



US Department  
of Transportation

**Research and  
Special Programs  
Administration**

Office of the  
Chief Counsel

400 Seventh St. S.W.  
Washington, D.C. 20591

JAN 24 1994

Sgt. David W. Ford  
Commander  
Hazardous Materials Section  
Motor Carrier Division  
Department of State Police  
State of Michigan  
300 North Clippert  
Lansing, MI 48913

Dear Sergeant Ford:

I am responding to your October 29, 1993 letter requesting comments on current and proposed Michigan statutes concerning cargo tanks used to transport flammable liquids.

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 determination process established in the 1990 amendments to the Hazardous Materials Transportation Act (HMTA), at 49 App. U.S.C. § 1811(c)(1).

Nonetheless, at your request, I have briefly reviewed the current and proposed statutes provided with your letter, and I am providing you with my personal, informal, and unofficial comments addressed to the questions set forth on page 2 of your letter. As you have asked, these comments assume the adoption of the proposed rule in RSPA's Docket No. HM-200, see 58 Fed. Reg. 36923-24 (July 9, 1993), correction, 58 Fed. Reg. 38112 (July 15, 1993), and that the HMR apply to all intrastate transportation of hazardous materials. I also enclose the most recent index and summary of preemption determinations and inconsistency rulings issued by RSPA.

The criteria for HMTA preemption of non-Federal requirements are set forth in 49 App. U.S.C. § 1811(a). As applicable to the questions you raise, non-Federal requirements are preempted (unless they are otherwise authorized by Federal law) when they (a) create an obstacle to the accomplishment and execution of the HMTA or the Hazardous Materials Regulations (HMR), or (b) concern any of five "covered subjects" and are not "substantively the same as" requirements in the HMTA or the HMR.

The "covered subjects" in the HMR include the "design [and] manufacturing . . . of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials." 49 App. U.S.C. § 1804(a)(4)(B)(v). Any requirement concerning the design and construction of a cargo tank that is not "substantively the same as" the requirements in the HMR for DOT specification cargo tanks, therefore, would be preempted. This would include any height and weight limitations that are within Federal Highway Administration (FHWA) size and weight standards and which would restrict the design and construction of the package or container (i.e., a DOT specification cargo tank).

Accordingly, with respect to questions Nos. 4 and 5, the HMTA would preempt construction requirements (including gallon or size limitations) on a cargo tank which is otherwise within size and weight limits allowed under FHWA regulations. The HMTA would also appear to preempt Section 722a(2), since its requirements for manhole and inspection openings are not "substantively the same as" the requirements in the HMR.

In prior inconsistency rulings and preemption determinations, RSPA has found that there is a conflict with the accomplishment and execution of the HMR when non-Federal requirements cause any unnecessary delay. In addition, States and localities may not reroute hazardous materials traffic around them (or "ban" through hazardous materials traffic), without performing a detailed safety analysis or consulting with all other affected jurisdictions, by imposing equipment, operating, or other requirements. This rationale would appear to apply to questions Nos. 1-3. However, without additional information concerning the nature and effects of Michigan's operating and equipment requirements, I cannot provide any further guidance as to whether the HMTA would preempt these requirements.

I apologize for the delay in responding to your letter, which I hope has not caused you any hardship. 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