



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

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

APR 17 1997

BY FACSIMILE

Stanley W. Landfair, Esq.
McKenna & Cuneo, L.L.P.
444 South Flower Street
Los Angeles, CA 90071-2901

Dear Mr. Landfair:

I am dismissing the April 4, 1997 petition for an administrative determination of preemption, submitted by you on behalf of Shell Oil Company (Shell), because Shell has not identified an actual, existing non-Federal requirement affecting the transportation of hazardous material.

Shell's petition concerns the form of a proposed preliminary injunction sought by a non-profit corporation, As You Sow (AYS), in litigation in the Superior Court of California. Shell states AYS is asking the Court to issue an injunction that would allegedly implement the requirement in Proposition 65 (California Health & Safety Code § 25249.6) to provide "a clear and reasonable warning" of any "chemical known to the state to cause cancer or reproductive toxicity." That statute appears to indicate that the required "warning" may be provided in a variety of ways, including "general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like . . ." California Health & Safety Code § 25249.11. AYS's February 5, 1997 memorandum filed in support of the originally proposed preliminary injunction (in Exhibit C to Shell's petition) indicates that, under 22 California Code of Regulations § 12601(a),

the method employed to transmit the warning must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure.

In the original proposed preliminary injunction (in Exhibit C to Shell's petition), AYS asked the Court to require Shell to print on, or affix to "the container or label of each Toluene Product, prior to shipment to Shell's customers in California" the following words:

Warning: Toluene is a chemical known to the State of California to cause birth defects or other reproductive harm.

The Research and Special Programs Administration (RSPA) has now received from AYS's counsel a revised form of preliminary injunction, in which the request has been modified to require the above-quoted "Warning" language on "the container or label of each Toluene Product, once it is out of transit and transferred to Shell's customers in California." In its accompanying April 14, 1997 reply memorandum, AYS states that

it is not trying to enforce Proposition 65 while Shell's chemical products are "in transit." Similarly, AYS is not requesting that Shell provide reproductive toxicity warnings on, or attached to, the tanker trucks, that deliver the toxins. . . . AYS seeks to ensure that Shell provide clear and reasonable warnings when it transfers the chemical product to its customer, after the product is unloaded and, thus, out of transit.

Based on the materials available to me, I conclude that (1) the above-quoted "Warning" language is not explicitly required by the California statute or regulations, and (2) there is no request that this "Warning" language be required on a package of hazardous materials in "transportation," i.e., during "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C. § 5102(12). For these reasons, there is no "requirement of a State . . ." for me to consider under the provisions of 49 U.S.C. § 5125(d) and 49 C.F.R. § 107.203.

RSPA's Office of the Chief Counsel will respond to your separate request for an informal, advisory opinion concerning the possible preemptive effect of 49 U.S.C. § 5125 on a requirement to print or affix the above-quoted "Warning" language on rail tank cars containing toluene.

Sincerely,



Alan I. Roberts
Associate Administrator for
Hazardous Materials Safety

cc: The Honorable Daniel E. Lundgren