U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Office of
Chief Counsel

MAY 25 2011

Tom Bosworth, Esq.
Sr. Deputy County Counsel
County of San Diego
1600 Pacific Highway
Room 355
San Diego, CA 92101

Dear Mr. Bosworth:

This responds to your recent email to Bizunesh Scott, Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), concerning the planned transportation of radioactively contaminated steam generators from the San Onofre Nuclear Generating Station to Clive, Utah for disposal. In your email, you state that the utility and its contractor are questioning whether Federal hazardous material transportation law (Federal hazmat law) preempts the requirement of the County of San Diego for a "moving permit to evaluate the route associated with the movement of such large objects" whose size will require certain traffic controls to be instituted, including the removal (and subsequent reinstallation) of traffic signals, street lights, and other infrastructure.

You indicate that you are seeking informal guidance, rather than asking the Department of Transportation (DOT) to issue an administrative determination whether Federal hazmat transportation law preempts a State or local requirement concerning the transportation of hazardous materials. Accordingly, this letter summarizes the preemption provisions in Federal hazmat law and discusses some of the judicial and administrative decisions that appear to relate to this matter.

In 49 U.S.C. § 5125(a), Federal hazmat law provides that, in the absence of a waiver of preemption by DOT or specific authority in another Federal law, a requirement of a State, political subdivision of a State, or Indian tribe is preempted when:

--it is not possible to comply with both the non-Federal requirement and the Federal hazmat law, a regulation prescribed under Federal hazmat law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security (DHS); or

--as applied or enforced, the non-Federal requirement is an obstacle to accomplishing and carrying out the Federal hazmat law, a regulation prescribed under Federal hazmat law, or a hazardous material transportation security regulation or directive issued by DHS

In addition, subsection 5125(b)(1) lists five subject areas on which a non-Federal requirement is preempted unless it is "substantively the same as" a requirement in the Federal hazmat law, a regulation prescribed under Federal hazmat law, or a hazardous material security regulation or directive issued by DHS. Furthermore, subsection 5125(c) provides that a State or Indian tribe may designate, limit, or restrict a highway route for transporting hazardous materials only in accordance with the procedural and substantive requirements of the Federal Motor Carrier Safety Administration (FMCSA) set forth in 49 C.F.R. part 397, subpart C (with respect to non-radioactive materials) and 49 C.F.R. part 397, subpart D (with respect to radioactive materials). Finally, subsection 5125(f) provides that a State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response

A Federal court has noted that "the propriety of local highway safety regulation has long been recognized" and that "state highway safety regulations carry a strong presumption of validity." *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509, 516 (D.R.I. 1982), *aff'd* 698 F.2d. 559 (1st Cir. 1983). *See also* the provision in FMCSA's regulations that: "Every motor vehicle containing hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless they are at variance with specific regulations of the Department of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint." 49 C.F.R. § 397.3.

Accordingly, PHMSA (and its predecessor agencies) have found that "[l]ocal traffic controls are presumed to be valid." Inconsistency Ruling (IR) No. 20 (Triborough Bridge and Tunnel Authority), 52 Fed. Reg. 24396, 24398 (June 30, 1987). Thus, "rules of the road" are normally assumed "to be a proper form of state and local regulatory control applied to motor vehicles carrying hazardous materials." IR-3 (Boston), 46 Fed. Reg. 18918, 18923 (Mar. 26, 1981), decision on appeal, 47 Fed. Reg. 18457 (Apr. 29, 1982). At the same time, a state or locality needs justification "to single out radioactive materials traffic for different types of control than hazardous materials generally." IR-15(A) (Vermont), 52 Fed. Reg. 13062, 13064 (Apr. 20, 1987).

PHMSA has also found that "[p]ermit requirements do not, per se, make it impossible to comply with Federal hazmat law or HMR requirements, or create an obstacle to accomplishing and carrying out Federal hazmat law or the HMR. . . . Whether or not a permit requirement is preempted depends on the steps required to obtain the permit." Preemption Determination (PD) No. 22(R) (New Mexico), 67 Fed. Reg. 59396, 59402-03 (Sept. 20, 2002), decision on petition for reconsideration, 68 Fed. Reg. 55080 (Sept. 22, 2003), citing PD-9(R) (Los Angeles County), 60 FR 8774, 8785 (Feb. 15, 1995). *See also* IR-28 (San Jose, California), 55 FR 8884 (Mar. 8, 1990); IR-20; IR-2 (Rhode Island), 44 FR 75566 (Dec. 20, 1979); *New Hampshire Motor Transport Ass'n* v. *Flynn*, 751 F.2d 43 (1st Cir. 1984); *Colorado Public Utilities Comm'n* v.

Harmon, CV 88-Z-1524 (D. Colo. 1989), *rev'd on other grounds*, 951 F.2d 1571 (10th Cir. 1991).

A major concern with permit requirements is when the lead time for obtaining a permit – or the information which must be provided – creates a potential for unnecessary delay in the transportation of hazardous materials. We have found that delay in the transportation of hazardous materials "is incongruous with safe transportation" and that "the time between loading and unloading [should] be minimized," as articulated in 49 C.F.R, § 177.800(d): "All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination." *See* IR-2, 44 Fed. Reg. at 75571; IR-28, 55 Fed. Reg. at 8890-91. However, in this case, the potential for delay may be greatly reduced when there is a "long lead time in planning" the shipment of these steam generators, as there would be with shipments of spent nuclear fuel. IR-17 (Illinois), 51 Fed. Reg. 20926, 20929 (June 9, 1986), decision on appeal, 52 Fed. Reg. 36200 (Sept. 25, 1987).

I hope this information is helpful. If you have further questions, please feel free to contact Frazer C. Hilder of my office at 202-366-6360, by fax to 202-355-7041, or by email to mike.hilder@dot.gov.

Sincerely,

Joseph Solomey
Assistant Chief Counsel for
Hazardous Materials Safety Law

cc: Mr. Mark Malzahn
Manager, RSG/OSG Transport
Southern California Edison
14300 Mesa Road (M/S N47)
San Clemente, CA 92672