chief Counsel

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

JUN 27 1996

Mr. Michael Pulice
Director of Public Safety
City of Fairbanks
656 7th Avenue
Fairbanks, AK 99701

Dear Mr. Pulice:

I am responding to your April 22, 1996 facsimile letter addressed to Mr. Hilder of my staff concerning shipments of ammonium nitrate through a rail yard in the center of Fairbanks. You raise questions concerning State and local regulation of hazardous materials at various points during these shipments.

The situation you describe involves the delivery at the Fairbanks rail yard, approximately once a week, of a 100,000-lb. rail car containing ammonium nitrate. You state that this rail car is placed on a siding for off-loading into truck hoppers for further transportation to a mine location south of Fairbanks. You also indicate that as many as five full rail cars containing ammonium nitrate are present on this siding at any one time.

You state that your department wishes to prohibit the use of the Fairbanks rail yard for delivery and storage of large shipments of ammonium nitrate and other hazardous materials that will be used at this mine. You indicate that there is a rail siding south of Fairbanks, closer to the mine site, which is sufficient to hold several rail cars, but that the trucking company opposes use of this siding on the grounds that this location is difficult to secure and there have been past instances of theft and vandalism.

As I believe you already understand, the Research and Special Programs Administration (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. 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). Also, there is no information as to 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).

Nonetheless, at your request, I am providing my personal, informal, and unofficial comments on the situation discussed in your letter. On this basis, I do not believe that 49 U.S.C. § 5125 preempts either (1) a local prohibition on storage of ammonium nitrate at the Fairbanks rail yard for longer than the period of time necessary for the off-loading and onward movement of the ammonium nitrate to the mine site, or (2) a requirement that rail cars containing ammonium nitrate must be delivered to the trucking company at the rail siding south of Fairbanks when (a) this delivery can be done safely and securely and (b) the State or other political jurisdiction in which that siding is located agrees with and joins in imposing that requirement.

The four questions set forth in your letter are rephrased and answered as follows:

1. Do Federal hazardous material transportation law, 49 U.S.C. § 5101 et seq., and the Hazardous Materials Regulations, 49 C.F.R. Parts 171-180, apply to the ammonium nitrate in rail cars on a siding at the Fairbanks rail yard?

Any "storage" incidental to the "movement" of property is considered to be a part of the transportation covered by the Federal hazardous material transportation law and Hazardous Materials Regulations. The issue is not whether hazardous materials are in "storage," as opposed to being in "transportation," but whether any storage is part of the transportation. Storage that is incidental to transportation is governed by the Federal hazardous material transportation law and regulations.

2. Is there a limit on the time during which these rail cars can be in storage incidental to their movement and, therefore, subject to Federal regulation?

There is no absolute time limit. Whether the hazardous materials in these rail cars are governed by Federal hazardous material law and regulations depends on whether the storage is incidental to the continued movement of the ammonium nitrate or whether the storage is for another purpose. However, a rail carrier must forward a shipment of hazardous materials within 48 hours of receipt (plus Saturdays, Sundays and holidays). 49 C.F.R. § 174.14

3. In what instances do Federal regulations supersede local regulations?

I enclose a copy of 49 U.S.C. § 5125 which provides, in summary, that a State and local regulation concerning the transportation of hazardous materials is preempted in the following situations:

- a. when it is impossible to comply with both the Federal regulation and the State or local regulation.
 - b. when the State or local regulation, as applied or enforced, is an "obstacle" to accomplishing and carrying out of the Federal hazardous material transportation law and regulations.
 - c. when the State or local regulation concerns a "covered subject" and is not "substantively the same as" the Federal hazardous material transportation law and regulations. The five covered subjects are listed in § 5125(b)(1).
4. Are there Federal regulations governing the handling, separation, and transloading of ammonium nitrate?

Yes. Handling, loading, and separation regulations governing rail transportation are contained in 49 C.F.R. Part 174 (see especially §§ 174.55-174.81 and 174.510-174.580). The comparable regulations applicable to motor carrier transportation are set forth in Part 177 (see especially §§ 177.834-177.848). These modal-specific requirements are in addition to the classification of hazardous materials in § 172.101 (Hazardous Materials Table), the general requirements for shipments and packagings in Part 173, and the hazard communication requirements in Part 172, Subparts B-G.

For additional information, I also enclose the most recent index and summary of preemption determinations and inconsistency rulings issued by RSPA.

Please feel free to contact Mr. 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,

A handwritten signature in dark ink, appearing to read "Edward H. Bonekemper, III". The signature is fluid and cursive, with a large initial "E" and a long, sweeping underline.

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

Enclosures