



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

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

JAN 24 1994

Mr. James N. Denn
Commissioner
Minnesota Department of Transportation
Transportation Building
395 John Ireland Boulevard
Saint Paul, MN 55155

Dear Commissioner Dean:

I am responding to your November 12, 1993 letter requesting comments on Minnesota Statutes, section 221.033, subdivisions 2b and 4, concerning the transportation of gasoline within the State of Minnesota in cargo tanks with a capacity of 3,000 gallons or less.

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 subdivisions 2b and 4 of Minn. Stat. § 221.033, and I am providing you with my personal, informal, and unofficial comments as to whether those subdivisions are preempted by the HMTA.

Non-Federal requirements that concern certain "covered subjects" and are not "substantively the same as" requirements in the HMTA or the Hazardous Materials Regulations (HMR) are specifically preempted by the HMTA. 49 App. U.S.C. §§ 1804(a)(4)(a), 1811(a)(3). These "covered subjects" include the "maintenance . . . or testing 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).

According to your letter, subdivision 1 of Minn. Stat. § 221.033 makes the HMR applicable to the transportation of hazardous materials (including hazardous substances and hazardous wastes) within the State of Minnesota. This would include the HMR's requirement for use of DOT specification cargo tanks to transport gasoline. Therefore, it appears that Minnesota does not authorize any non-DOT specification cargo tanks for transportation of gasoline within the State of Minnesota. (At present, intrastate motor carriers are subject to the HMR only when they transport hazardous wastes, hazardous substances, marine pollutants, and flammable cryogenic liquids in cargo tanks and portable tanks. If the proposed rule in RSPA's Docket No. HM-200 is adopted, see 58 Fed. Reg. 36923-24 [July 9, 1993], correction, 58 Fed. Reg. 38112 [July 15, 1993], the HMR's requirement for the use of DOT specification cargo tanks, in 49 C.F.R. Part 173, and the testing requirements in 49 C.F.R. Part 180, will apply to all motor carriers on and after October 1, 1996.)

All DOT specification cargo tanks, other than MC 338, must be tested for leaks in accordance with 49 C.F.R. § 180.407(h), under the schedule set forth in 49 C.F.R. § 180.407(c). There is no exception for cargo tanks of 3,000 gallons or less used for the transportation of flammable liquids. (Prior to December 31, 1990, the inspection and testing requirements in former 49 C.F.R. § 177.824 did not apply to cargo tanks of "3,000 gallons or less used exclusively for the transportation of flammable liquids." That exception was eliminated as of December 31, 1990, and all cargo tank motor vehicles must conform to the "retest and inspection requirements set forth in subpart E or part 180" of 49 C.F.R.)

Accordingly, I conclude that the HMTA preempts those provisions of subdivisions 2b and 4 of Minn. Stat. § 221.033 that except DOT specification cargo tanks of 3,000 gallons or less from inspection and testing requirements in the HMR, because these provisions are not "substantively the same as" the maintenance and testing requirements in the HMR.

Your letter does not contain sufficient information for me to comment on any other "inspection, testing, and registration requirements" that may be established for cargo tanks with a capacity of 3,000 gallons or less that are used to transport gasoline solely within the State of Minnesota.

As you note, RSPA recently issued a preemption determination concerning California's inspection and registration requirements covering tanks used to transport flammable and combustible liquids. PD-4(R), 58 Fed. Reg. 48933, Sept. 20, 1993. A petition for reconsideration of PD-4(R) has been submitted, and, when RSPA issues its decision on the petition for reconsideration, you may find further guidance from PD-4(R). For additional information, I enclose the most recent index and summary of preemption determinations and inconsistency rulings issued by RSPA.

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