



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

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

AUG 13 1998

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Sr. Assistant County Attorney
Room 600
Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

Dear Mr. Gardiner:

I am responding to your request to Frazer Hilder of my staff for an informal evaluation of a proposal to add to the Westchester County Sanitary Code a new Article XXVII, entitled Pollution Prevention, applicable to carriers of fuel, chemicals in quantities that require a placard, and hazardous materials being transported in the course of spill response and remediation.

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. Moreover, informal reviews are hindered by the absence of the public input that occurs in the formal preemption determination process under 49 U.S.C. § 5125(d)(1). Moreover, there is no information as to the manner in which a requirement is 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 have briefly reviewed proposed Article XXVII as provided by you, and I am providing you with my personal, informal, and unofficial comments. I am also enclosing RSPA's most recent subject matter index of preemption determinations, inconsistency rulings, and court decisions. This index and information on the status of applications for preemption determinations are also available on the homepage of RSPA's Office of the Chief Counsel: <http://rspa-atty.dot.gov>.

The criteria for preemption of non-Federal requirements concerning the transportation of hazardous materials are set forth in 49 U.S.C. § 5125. In summary, a non-Federal requirement is preempted (unless it is otherwise authorized by Federal law) when:

- (a) it is not possible to comply with both the non-Federal requirement and the Federal hazardous material transportation law or RSPA's requirements in the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180;
- (b) the non-Federal requirement is an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR;
- (c) the non-Federal requirement concerns any of five "covered subjects" and is not "substantively the same as" requirements in the Federal hazardous material transportation law or the HMR;
- (d) a non-Federal routing requirement does not comply with regulations of the Federal Highway Administration (FHWA); or
- (e) a fee related to the transportation of hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material (including enforcement and planning, developing, and maintaining a capability for emergency response).

These preemption criteria are based on congressional findings that national uniform requirements for the transportation of hazardous materials are "necessary and desirable" to promote safety. Public Law 101-615, § 2, 104 Stat. 3244 (1990). Congress considered Federal preemption necessary "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974).

At the outset, I note that Article XXVII "is intended to be consistent with applicable federal and state laws and regulations and shall be construed, whenever possible, to achieve such consistency." As Mr. Hilder advised you over the telephone, New York has adopted the HMR with respect to highway transportation, and 49 U.S.C. § 5125 does not prohibit a county from adopting and enforcing the HMR as county requirements for highway transportation.

In the "Definitions" section of Article XXVII, there appear to be two problems. First, the definition of "Hazardous Materials" differs from the definition of that term in the HMR. A local requirement on the "definition, description, [or] classification

of hazardous material" is preempted if it is not substantively the same as the HMR. 49 U.S.C. § 5125(b)(1)(A). Second, the term "Bulk Chemical Carrier Vehicle" covers any vehicle "required to bear a placard" under the HMR. This would likely cause confusion because placards are required on a freight container or transport vehicle that contains non-bulk packages of hazardous materials. For materials listed in Table 1 of 49 C.F.R. § 172.504(e), placarding is required for any quantity; for materials listed in Table 2 of that section, placarding is required for 1,001 lbs. (454 kg) or more, which is less than the weight of three 55-gallon drums of most liquids. In contrast, a "bulk packaging" in the HMR is a container with no intermediate form of containment and a capacity greater than 119 gallons (450 L) or 882 lbs. (400 kg). 49 C.F.R. § 171.8.

Article XXVII would require various documents to be carried on a vehicle transporting fuel, chemicals, or hazardous material being cleaned up by a contractor: vehicle permits, operator permits, logs of inspections and equipment replacements over the last three months, and written spill contingency plans. The HMR do not require any of these documents to be carried on the vehicle. The Federal Highway Administration (FHWA) requires owners of more than one commercial motor vehicle to have its drivers perform a daily inspection, but only the "last vehicle inspection report" need be "carried on the power unit." 49 C.F.R. § 396.11(c)(3).

As a general matter, requirements to carry additional documents on the vehicle have the potential to cause confusion and interfere with compliance with provisions in the HMR concerning shipping papers, including the ready availability of shipping papers to emergency response personnel in the event of an incident. Accordingly, such requirements are preempted under 49 U.S.C. § 5125(a)(2) and (b)(1)(C). See the cases under "Information/Documentation Requirements" and "Shipping Papers" in the enclosed index.

In addition, FHWA requires drivers of commercial motor vehicles to have a commercial driver's license (CDL) issued by a State or other jurisdiction in accordance with 49 C.F.R. Part 383. When the vehicle is required to be placarded for hazardous materials, a hazardous materials endorsement on the CDL is required. However, the driver of a commercial motor vehicle may not hold two driver's licenses. 49 C.F.R. § 383.21(a).

The requirements to obtain a vehicle permit are not spelled out in Article XXVII. RSPA has found that transportation permits are not preempted per se; rather, preemption depends on the conditions to obtain the permit. Thus, RSPA has found that

extensive information and documentation requirements, coupled with broad discretion to issue or deny a permit, and cumbersome time limits (e.g., long lead times or short intervals) for applying for a permit that do not fit normal shipment planning will make a permit requirement preempted. See the cases under "Permit Requirements" in the enclosed index.

Any fees charged for permits would be preempted if the amount of the fee is not "fair" and the fees collected are not used for a purpose that is "related to transporting hazardous material (including enforcement and planning, developing, and maintaining a capability for emergency response)." 49 U.S.C. § 5125(g). See the cases under "Fee Requirements" in the enclosed index.

Article XXVII would require operators of fuel carriers, bulk chemical carriers, and vacuum trucks used to remove a spill to complete a training course in order to obtain a "registration card" or operator permit. The training program would have to meet the requirements of the Department of Labor's Occupational Safety and Health Administration (OSHA) in 29 C.F.R. § 1910.120 and be approved by the Health Commissioner. At the discretion of the Health Commissioner, the training program would also include the Health Department's Spill Prevention and Containment Course.

This requirement appears to differ from the HMR in two ways; it may not include certain training required in the HMR, and it may also require additional training beyond that specified in the HMR. The HMR require hazmat employees to be trained in three subject matter areas: (1) general awareness, (2) function-specific, and (3) safety. 49 C.F.R. § 172.704(a). "[T]o the extent that training [under 29 C.F.R. § 1910.120] addresses the training specified" in the HMR, it may be used to satisfy the HMR training requirement "in order to avoid unnecessary duplication." 49 C.F.R. § 172.704(b). However, it is uncertain whether OSHA training would satisfy function-specific training required in the HMR for drivers of vehicles transporting fuel, chemicals, or other hazardous materials being removed from a spill site.

Moreover, the County may not impose more stringent training requirements on motor vehicle drivers, beyond the hazmat training required in the HMR. For motor vehicle drivers, only a State may impose additional training requirements; those additional requirements may not conflict with the HMR training requirements; and additional training requirements may apply only to drivers domiciled in the State. 49 C.F.R. § 172.701. See the cases under "Training Requirements" in the enclosed index.

In the absence of more information, I cannot evaluate the requirement for a spill contingency plan. However, certain emergency response requirements that go beyond the HMR will be preempted if they create an obstacle to accomplishing and carrying out the HMR or, as noted above, require documentation to be carried on the vehicle. See the cases under "Emergency Response" in the enclosed index.

I hope these comments are helpful. In the brief time available, I have attempted to cover the main requirements in Article XXVII, but my failure to discuss any specific provision should not be considered as a finding that a proposed requirement would not be preempted. If you have additional specific questions or wish to discuss any of these matters further, please to contact Mr. Hilder or me, at the above address, by telephone at 202-366-4400, or by fax at 202-366-7041.

Sincerely,



Edward H. Bonekemper, III
Assistant Chief Counsel for
Hazardous Materials Safety and
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Enclosure