



Department of Veterans Affairs

8. In which category would your last year's income best fit? (Check one)

- | | | |
|--|--|--|
| ☐ Below \$10,000 | ☐ \$20,000 - \$29,999 | ☐ \$40,000 - \$50,000 |
| ☐ \$10,000 - \$19,999 | ☐ \$30,000 - \$39,999 | ☐ Over \$50,000 |

9. What is the highest education level you have attained? (Check one)

- | | | |
|--|---|--|
| ☐ Jr. High School | ☐ Some College | ☐ Bachelor Degree |
| ☐ High School | ☐ Associate Degree | ☐ Graduate Studies/Degree |

10. Please provide any other comments you may have about this survey or your experiences with the VA flight training programs in the space below.

Disclosed as of January 12, 1993

PRIVACY ACT INFORMATION: The response you submit is considered confidential (38 U.S.C. 3301), and may be disclosed outside VA only if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records 58VA21/22/28, Compensation, Pension, Education, and Rehabilitation Records - VA, published in the Federal Register.

RESPONDENT BURDEN: Public reporting burden for this collection of information is estimated to average 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the VA Clearance Officer (723), 810 Vermont Ave., NW, Washington, DC 20420; and to the Office of Management and Budget, Paperwork Reduction Project (2900-xxxx), Washington, DC 20503. Do NOT send requests for benefits to these addresses.

Thank you for your time. Your assistance is greatly appreciated.

Sunshine Act Meetings

Federal Register

Vol. 58, No. 15

Tuesday, January 26, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

DEPARTMENT OF JUSTICE

FOREIGN CLAIMS SETTLEMENT COMMISSION

F.C.S.C. Meeting Notice No. 5-93

Notice of Meetings

Announcement in Regard to Commission Meetings and Hearings

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date, Time, and Subject Matter

Wed., February 3, 1993 at 10:30 a.m.—
Consideration of Proposed Decisions on claims against Iran.

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 601 D Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 601 D Street, NW., Room 10000, Washington, DC 20579. Telephone: (202) 208-7727.

Dated at Washington, DC, on January 22, 1993.

Judith H. Lock,

Administrative Officer.

[FR Doc. 93-1991 Filed 1-22-93; 3:24 pm]

BILLING CODE 4410-01-M

DEPARTMENT OF JUSTICE

UNITED STATES PAROLE COMMISSION

Public Announcement

Pursuant to the Government in the Sunshine Act

(Public Law 94-409) [5 U.S.C. Section 552b]

DATE AND TIME: Tuesday, January 26, 1993, 9:30 a.m., Eastern Daylight Time.

PLACE: 5550 Friendship Boulevard, Chevy Chase, Maryland, 20815.

STATUS: Closed—Meeting.

MATTERS CONSIDERED: The following matters will be considered during the

closed portion of the Commission's Business Meeting:

(1) Appeals to the Commission involving nine cases decided by the National Commissioners pursuant to a reference under 28 C.F.R. 2.27. These cases were originally heard by an examiner panel wherein inmates of Federal prisons have applied for parole or are contesting revocation of parole or mandatory release.

(2) Review of internal management team report with respect to the Commission's internal organization, personnel and policy practices.

AGENCY CONTACT: Jeffrey Kostbar, Case Analyst, National Appeals Board, United States Parole Commission, (301) 492-5968.

Dated: January 14, 1993.

Michael A. Stover,

General Counsel, U.S. Parole Commission.

[FR Doc. 93-2017 Filed 1-22-93; 3:26 pm]

BILLING CODE 4410-01-M

DEPARTMENT OF JUSTICE

UNITED STATES PAROLE COMMISSION

Public Announcement

Pursuant to the Government in the Sunshine Act

(Public Law 94-409) [5 U.S.C. Section 552b]

TIME AND DATE: 1:00 p.m., Tuesday, January 26, 1993.

PLACE: 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

STATUS: Open.

MATTERS TO BE CONSIDERED: The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Approval of minutes of previous Commission meeting.
2. Reports from the Chairman, Commissioners, Legal, Case Operations, Program Coordinator, and Administrative Sections.

3. Discussion of Modification of Supervised Release Conditions For Treaty Prisoners.

4. Adoption of Modified Search and Seizure Guidelines.

5. Discussion of Adverse Witnesses in Federal and State Custody.

6. Discussion of Commission Policy With Respect To Using An Offender's Own Admission to Criminal Conduct.

7. Discussion of Modification of 28 C.F.R. 2.47, Warrant Placed As A Detainer And Dispositional Review.

8. Habitual Offender Task Force Report.

9. Enhanced Supervision Task Force Report.

10. Discussion of Management Control and Quality Assurance Review.

11. Discussion of Audio And Video Tape Submissions At Hearings.

12. Discussion of Increasing Case Processing Efficiency.

13. Discussion of Processing Institutional Revocation Hearings that have been Transferred From the Originating Region.

14. Discussion of the Commission's Policy With Regard To Parolees Working in the Legal Business.

15. Presentation regarding the Bureau of Prison's Victim/Witness Program.

AGENCY CONTACT: Tom Kowalski, Case Operations, United States Parole Commission, (301) 492-5962.

Dated: January 22, 1993.

Michael A. Stover,

General Counsel, U.S. Parole Commission.

[FR Doc. 93-2018 Filed 1-22-93; 3:26 pm]

BILLING CODE 4410-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m., Tuesday, February 2, 1993.

PLACE: The Board Room, 5th Floor, 490 L'Enfant Plaza, SW., Washington, DC 20594.

STATUS: Open.

MATTERS TO BE CONSIDERED:

5776A—Aviation Accident Report: Scenic Air Tours Flight 22, Beech E18S, Maui, Hawaii, April 22, 1992.

NEWS MEDIA CONTACT: Telephone (202) 382-0660.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382-6525.

Dated: January 22, 1993.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 93-1992 Filed 1-22-93; 3:25 pm]

BILLING CODE 7533-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of January 25, February 1, 8, and 15, 1993.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO CONSIDERED:

Week of January 25

Friday, January 29

10:00 a.m.

Briefing on Implementing Guidance for the Maintenance Rule and Industry Verification and Validation Effort (Public Meeting)

(Contact: William Russell, 301-504-1274)
11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.

Briefing by Agreement States on Their Activities in Medical Use Area (Public Meeting)

(Contact: Carlton Kammerer, 301-504-2321)

Week of February 1—Tentative

Wednesday, February 3

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of February 8—Tentative

Monday, February 8

10:00 a.m.

Briefing by IIT on Loss of Iridium-192 Source and Therapy Misadministration at Indiana Regional Cancer Center, Indiana, PA., November 16, 1992 (Public Meeting)

(Contact: Carl Paperiello, 708-790-5517)

2:00 p.m.

Periodic Briefing on EEO Program (Public Meeting)

(Contact: Jim McDermott, 301-492-4661)

Tuesday, February 9

2:30 p.m.

Periodic Briefing on Operating Reactors and Fuel Facilities (Public Meeting)

(Contact: William Bateman, 301-504-1711)

4:30 p.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of February 15—Tentative

Friday, February 19

10:00 a.m.

Briefing by Advisory Committee on Medical Uses of Isotopes (Public Meeting)

(Contact: John Glenn, 301-504-3415)

2:00 p.m.

Briefing on Status of Issues and Approach to GEIS Rulemaking for Part 51 (Public Meeting)

(Contact: Donald Cleary, 301-492-3936)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meeting Call (Recording)—(301) 504-1292.

CONTACT PERSON FOR MORE INFORMATION:
William Hill (301) 504-1661.

Dated: January 21, 1993.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 93-2020 Filed 1-22-93; 3:27 pm]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION Agency Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of January 24, 1993.

A closed meeting will be held on Monday, January 25, 1993, at 2:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5

U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Beese, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Monday, January 25, 1993, at 2:30 p.m., will be:

Institution of injunctive actions.

Settlement of injunctive actions.

Institution of administrative proceedings of an enforcement nature.

Litigation matter.

Opinions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Bruce Rosenblum at (202) 272-2300.

Dated: January 21, 1993.

Jonathan G. Katz,
Secretary.

[FR Doc. 93-2024 Filed 1-22-93; 3:59 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register

Vol. 58, No. 15

Tuesday, January 26, 1993

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ES93-17-000, et al.]

Electric Rate, Small Power Production, and Interlocking Directorate Filings; Glen Park Associates Limited Partnership, et al.

Correction

In notice document 93-700 beginning on page 4157 in the issue of Wednesday, January 13, 1993, make the following corrections:

1. On page 4157, in the third column, under the heading 2. Consolidated Edison Company of New York, Inc., the Docket No. should read "ER93-305-000".

2. On page 4159, in the second column, under the heading 15. Midwest Power Systems Inc., the Docket No. should read "ES93-10-003".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP93-129-000, et al.]

Texas Eastern Transmission Corp. et al.; Natural Gas Certificate Filings

Correction

In notice document 93-703 beginning on page 4160 in the issue of Wednesday, January 13, 1993, make the following correction: On page 4161, in the first

column, under the heading 2. Southern Natural Gas Co., the Docket No. should read "CP93-134-000".

BILLING CODE 1505-01-D

FEDERAL MARITIME COMMISSION

46 CFR Part 514

[Docket No. 93-01]

Electronic Filing of Military Rates

Correction

In proposed rule document 93-695 beginning on page 4137 in the issue of Wednesday, January 13, 1993, make the following correction: On page 4138, in the first column, in the fourth full paragraph, in the fifth line, "staff" should read "tariff".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 316

[Docket No. 85N-0483]

RIN 0905-AB55

Orphan Drug Regulations

Correction

In rule document 92-31192 beginning on page 62076 in the issue of Tuesday, December 29, 1992, make the following corrections:

§ 316.10 [Corrected]

1. On page 62087, in § 316.10(b)(10), in the seventh line, "lift-threatening" should read "life-threatening".

§ 316.27 [Corrected]

2. On page 62090, in § 316.27(a)(2)(ii), in the second line, "complete" should read "complete".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Centers for Disease Control; Statement of Organization, Functions, and Delegations of Authority

Correction

In notice document 93-616 appearing on page 3963 in the issue of Tuesday, January 12, 1993, in the second column, in the third full paragraph, in the sixth line, "Assistant" should read "Associate".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-03-4210-04; IDI-27201]

Notice of Exchange and Order Providing for Opening of Public Lands; Idaho

Correction

In notice document 92-31358 beginning on page 61603 in the issue of Monday, December 28, 1992, make the following corrections:

1. On page 61603, in the third column, land descriptions T. 16 N., R. 5 W. and T. 16 N., R. 6 W. should be moved to the second column before land description T. 17 N., R. 4 W.

2. On the same page, in the third column, under land description T. 13 N., R. 5 W., in the second line, "Sec. 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$;" should read "Sec. 3, SE $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$;"

BILLING CODE 1505-01-D

Registered

Tuesday
January 26, 1993

Part II

Department of Transportation

**Research and Special Programs
Administration**

**Notice of Application for a Preemption
Determination as to Hazardous Materials
Marking Requirements Imposed by
Michigan**

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. PDA-8(R); Notice No. 93-4]

Chemical Waste Transportation Institute; Application for a Preemption Determination as to Hazardous Materials Marking Requirements Imposed by the Michigan Department of Natural Resources

AGENCY: Research and Special Programs Administration (RSPA), U.S. Department of Transportation.

ACTION: Public notice and invitation to comment.

SUMMARY: The Chemical Waste Transportation Institute (CWTI) has applied for an administrative determination as to whether the hazardous materials marking requirements imposed by the Michigan Department of Natural Resources on vehicles used to transport hazardous waste are preempted by the Hazardous Materials Transportation Act (HMTA). **DATES:** Comments received on or before March 31, 1993, and rebuttal comments received on or before June 4, 1993, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, room 8421, 400 Seventh Street, SW., Washington, DC 20590-0001 (Tel. No. (202) 366-4453). Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (PDA-8(R)). Three copies of each should be submitted. In addition, a copy of each comment and each rebuttal comment must also be sent to: (a) Mr. Stephen Hansen, Chairman, Chemical Waste Transportation Institute, 1730 Rhode Island Avenue, NW., suite 1000, Washington, DC 20036; and (b) Mr. James Sygo, Chief, Waste Management Division, Michigan Department of Natural Resources, P.O. Box 30241, Lansing, MI 48933. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Messrs. Hansen and Sygo at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT:

James E. Meason, Attorney, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001 (Tel. No. (202) 366-4400).

I. CWTI's Application for a Preemption Determination

With its January 4, 1993 letter, CWTI applied for a determination that Michigan's hazardous materials marking laws and regulations for vehicles used to transport hazardous waste are preempted by the HMTA. The text of CWTI's application follows (the appendices to CWTI's application are available for examination at, and copies may be obtained at no cost from, RSPA's Dockets Unit at the address and telephone number set forth in "ADDRESSES" above).

Application of the Chemical Waste Transportation Institute To Initiate a Proceeding To Determine That the Various Hazardous Materials Marking Requirements Imposed by the Michigan Department of Natural Resources on Vehicles Used To Transport Hazardous Waste Are Preempted by the Hazardous Materials Transportation Act

Interest of the Petitioner

The Chemical Waste Transportation Institute (CWTI) is part of the National Solid Wastes Management Association, a not-for-profit association that represents approximately 2,000 waste services companies throughout the United States and Canada. Members of the Institute are commercial firms specializing in the transportation of hazardous waste, by truck and rail, from its point of generation to its management destination. Our members are both private and for hire carriers that operate in interstate and intrastate commerce, including points to and from and through Michigan. To the extent that member companies are motor carriers and operate in Michigan, these members must mark the portion of each motor vehicle that will be used to transport hazardous waste in contravention of the Hazardous Materials, Transportation Act (HMTA) and the Hazardous Materials Regulations (HMRs).

Background

Prior to the 1975 enactment of the HMTA, legislation was enacted in Michigan—Act 136—to regulate the management of "liquid industrial waste."¹ In 1979, Michigan enacted its version of legislation—Act 64—intended to implement the hazardous waste aspects of the 1976 amendments to the federal Solid Waste Disposal Act or the so-called Resource Conservation and Recovery Act (RCRA).² While neither the definition of "liquid industrial waste" from Act 136 nor the definition of "hazardous waste" pursuant

to RCRA or "hazardous materials" pursuant to the HMTA, most of the materials regulated by these state statutes are regulated at the federal level in transportation under the HMTA, though not all may be RCRA-regulated hazardous wastes—for example waste combustible liquids with flash points above 140 °F.³

Part of the regulatory scheme set forth in both Act 136 and Act 64 are requirements to "license" vehicles used to transport either "liquid industrial waste" or "hazardous waste." Act 136 specifically requires that "there shall be painted on both sides of the vehicle in letters not less than 2 inches high the words 'licensed industrial waste hauling vehicle' * * *." In setting forth the requirements applicable to vehicles licensed under Act 64, regulations of the Michigan Department of Natural Resources (DNR) require that the words "Hazardous Waste-Hauling Vehicle" be placed on the "waste-hauling portion of the vehicle in letters not less than 5 centimeters high."⁴ Again, the lettering is permanent and must be placed on each side of the vehicle.⁵

Basis for the Application

The DNR marking requirements described above cannot be reconciled with the authority of the HMTA to find preempted non-federal requirements that are not "substantively the same as" federal requirements in certain covered subject areas including the "marking" of hazardous materials.⁶ When the 101st Congress was contemplating amendments to the scope of the preemptive authority under the HMTA, DOT urged that there should be "federal primacy in certain critical areas of hazardous materials transportation regulation * * * (and that) non-federal entities would be prohibited from enacting their own laws or regulations with respect to specifically enumerated subjects unless their requirements are identical to the Federal requirements. Taken together (these) proposals * * * are intended to greatly reduce the potential for a multiplicity of conflicting State and local requirements, with

³ See Michigan Act 136, Section 1(b) for a definition of "liquid industrial waste" (copy attached); Michigan Act 64, Section 4(3) for a definition of "hazardous waste" (copy attached); P.L. 93-633, Section 103(2) for a definition of "hazardous material"; P.L. 94-580, Section 1004(5) for a definition of "hazardous waste"; and P.L. 99-499, Section 306(a), referencing Section 101(14) for DOT authority to regulate RCRA-regulated hazardous wastes as hazardous materials in transportation. Also see, 49 CFR 171.8 definition of hazardous material as amended by 57 FR 52935 (Nov. 5, 1992) and 49 CFR 171.3(a).

⁴ See attached Act 136, Section 7(1).

⁵ See attached Michigan Administrative Code Section R 299.9406(6)(a).

⁶ Provision is made in the DNR regulations for a transporter to remove this lettering for uses other than hazardous waste "treatment." (According to the DNR the regulation incorrectly states "treatment" when "transportation" was intended.) However, this option is only available if the alternate use(s) of the vehicle have been identified in the transporter's business or vehicle license. The permanent nature of the lettering and the prior approval requirement negate any practical application of this "option."

⁷ See P.L. 101-615, Section 4(a)(4)(B).

¹ See Michigan Public Acts of 1969.

² See P.L. 94-580.

the result being an enhancement of national uniformity."⁸ In draft legislation submitted to Congress by DOT, "marking" of hazardous materials was identified as one of the "critical areas of hazardous materials transportation regulation." Congress concurred with the Department's view. The 1990 amendments to the HMTA provide express authority for DOT to preempt non-federal hazardous materials marking requirements unless the non-federal requirements are "substantively the same as" the federal requirements.⁹

"Otherwise Authorized by Federal Law"

Despite the greatly enhanced preemptive authority contained in the 1990 amendments, Congress recognized that DOT's preemptive authority of state and local requirements is limited to the extent that such non-federal requirements are "otherwise authorized by Federal law."¹⁰ Since the enactment of the 1990 amendments, the courts have acted to circumscribe the reach of the "otherwise authorized by federal law" provisions. The Tenth Circuit Court of Appeals concluded that state requirements which are not specifically authorized pursuant to other federal statutes are not "otherwise authorized" simply because such federal statutes do not preempt such requirements.¹¹

In this instant case, RCRA specifies that standards be established for "labeling practices for any containers used for the * * * transport * * * of such hazardous waste" and that no hazardous waste may be transported unless "properly labeled."¹² EPA defines the word "container" to mean "any portable device in which a material is * * * transported * * *" and has interpreted the statutory labeling requirement to be, with one exception, DOT's standards for labeling, marking, and placarding as provided in 49 CFR 172.¹³ The one exception provides that each container of 110 gallons or less used in the transportation of hazardous waste must be marked, in accordance with the requirements of 49 CFR 172.304, with the following:¹⁴

Hazardous Waste—Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.
Generator's Name and Address _____
Manifest Document Number _____

Neither RCRA nor its implementing regulations specifically authorize any non-federal "marking" requirements, let alone the bulk package marking requirements enforced by the DNR. In fact, RCRA bars EPA from promulgating regulations applicable to transporters of hazardous waste that are

inconsistent with the requirements of the HMTA and the HMRs.¹⁵ When EPA delegates its authority to issue regulations to a state, the state's hazardous waste program must be equivalent to the federal program and consistent with other state authorized programs.¹⁶

While RCRA does not have a mechanism to prohibit states from imposing requirements on the transportation of hazardous waste which are more stringent or broader in scope than those imposed by EPA, states may not rely on RCRA to shield such requirements from review under the HMTA. The legislative history underpinning RCRA's grant of "more stringent than" authority to states shows that Congress intended to allow states to create rules "more stringent than" the federal standards only for the selection of hazardous waste disposal sites.¹⁷ Additionally, requirements which are broader in scope than EPA's are not part of the federally approved program.¹⁸ EPA clarified, in a letter to CWTI concerning its grant of final authorization to California's hazardous waste program, that "State hazardous waste transportation requirements that are inconsistent with the HMTA should be dealt with through the (DOT) under the special procedures established under the HMTA for that purpose; * * * in (EPA's) view the RCRA process does not preempt DOT authority in the area of transportation."¹⁹

The DNR Marking Requirements Are the Type Congress Intended To Preempt

The Michigan requirements at issue here are exactly the type of divergent state hazardous materials marking requirements which Congress intended to be preempted by the HMTA and the HMRs. Hazardous materials that happen to be "liquid" and meet the "waste" definitions of Act 136 and Act 64 are not only subject to duplicative, inconsistent DNR marking requirements, but other more serious outcomes result from the DNR requirements that should factor in DOT's evaluation of this application.²⁰

⁸ See P.L. 94-580, Section 3003(b).

⁹ See P.L. 94-580, Section 3006(b).

¹⁰ See 125 Cong. Rec. S8824-5, Daily Ed., June 4, 1979. The courts have upheld this view. See *Enesco Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986) (Section 3009 "acknowledges only the authority of state and local government entities to make good-faith adaptations of federal policy to local conditions"; provision applies only to certain limited state requirements pertaining to land disposal or treatment facilities); *Ogden Environmental Servs. v. City of San Diego*, 687 F. Supp. 1436 (S.E. Cal. 1988) (Citing *Enesco*).

¹¹ See 40 CFR 271.1(i).

¹² See attached letter to Cynthia Hilton, CWTI, from Devereaux Barnes, EPA, dated October 29, 1992.

¹³ The CWTI has been involved in discussions with the DNR in an attempt to resolve this matter without recourse to DOT. During those discussions the DNR indicated a willingness to take steps to minimize the burden of vehicle marking on motor carriers of hazardous waste. Specially, the DNR proposed to eliminate the duplicative marking between Act 136 and the Michigan Administrative Code (MAC) as well as to recognize similar vehicle marking requirements of other states in lieu of the MAC marking. Despite this willingness to minimize burdens, the DNR is insistent on retaining some

First and foremost, the DNR markings have nothing to do with evidence that a motor carrier has obtained state issued licenses, and everything to do with hazard identification. Act 136 and the Michigan Administrative Code (MAC) implementing Act 64 require the DNR to supply as proof of vehicle licensure indicia—"seals"—that must be affixed to the waste-hauling portion of the vehicles separate and apart from the hazardous materials markings at issue.²¹ The size of the lettering and the fact that both markings must be on all licensed vehicles regardless of whether the vehicles are destined to, from or through the state clearly show that the intent of the markings is to alert the public and enforcement personnel of risk presented in transportation by certain hazardous materials. As noted above, the HMTA reserves to the federal government the entire field of hazardous identification unless the non-federal requirements are "substantively the same as" federal requirements.

Second, hazardous wastes are found in every DOT hazard class except Hazard Class 7, Radioactive. To the extent that the DNR marking requirements apply only to hazardous waste and apply differently from or in addition to the HMRs concerning marking requirements, they are inconsistent with and preempted by the HMTA.²²

Third, vehicles transporting hazardous waste are not fixed facilities. They operate through numerous jurisdictions. To the extent that the public and local emergency responders in other jurisdictions are unfamiliar with these non-federal marking requirements confusion will result and safety will be undermined.

Fourth, because of the permanent nature of the Act 136 and MAC markings, they cannot be physically removed without great hardship to the carrier when non-waste loads are being transported. As mentioned above, the ability to remove MAC markings in order to transport non-waste materials, even if such transport is permissible under the HMTA, is further restricted pending DNR prior authorization of the transporter's business or vehicle license that such alternate transportation is approved. Thus a secondary effect of the marking requirements is de facto dedication of hazardous waste hauling equipment. For example, vehicles marked as prescribed by the DNR have been denied entry to waste management facilities that receive industrial, non-hazardous waste, although the transportation of these wastes in vehicles that have been used to transport hazardous waste is consistent with the HMRs.²³ This trend is likely to be

non-federal, hazard identification vehicle marking requirement. Inasmuch as this issue does have ramifications for jurisdictions outside of Michigan, the DNR and the CWTI mutually agreed to submit this matter to DOT for a determination of preemption.

²¹ See Act 136, Section 7(i) and MAC R 299.9406(b)(b).

²² See 49 CFR 171.3(c)(1).

²³ CWTI members have been advised to "cover up" DNR markings as an alternative to "removing" the markings when transporting "approved" materials not subject to the markings. However, members are uncomfortable with the public

Continued

⁸ See DOT Section-by-Section Analysis accompanying draft legislation to amend the HMTA sent to Congress July 11, 1989.

⁹ See P.L. 101-615, Section 4(a)(4)(B)(ii), as implemented by 49 CFR 107.202. (See 56 FR 8616 (February 28, 1991) and 57 FR 20424 (May 13, 1992).)

¹⁰ See P.L. 101-615, Section 13(a).

¹¹ See *Colo. Pub. Utilities Comm'n v. Harmon*, 951 F.2d 1571 at 1581 n.10 (10th Cir. 1991).

¹² See P.L. 94-580, Sections 3002(a)(2) and 3003(a)(2).

¹³ See 40 CFR 262.31, 262.32, and 262.33.

¹⁴ See 40 CFR 262.32(b).

exacerbated as sanitary non-hazardous waste landfills implement EPA requirements to conduct random inspections of incoming loads to ensure that such loads do not contain regulated hazardous wastes or PCBs.²⁴ Sanitary landfills are not equipped with sampling laboratories. Vehicles with DNR markings are more likely to be turned away because sanitary landfills cannot verify the non-hazardous status of the transported material. The inevitable result is "additional trips with additional mileage * * * (and) the potential for more accidents (thereby) creat(ing) greater danger to the public."²⁵

Fifth, the permanent nature of the Act 136 and MAC markings violates the prohibitions in the HMTA and the HMR against labeling or placarding a packaging which does not contain hazardous materials. Congress felt so strongly about hazard communication and marking requirements that it not only provided in the 1990 amendments that non-federal requirements would be preempted unless substantively the same as the federal requirements, but also provided that "no person shall, by marking or otherwise, represent that a hazardous material is present in a * * * motor vehicle * * * if the hazardous material is not present."²⁶ Again, the DNR requirements frustrate hazard communication by placing motor carriers in the untenable position of choosing compliance with DNR or federal standards.

Lastly, the final rule implementing the "substantively the same as" authority, DOT stated that "in the covered subject areas, national uniformity is critical * * *. Any additional requirements, in excess of the Federal requirements, would not be 'substantively the same,' and would be preempted."²⁷ Only "editorial and other similar de minimis changes are permitted."²⁸ DNR marking requirements are neither "editorial" nor otherwise similarly "de minimis."

Conclusion

The DNR marking requirements as they apply to hazardous materials, including hazardous wastes, (1) are not substantively the same as the federal standard; (2) impermissibly discriminate against a subset of hazardous materials; (3) are unreasonably burdensome; and (4) lack any technical or safety justification. As a result, the DNR marking requirements are an obstacle to the accomplishment of the HMTA and the HMRs. The CWTI requests that a binding determination of preemption be issued invalidating the DNR vehicle marking requirements to the extent that hazard-specific lettering is required to be imprinted on both sides of motor vehicles transporting hazardous materials, including hazardous wastes.

Certification

relations message conveyed by motor carriers that resort to this remedy to the effect that they are attempting to conceal something and therefore must be engaged in illegal activities.

²⁴ See 40 CFR 258.20(a)(1).

²⁵ See 57 FR 23291 (June 2, 1992).

²⁶ See P.L. 101-615, Section 5(e)(2).

²⁷ See 57 FR 20425 (May 13, 1992).

²⁸ See 49 CFR 107.202(d).

Pursuant to 49 CFR 107.205(a), I hereby certify that a copy of this application has been forwarded with an invitation to submit comments within 45 days to: James Sygo, Chief, Waste Management Division, Michigan Department of Natural Resources, P.O. Box 30241, Lansing, MI 48933.

Respectfully submitted,

Stephen Hansen,

Chairman.

Enclosures

II. Background

The HMTA was enacted in 1975 to give the Department of Transportation greater authority " * * * to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 App. U.S.C. 1801. It replaced a patchwork of State and local laws.

" * * * [U]niformity was the linchpin in the design of [the HMTA]." *Colorado Public Utilities Comm. v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). Unless otherwise authorized by Federal law or unless a waiver of preemption is granted by DOT, the HMTA explicitly preempts " * * * any requirement of a State or political subdivision thereof or Indian tribe * * * if:

(1) Compliance with both the State or political subdivision or Indian tribe requirement and any requirement of (the HMTA) or of any regulation issued under (the HMTA) is not possible;

(2) The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of (the HMTA) or the regulations issued under (the HMTA); or

(3) It is preempted under section 105(a)(4) (49 App. U.S.C. 1804(a)(4)), describing five "covered subject" areas or section 105(b) (49 App. U.S.C. 1804(b)), dealing with highway routing requirements). 49 App. U.S.C. 1811(a).

With two exceptions, section 1804(a)(4) preempts " * * * any law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof or an Indian tribe * * * which concerns a "covered subject" and "is not substantively the same" as a provision in the HMTA or regulations promulgated pursuant to the HMTA. The two exceptions are State and Indian tribe hazardous materials highway routing requirements governed by 49 App. U.S.C. 1804(b) and requirements "otherwise authorized by Federal law." The "covered subjects" defined in section 1804(a)(4) are the:

(i) Designation, description, and classification of hazardous materials;

(ii) Packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(iii) Preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents;

(iv) Written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and

(v) Design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

In a final rule published in the *Federal Register* on May 13, 1992 (57 FR 20424, 20428), RSPA defined "substantively the same" to mean "conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

The HMTA provides that any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision, or Indian tribe requirement is preempted by the HMTA. Notice of the application must be published in the *Federal Register*, and the applicant is precluded from seeking judicial relief on the "same or substantially the same issue" of preemption for 180 days after the application, or until the Secretary takes final action on the application, whichever occurs first. 49 App. U.S.C. 1811(c)(1). A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final. 49 App. U.S.C. 1811(e).

The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing, which were delegated to the Federal Highway Administration. 49 CFR 1.53(b). RSPA's regulations concerning preemption determinations are set forth at 49 CFR 107.201-107.211 (including amendments of February 28, 1991 (56 FR 8616), April 17, 1991 (56 FR 15510), and May 13, 1992 (57 FR 20424)). Under these regulations, RSPA's Associate Administrator for Hazardous Materials Safety issues preemption determinations. Any person aggrieved by RSPA's decision on an application for a preemption determination may file a petition for reconsideration within 20 days of service of that decision. 49 CFR 107.211(a).

The decision by RSPA's Associate Administrator for Hazardous Materials Safety becomes RSPA's final decision 20 days after service if no petition for reconsideration is filed within that time; the filing of a petition for reconsideration is not a prerequisite to seeking judicial review under 49 U.S.C. 1811(e). If a petition for reconsideration is filed, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration is RSPA's final agency action. 49 CFR 107.211(d).

In making decisions on applications for preemption determinations, RSPA is guided by the principles and policy set forth in Executive Order No. 12,612, entitled "Federalism" (52 FR 41685 (Oct. 30, 1987)). Section 4(a) of that Executive Order authorizes preemption

of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. The HMTA contains express provisions, which RSPA has implemented through its regulations.

III. Further Comments

All comments should be limited to the issue of whether Michigan's hazardous materials marking laws and regulations for vehicles used to transport hazardous waste are preempted by the HMTA. Comments should specifically address the "substantively the same," "dual compliance," and "obstacle" tests

described in Part II above. Comments should also address the issue of whether Michigan's hazardous materials regulations are "otherwise authorized by Federal law."

Persons intending to comment should review the standards and procedures governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201-107.211.

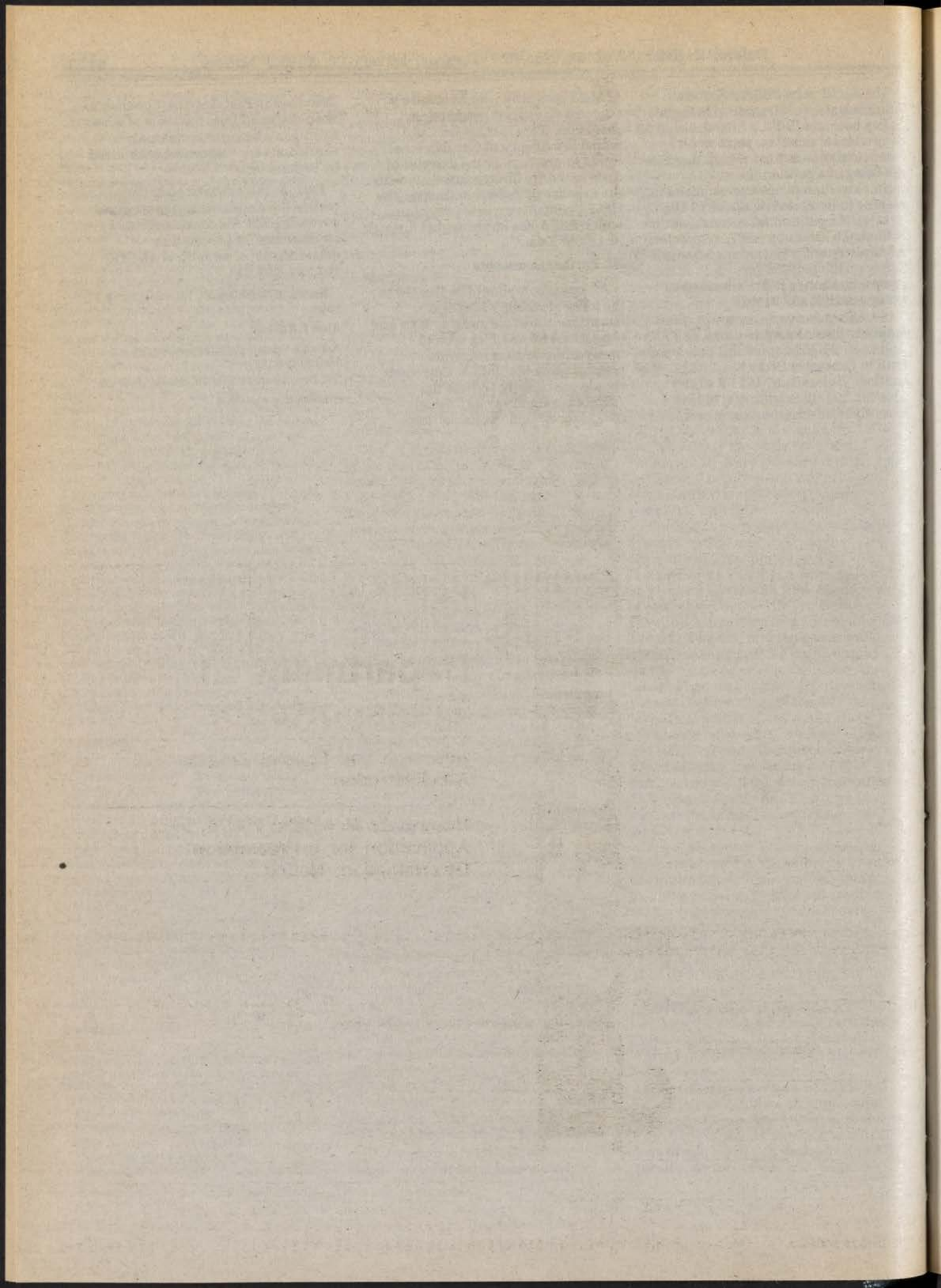
Issued in Washington, DC, on January 17, 1993.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 93-1778 Filed 1-25-93; 8:45 am]

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federal register

**Tuesday
January 26, 1993**

Part III

Department of Transportation

**Research and Special Programs
Administration**

**Hazardous Materials: HASA, Inc.;
Application for a Preemption
Determination; Notice**

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. PDA-7(R); Notice No. 93-3]

Application by HASA, Inc. for a Preemption Determination as to Hazardous Materials-Related Codes Applied by the County of Los Angeles, California, to the Transportation of Hazardous Materials on Private Property

AGENCIES: Research and Special Programs Administration (RSPA) and Federal Railroad Administration (FRA), U.S. Department of Transportation.

ACTION: Public notice and invitation to comment.

SUMMARY: HASA, Inc. (HASA) has applied for an administrative determination as to whether various hazardous materials-related codes of Los Angeles County imposed upon the transportation of hazardous materials on private property owned, leased, or under the control of the consignor, consignee, or transporter of hazardous materials are preempted by the Hazardous Materials Transportation Act (HMTA).

DATES: Comments received on or before March 31, 1993 and rebuttal comments received on or before June 4, 1993 will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, room 8421, 400 Seventh Street SW., Washington, DC 20590-0001 (Tel. No. [202] 366-4453). Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (PDA-7(R)). Three copies of each should be submitted. In addition, a copy of each comment and each rebuttal comment must also be sent to: (a) Ms. Mary Flynn, Director, Government Relations and Public Affairs, HASA, Inc., 23119 Drayton St., Saugus, CA 91350; and Mr. Larry J. Monteilh, Executive Officer, Board of Supervisors for the County of Los Angeles, 500 West Temple Street, room 383, Los Angeles, CA 90012. A certification that a copy has been sent to these persons must also be included with the comment. (The following

format is suggested: "I hereby certify that copies of this comment have been sent to Ms. Flynn and Mr. Monteilh at the addresses specified in the **Federal Register**.")

FOR FURTHER INFORMATION CONTACT: James E. Meason, Attorney, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001 (Tel. No. [202] 366-4400).

I. HASA's Application for a Preemption Determination

With its December 22, 1992 letter, HASA applied for a determination that various Los Angeles County codes relating to the transportation of hazardous materials on private property owned, leased, or under the control of the consignor, consignee, or transporter of hazardous materials are preempted by the HMTA. The text of HASA's application follows (the appendices to HASA's application are available for examination at, and copies may be obtained at no cost from, RSPA's Dockets Unit at the address and telephone number set forth in **ADDRESSES** above).

Ms. Mary Flynn, Director, Government Affairs and Public Relations, HASA, Inc., 23119 Drayton Street, Santa Clarita, California 91350, 805/259-5848; FAX 805/259-1538

Before the Associate Administrator for Hazardous Materials Safety Research and Special Programs Administration, United States Department of Transportation

HASA, Inc., Applicant; Application for an Administrative Determination Pursuant to 49 U.S.C. 1811(c) and 49 CFR 107.203 et seq. Docket No.

I

This is an application by HASA, Inc., a California corporation, to the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, United States Department of Transportation for an administrative determination pursuant to 49 U.S.C. App. 1811(c)(1) and regulations thereunder promulgated in 49 CFR 107.203 et seq. at to whether sections 2.20.140 through 2.20.170 of part 2, title 2 of the Los Angeles County Code (Los Angeles County Ordinance, "LACoC," No. 90-0109), "LACoC," attached herewith and identified as "Exhibit 1;" Sections 4.108 c. 6.; 80.101, EXCEPTION 1; 80.103 (a), (c), (d), and (e); 80.104 (a), (f) and (g); 80.201; 80.202 (a); 80.202 (b); 80.203; 80.301 (b) (1) and 80.402 (c) (8) (A) of the County of Los Angeles 1990 Fire Code (Title 32 of the LACoC, LACoC No. 90-0110), "Exhibit 2" attached herewith, are preempted by Sections 112 (a) (1), (2), and (3) of the Federal Hazardous Materials Transportation Act, as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990, "HMTA," and/or

regulation promulgated pursuant thereto at 49 CFR 107.202.

II

The issue presented to the Assistant Administrator is as to whether Federal statute and regulation thereunder are applicable to transportation of hazardous materials, including loading, unloading, and storage incidental thereto, on private property owned, leased and/or under the control of the consignor, consignee, and/or transporter of the hazardous materials shipment.

The Consolidated Fire Protection District of Los Angeles County through its authorized representative, the Los Angeles County Fire Department, alleges and believes that local regulations, i.e., the LACoC, preempt the HMTA and regulation thereunder when transportation of hazardous materials, including loading, unloading, and storage incidental thereto, occurs on the private property owned, leased, and/or otherwise under the control of the consignor, consignee, and/or the transporter.

If the LACoC rather than the HMTA and regulation thereunder is applicable to the transportation of hazardous materials, including loading, unloading, and storage incidental thereto, on private property owned, leased, and/or otherwise under the control of the consignor, consignee, and/or transporter, dozens of local and state regulations become applicable, many of which are incompatible with or an obstacle to the accomplishment of the Federal scheme.

The applicant, HASA, Inc., alleges and believes that the HMTA and regulation thereunder is applicable to the transportation of hazardous materials, including loading, unloading, and storage incidental thereto, irrespective of the locale, i.e., public property, public right-of-way, railroad property, other private property, private siding, etc.

This application for an administrative determination of pre-emption is specific to the transportation, including loading, unloading, and storage incidental thereto, of liquefied chlorine in rail road tank cars at the Santa Clarita, California manufacturing facility of HASA, Inc.

HASA, Inc. requests that the Associate Administrator consider, when evaluating this administrative application for pre-emption, transportation, including loading, unloading, and storage incidental thereto of all hazardous materials. We allege and believe that consideration of the larger issue, i.e., transportation of all hazardous materials, is in the public interest. There are several thousand shipments of hazardous materials each and every day within the County of Los Angeles which may be subjected to the regulatory scheme contained in the LACoC. Nationwide, there are 500,000 shipments of hazardous materials each and every day in both inter- and intra-state commerce.

III

The applicant, HASA, Inc., is a California corporation with manufacturing and distribution facilities located in California and in Arizona. We distribute products

through the western United States and, additionally, both in Alaska and in Hawaii. Our California manufacturing facility is located at 23119 Drayton Street; Santa Clarita, California 91350. The city of Santa Clarita is located within the County of Los Angeles and within the Consolidated Fire Protection District of Los Angeles County.

HASA, Inc. manufactures, packages, warehouses, and transports chemical compounds for use in potable and waste water treatment, swimming pool and spa disinfection, etc. Many of these chemicals are classified as hazardous materials in the "Hazardous Materials Table," 49 CFR 172.101 and are, therefore, subject to regulation—with respect to transportation including loading, unloading, and storage incidental thereto—under the HMTA and regulations thereunder promulgated.

IV

HASA, Inc. receives railroad tank cars containing liquefied chlorine from manufacturers engaged in interstate commerce. We unload liquefied chlorine from these railroad tank cars on our private siding adjacent to our facility in Santa Clarita, California. Transportation of liquefied chlorine, including loading, unloading, and storage incidental thereto, at our facility is in accordance with the HMTA, regulations thereunder promulgated at 49 CFR part 174, in accordance with the Chlorine Manual and related pamphlets published by the Chlorine Institute, and in accordance with a specific exemption issued by the Research and Special Programs Administration, "RSPA," E-10552.

V

Santa Clarita is an incorporated city within the County of Los Angeles. Our city does not maintain a "city fire department." Fire protection is provided by the Consolidated Fire Protection District of Los Angeles County, "CFPD/LACo," under contract with the city. Santa Clarita is one of many cities which have contracted with the CFPD/LACo for fire protection services. All contract cities are located within the CFPD/LACo. The CFPD/LACo adopted title 32 of the LACoC (LACoC No. 90-0111) as the fire code for the CFPD/LACo, i.e., the fire code for the County of Los Angeles and the CFPD/LACo are identical.

Title 32 of the Los Angeles County Code was amended by Los Angeles County Ordinance 90-0110, discussed *ante*, and includes adoption by reference with additional amendments of the 1988 edition of the Uniform Fire Code, published jointly by the International Conference of Building Officials and the Western Fire Chiefs Association. Fire protection services for the CFPD/LACo are provided by the Los Angeles County Fire Department.

VI

Over the past year, HASA, Inc. has been inspected numerous times by the county fire department, and as a result of these inspections, subsequently ordered to comply with the regulation contained in the county fire code with respect to "on-site transportation" of hazardous materials. In each and every case—having been inspected

and ordered to comply with the county fire code requirements—HASA, Inc. has filed an appeal in a timely manner in accordance with the requirements for filing an administrative appeal as set forth in the applicable county fire code. As of the date of this application for an administrative determination for pre-emption with the Associate Administrator, none of these administrative appeals filed in accordance with our county fire code has been scheduled for hearing, i.e., neither the Board of Appeals of the City Council of the City of Santa Clarita nor the Board of Appeals of the CFPD/LACo has set these matters for hearing.

HASA, Inc. has paid annual fees to the County of Los Angeles since 1990 for "handling" liquefied chlorine in rail road tank cars. These fees are used by the County for enforcement of Chapter 6.95 of the California H&SC, not for purposes related to the transportation of hazardous materials.

VII

HASA, Inc. requests that the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, United States Department of Transportation, make an administrative determination in accordance with the HMTA and regulations thereunder that sections 2.20.140 through 2.20.170 of title 2 of the LACoC, sections 4.108 c. 6.; 80.101, EXCEPTION 1; 80.103 (a), (c), (d), and (e); 80.104 (a), (f), and (g); 80.201; 80.202 (a); 80.202 (b); 80.203; 80.301(b)(1) and 80.402(c)(8)(A) in title 32 of the LACoC (LACoC No. 90-0110, as adopted by LACoC 90-0111 as the Fire Code for the CFPD/LACo) are pre-empted by sections 112(a) (1), (2), and/or (3) of the HMTA, and/or 49 CFR 107.202.

VIII

The text of the LACoC for which a Pre-emption Determination is sought is set out *post*.

2.20.140 Annual Fees to be Paid by Handlers of Hazardous Materials. The annual fee required to be paid to the county by every handler of hazardous materials for the administration and enforcement of the provisions of the Act shall be as follows: (Note: balance of text appears in "Exhibit 1" attached herewith.)

. . . . and

2.20.150 Additional Fees—Acutely Hazardous Substances. Every handler of an acutely hazardous material, shall in addition to the fee specified in Section 2.10.140, be required to pay an annual fee to the county for administration and enforcement of acutely hazardous materials registration, risk assessment, and risk mitigation in accordance with compliance under the Act. The fee shall be calculated as follows: (Note: balance of text appears in "Exhibit 2" attached herewith.)

. . . . and

2.20.160 Late Submission Fee. A late submission fee shall apply to the filing requirements of both the business plan and inventory and to the AHM registration requirements as follows: (Note: balance of text appears in "Exhibit 1" attached herewith.)

. . . . and

2.20.170 Fee Schedule—Annual Adjustment Procedure. Beginning with the 1991-1992 fiscal year, the schedule of fees contained in Section 2.20.140 through 2.20.160 inclusive shall be adjusted annually by the following procedure: (Note: balance of text appears in "Exhibit 1" attached herewith.)

. . . . and

Note: The following Sections reference sections in the County of Los Angeles 1990 Fire Code, which consists of the 1988 edition of the Uniform Fire Code as amended by LACoC 90.0110—Title 32 of the LACoC. The numbering system deviates from the system incorporated in the LACoC and is based on the numbering system in the *Uniform Fire Code*.

Section 4.108 c. 6. Compressed Gases. To store, transport on site, dispense, use, or handle at normal temperatures and pressures compressed gases in excess of the following amounts:

Type of gas	Amount
Flammable (except cryogenic fluids and liquefied petroleum gases).	200 cubic feet.
Oxidizing (including oxygen).	500 cubic feet.
Corrosive	Any Amount.
Highly Toxic	Any Amount.
Radioactive	Any Amount.
Reactive (Unstable)	Any Amount.
Inert	6,000 cubic feet.

See Article 74, Article 80, and Article 82.

. . . . and

Scope

Section 80.101 The classification system referenced in Division II shall apply to all hazardous materials, including those materials regulated elsewhere in this code.

EXCEPTIONS: 1. The off-site transportation of hazardous materials when in conformance with the Department of Transportation (DOT) regulations.

. . . . and

Permits

Section 80.103(a) General. No person, firm or corporation shall store, dispense, use, or handle hazardous material in excess of the quantities specified in Section 4.108 unless and until a valid permit has been issued pursuant to this article.

A permit shall be obtained when a material is classified as having more than one hazard category of the quantity limits are exceeded in any category. . . .

(c) Hazardous Materials Business Plan. Each application for a permit required by this article shall include a Hazardous Materials Business Plan (HMBP) in accordance with chapter 2.20 of part 2 of the Los Angeles County Code. Note: Chapter 2.20, Part 2, LACoC is attached herewith as "Exhibit 1."

(d) Hazardous Materials Inventory Statement. Each application for a permit required by this article shall include a Hazardous Materials Inventory Statement (HMIS) in accordance with chapter 2.20 of part 2 of title 2 of the Los Angeles County Code.

(e) Emergency Information. Hazardous Materials Business Plans, Risk Management Prevention Program and Hazardous Materials Inventory Statements shall be posted in an approved location and immediately available to emergency responders. The chief may require that the information be posted at the entrance to the occupancy or property.

and

General Requirements

Section 80.104 (a) General. The storage, use, dispensing, and handling of hazardous materials shall be in compliance with the provisions of this article. . . .

(f) Hazardous Materials Business Plan. Every business shall comply with the reporting requirements as set forth in chapter 2.202 of part 2 of title 2 of the Los Angeles County Code.

(g) Risk Management and Prevention Program. Every business shall comply with the requirements as set forth in chapter 2.20 of part 2 of title 2 of the Los Angeles County Code.

and

Scope

Section 80.201. For the purposes of this code, hazardous materials shall be divided into hazard categories. The categories include materials regulated under this article and materials regulated elsewhere in this code.

and

Hazardous Categories

Section 80.202 (a) Physical Hazards. The materials listed in this section are classified as physical hazards. A material with a primary classification as a physical hazard may also present a health hazard.

1. Explosives and blasting agents, regulated elsewhere in this code.
2. Compressed Gases, regulated in this article and elsewhere in this code.
3. Flammable and combustible liquids regulated elsewhere in this code.
4. Flammable solids.
5. Organic peroxides.
6. Oxidizers.
7. Pyrophoric materials.
8. Unstable (reactive) materials.
9. Water-reactive materials.
10. Cryogenic fluids, regulated under this article and elsewhere in this code.

(b) Health Hazards. The materials listed in this section are classified as health hazards. A material with a primary classification as a health hazard may also present a physical hazard.

1. Highly toxic or toxic materials, including highly toxic or toxic compressed gases.
2. Radioactive materials.
3. Corrosives.
4. Other Health hazards.

and

Appendix

Section 80.203. Descriptions and examples of materials included in hazard categories are contained in Appendix VI-A.

and

Section 80.301 (b) Containers and Tanks 1 Design and Construction. Containers and

tanks shall be designed and constructed in accordance with nationally recognized standards. See Section 2.304 (b). Tank vehicles and railroad tank cars shall not be used as storage tanks. Unloading operations shall be in accordance with Section 79.808.

. . . . and

80.402(c) (3) Special Requirements for Highly Toxic or Toxic Compressed Gases. A. Gas Cabinets or Local Exhaust. When . . . railroad tank cars regulated by DOT are used out-of-doors, gas cabinets or a locally exhausted enclosure shall be provided. When gas cabinets are provided, the installation shall be in accordance with the provisions of Section 80.303 (a) (6) (B). The required treatment system shall be designed in accordance with the provisions of Section 80.303 (a)(6)(D).

. . . . and

Appendix VI-A, "Hazardous Materials Classifications." Note: Due to length, Appendix VI-A is incorporated by reference as though it appears in its entirety herein. A copy of the Appendix is attached herewith in the Appendix to this application.

IX

Exception 1, Section 80.101 exempts "off-site transportation of hazardous materials" from regulation in the LACoC. Section 80.103, "Permits," references section 4.108 c. 6. for permit requirements. Section 4.108 c. 6. requires that a permit be obtained for "on-site transportation" of compressed gases in excess of 200—6,000 cubic feet, depending on the gas classification. It is clear that it is the intent of the county fire code that "on-site transportation" is subject to regulation.

When "on-site transportation" is subject to regulation in the county fire code, all of the requirements contained in Article 80, "Hazardous Materials" are applicable to compressed gases. Sections 80.103 (c), (d), and (e) and sections 80.104 (f) and (g) require compliance with chapter 2.20 of title 2 of the LACoC.

Chapter 2.20 of title 2 implements Chapter 6.95 of the California H&SC. The requirements contained in titles 2 and 32 of the LACoC are in addition to and different from requirements contained in the HMTA and regulation thereunder and stand as an obstacle to the accomplishment of the Act. In H.R. Report No. 444, Pt. 1, 101st Congress, 2d Session 34 (1990):

(C)onflicting Federal, State, and local requirements pose potentially serious threats to the safe transportation of hazardous materials. Requiring State and local governments to conform their laws to the HMTA and regulations thereunder with the specific subjects listed in 105 (a) (4) (B) will enhance the safe and efficient transportation of hazardous materials, while better defining the appropriate roles of Federal, State, and local jurisdictions.

HASA, Inc. requests the Associate Administrator compare the requirements set forth in part 2 of title 2 of the LACoC and title 32 of the LACoC, the "fire code" of the CFPD/LACoC, as set out *ante*, with the following Federal Statute, regulations promulgated thereunder, previously issued Inconsistency Rulings, Rulings of the Courts,

and Exemptions issued by the Administration.

Sections 80.103 (c), (d), and (e) require compliance with Part 2 of title 2 of the LACoC as a condition of obtaining a permit for "on-site" transportation of hazardous materials in excess of the permit quantities listed in section 4.108 of title 32 of the LACoC. Sections 2.20.140 through 2.20.170 of the LACoC provide for establishment and collection of fees for "handlers" of hazardous materials which are paid to the County of Los Angeles for administration and enforcement of chapter 6.95 of the California H&SC. Chapter 6.95 provides *inter alia* regulations for hazardous materials business plans, hazardous materials inventories, and risk management and prevention plans. None of these activities are related to the transportation of hazardous materials.

Article 1 of chapter 6.95 provides requirements for "Business and Area Plans." It is attached herewith and identified as "Exhibit 3." Article 2 of chapter 6.95 provides requirements for "Hazardous Materials Management." It is attached herewith and identified as "Exhibit 4." Regulations and reporting forms to carry out the requirements of chapter 6.95 have been promulgated at 19 California Code of Regulations, "CCR," 2720 *et seq.* These regulations and reporting forms are attached herewith and identified as "Exhibit 5."

The term "handler" is defined at section 2.20.100 of title 2 of the LACoC as follows.

"Handler" means any business which handles a hazardous material or acutely hazardous material, except where all acutely hazardous materials present at the business are handled in accordance with a removal or remedial action taken pursuant to the Carpenter-Prezley-Tanner Hazardous Substance Account Act (Chapter 6.8 (commencing with Section 25300) of the Health and Safety Code).

HASA, Inc. alleges and believes that (1) Non-Federal regulation of the "handling" of hazardous materials during transportation, including loading, unloading, and storage incidental thereto is pre-empted by the HMTA and regulation thereunder; and that (2) irrespective of pre-emption issues, the assessment and collection of fees in connection with the transportation of hazardous materials is pre-empted unless and until such fees collected are used for purposes relating to the transportation of hazardous materials.

At 49 CFR 107.202 (a)(2) and (c), "Standards for Determining Pre-emption" we find the following.

(a)(2) * * * (A)ny law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof * * * which concerns the following subjects and which is not substantively the same as any provision of this Act or any regulation under such provision which concerns such subject, is pre-empted: The packing, repacking, handling, labeling, marking, and placarding of hazardous materials (Emphasis added).

(c) A State or political subdivision thereof * * * may not levy any fee in connection with the transportation of hazardous materials that is not equitable and not used for purposes related to the transportation of

hazardous materials, including enforcement and the planning, development, and maintenance of a capability for emergency response.

Requirements contained in Chapter 6.95 provide for written notification, recording, and reporting of the unintentional release of hazardous materials. These requirements are pre-empted by 49 CFR 107.202(a)(4).

(a)(4) * * * (A)ny law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof * * * which concerns the following subjects and which is not substantively the same as any provision of this Act or any regulation under such provision which concerns such subject, is pre-empted: * * *. The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.

The requirement to comply with chapter 2.20 of title 2 of the LACoC is reiterated in title 32 of the LACoC under "General Requirements" at sections 80.104 (a), (f), and (g). It is our understanding that the intent of section 80.103 is to require that businesses produce a HMBP, HMIS, and RMPP in accordance with part 2 of title 2 of the LACoC prior to commencing operations. The intent of section 80.104 is to require existing businesses, which already are operating under a permit from the fire department, to comply with part 2 of title 2 of the LACoC.

We allege and believe that compliance with sections 4.108 c. 6., 80.103 (c), (d), and (e), and 80.104 (a), (f), and (g) with respect to "on-site" transportation of hazardous materials is also pre-empted by 49 CFR 107.202(b)(2).

(b)(2) * * * (A)ny requirement of a State or political subdivision * * * is pre-empted if (t)he State or political subdivision * * * requirement as applied or enforced creates an obstacle to the accomplishment and execution of the Act or regulations issued under the Act * * *.

Similar permit requirements are found in section 17.68.150 of the San Jose Municipal Code. In Inconsistency Ruling IR-28, City of San Jose, California; Restrictions on Storage of Hazardous Materials (55 FR 8884, March 8, 1990), the Director opined at 8890:

The type of unfettered discretion asserted by the City in this language with respect to approval or disapproval of storage of hazardous materials incidental to the transportation thereof is inconsistent with the HMTA and the HMR * * *.

(A) State or local permitting system which prohibits or requires certain hazardous materials transportation activities depending upon whether a permit has been issued (regardless of whether the activity is in compliance with the HMR), applies to selected hazardous materials * * * and contains considerable discretion as to permit issuance is

"Cumulatively, these factors constitute unauthorized prior restraints on shipments of * * * hazardous materials that are presumptively safe based on their compliance with Federal Regulations.

In *Southern Pacific Transportation Company v. Public Service Commission of Nevada* C.A. 9 (Nev) 1990, 909 F.2d 352, State of Nevada regulations requiring rail

carriers to obtain an annual permit prior to loading, unloading, and transferring or storing hazardous material on railroad property within the state were found to be pre-empted by the HMTA and regulations thereunder promulgated.

As a condition for obtaining a permit for "on-site transportation" of hazardous materials, the applicant must submit a Hazardous Materials Business Plan, a Hazardous Materials Inventory Statement, Emergency Information, comply with all of the additional requirements contained in Article 80, "Hazardous Materials," title 32, LACoC, section 79.808 of title 32, LACoC, and with chapter 2.20, part 2, LACoC which mandates compliance with Chapter 6.95 of the California H&SC.

The HMBP requires *inter alia* specific information about the facility's operation, including land uses on adjacent property, a detailed schematic of the facility, specific information about each hazardous material located on the premises, submission of a HMIS, employee training and information, emergency response information. See 19 CCR 2720, "Proposed Area Plans," in "Exhibit 5." The HMIS required as part of the HMBP, requires a list of all hazardous materials located, stored, and/or handled at the facility, quantity ranges, classification of hazard, days on-site, etc. See 19 CCR 2730, "Optional Model Inventory Reporting Form," in Exhibit 5.

In IR-28 at 8891, the Administrator opined:

Information and documentation requirements as prerequisites to hazardous materials transportation have been considered on many prior occasions. Where such requirements exceeded Federal requirements, they have been found to create potential delay or diversion of hazardous materials transportation, to constitute an obstacle to execution of the HMTA and the HMR, and thus to be inconsistent * * *.

The issue was succinctly addressed in IR-19 * * *. In summary, the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implementation of the HMTA and the HMR and are thus inconsistent with them.

The Administrator opined in IR-28 at 8890:

* * * the City's information requirements are inconsistent with the HMR insofar as they require emergency response information as a prerequisite to the loading, unloading and storage of hazardous materials incidental to their transportation * * *.

RSPA's emergency response information requirements (Note: Emergency Response Communication Standard, 49 CFR 172.201(d)) for hazardous materials transportation, including the loading, unloading, or storage incidental to such transportation exclusively occupy the field.

Sections 80.101, 80.201, 80.202, 80.203, and Appendix VI-A address classification of hazardous materials. The classification system is different from and in addition to the classification system promulgated by RSPA pursuant to the HMTA.

Presumptively, this classification system applies to "on-site transportation" of hazardous materials, and is not applicable to "off-site transportation" of hazardous materials. At 49 CFR 107.202(a)(1), in pertinent part:

(a)(1) (A)ny law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof * * * which concerns the following subjects and which is not substantively the same as any provision of this Act or any regulation under such provision which concerns such subject, is pre-empted: (t)he designation, description, and classification of hazardous materials.

Examples of consistency problems between the county fire code and 49 CFR 172.101, "Hazardous Materials Table," include chlorine and anhydrous ammonia. Under the DOT classification system chlorine is "2.3 Poisonous Gas." Anhydrous ammonia (domestic transportation) is "Nonflammable Gas." Under the county fire code classification system chlorine is "Oxidizer, Toxic, and Corrosive Gas." Anhydrous ammonia is "Corrosive Gas."

Section 80.301(b) *inter alia* provides as follows.

Tank vehicles and railroad tank cars shall not be used as storage tanks. Unloading operations shall be accordance with Section 79.808.

There is no provision in either the HMTA or regulations thereunder (Part 174, "Carriage by Rail," and part 177, "Carriage by Public Highway") which prohibits storage—incidental to transportation or otherwise—of hazardous materials in either tank vehicle or in tank cars. The county fire code clearly prohibits storage in cargo tanks and tank cars at places where and at times when such storage is permitted by the HMTA and regulations thereunder. Section 174.204(a)(2) specifically permits storage of specified gases on both private and carrier track. In pertinent part:

* * * such cars may be stored on a private track (see 171.8 of this subchapter) or on carrier tracks designated by the carrier for such storage.

Prohibition of storage in cargo tanks and tank trucks is an obstacle to the transportation of hazardous materials. At 49 CFR 107.202(b) in pertinent part:

(b)(2) * * * and requirement of a State or political subdivision * * * is pre-empted if— * * *. (t)he State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of the Act or a regulation issued under the Act.

The issue is further complicated by the requirement that unloading operations be in accordance with Section 79.808 of the county fire code. Section 79.808 is attached herewith and identified as "Exhibit 6." Section 79.808 addresses unloading operations for flammable and combustible liquids. Many of the requirements in section 79.808 are not only inappropriate but unsafe for unloading compressed and liquefied gases, including chlorine. Examples include the requirement to transfer only to an approved atmospheric tank or approved portable tank (Section 79.808 (b)), prohibition against remaining on a siding for more than 24 hours while

connected (Section 79.808(c)), and the attendance requirement (Section 79.808(c)).

Compressed gases cannot be unloaded into a tank "open to the atmosphere," i.e., they will no longer be "contained" or "compressed." Liquefied gases, including chlorine, are unloaded as liquefied gases at a finite rate to prevent the liquefied gas remaining in the tank car from freezing as heat is withdrawn from the liquid by expanding gas. With respect to chlorine, the normal unloading rate is 3,600–7,200 pounds per hour. This rate translates into 25–50 hours uninterrupted, i.e., continuous unloading, or 3½–6¼ days for single shifts of 8 hours per day.

Section 79.808 (c) requires the physical presence of a person while cargo is discharged. The requirement is similar to but not identical with the requirement set out at 49 CFR 174.67 (i). Section (j) requires that all connections to the tank car must be disconnected if unloading is halted for any reason. Ostensibly, the car will be "stored incidental to transportation" until the unloading process is continued, an activity prohibited by the county fire code. There are no time limitations for tank car unloading of compressed gases at either 49 CFR 174.67 or 49 CFR Subpart F. We request that the Associate Administrator compare these requirements in section 79.808 of the county fire code with the regulations at 49 CFR 174.67 and with the requirements in E-10552.

E-10552 provides an exemption from certain of the requirements at 49 CFR 174.67 (i) and (j) under specified conditions. The "unloader" need not be physically present where the unloading process is monitored. Section 79.808 of the county fire code is in direct conflict with this exception, i.e., the "unloader" must be present at all times during the unloading process. The fire department opines that E-10552 is not applicable where unloading is "on-site." Section 174.204, "Tank Car Delivery of Gases, Including Cryogenic Liquids," requires that tank cars be "unloaded on a private track" where private track is available. Any recipient of a rail road tank car containing compressed gases, which has private track available "on-site," must unload on private track. Under the county fire code scheme, such unloading constitutes "on-site" transportation and is subject to regulation thereunder. HASA, Inc. has a private siding on our property where chlorine is "unloaded." Therefore, all unloading of chlorine at our facility constitutes "on-site" transportation. The fire department alleges and believes that the county fire code pre-empts the HMTA and regulation thereunder, i.e., unloading at the HASA, Inc. siding constitutes "on-site transportation" of compressed gasses.

Section 80.402(c)(8) provides that "railroad tank cars regulated by DOT are used out-of-doors, gas cabinets or a locally exhausted enclosure shall be provided." "Use" is synonymous with "loading" and "unloading," and is defined at section 80.102(b) as follows:

USE (material) is the placing in action or making available for service by opening or connecting anything utilized for confinement of material whether a solid, liquid, or gas.

Section 80.402(c)(8) also references construction requirements for gas cabinets and provides that a treatment system be provided for gas discharged from the gas cabinet.

Under section 80.402(c)(8) requirements, railroad tank cars are enclosed within a sealed chamber connected to a treatment system designed to process the entire contents of the railroad tank car to ½ the established IDLH prior to discharge to the environment. We ask the Assistant Administrator to compare these requirements with the general unloading requirements for tank cars set out at 49 CFR 174.67 and the specific unloading requirements for compressed gases in Subpart F, "Detailed Requirements for Gases."

X

HASA, Inc. alleges and believes that the fire code is pre-empted with respect to the transportation of hazardous materials, specifically liquefied chlorine, including both loading and unloading and storage incidental thereto, by the HMTA and regulations thereunder.

The county fire code differentiates between "off-site" and "on-site" transportation of compressed gases. Section 80.101, EXCEPTION 1 exempts "off-site" transportation of compressed gases from county fire code regulation. However, "on-site" transportation not only is subject to county fire code regulation, but requires that the "on-site" transportation facility obtain a permit from the fire department prior to conducting "on-site transportation" activities, including both loading and unloading and storage incidental thereto. To obtain a permit from the fire department for "on-site" transportation, the facility must comply with the applicable requirements contained in the county fire code, title 32 of the LACoC; part 2 of title 2 of the LACoC, and by reference therein, chapter 6.95 of the California H&SC.

If Federal statute and regulation thereunder apply to both "off-site" and "on-site" transportation, as HASA, Inc. alleges and believes, none of the requirements in the county fire code is applicable to unloading of and storage incidental to such unloading of liquefied chlorine from rail road tank cars at our Santa Clarita facility.

With respect to our operations in Santa Clarita, California, aside from the requirement to obtain a fire department permit for "on-site transportation," compliance includes construction of a gas-tight structure in accordance with Section 80.303(a)(6)(B) of the county fire code, completely enclosing railroad tank cars while they are unloaded, construction of a treatment system in accordance with section 80.303(a)(6)(D) with the capacity to process 90 tons of chlorine gas, and dozens of additional requirements in Articles 79 and 80 of title 32 and chapter 2.20 of part 2 of title 2 of the LACoC.

Construction requirements for the containment structure include operation at negative pressure in relation to the surrounding area, self-closing, limited-access ports or noncombustible windows to give access to equipment and controls, connection

to a treatment system, self-closing doors, and fabrication from 12 gauge steel.

The treatment system construction requirements include the requirement to provide "treatment" for the "largest * * * tank utilized," or in our case for 90 tons of chlorine gas. "Treatment" reduces the concentration of toxic gases to one-half the IDLH at the point of discharge to the atmosphere. See section 80.303(a)(6)(D)(iii) in the county fire code. The IDLH for chlorine is 30 ppm. A discharge at 15 ppm (one-half the IDLH) is impractical. Chlorine can be detected by its physiological warning properties (odor and color) at 0.6–1.5 ppm in air. A discharge at 15 ppm would cause panic in any populated area.

There are only two practical ways to treat chlorine gas: incineration or reaction with dilute sodium hydroxide solution to form household bleach. There is virtually no chance that an incinerator of this capacity could be permitted within the Southern California Air Quality Management District, which includes Los Angeles County. Chemical treatment requires 1½ pounds of caustic soda, 1 gallon of water, and approximately 10 pounds of ice (or equivalent) for each pound of chlorine processed. For each 90 ton tank car in "use" we would have to maintain on site 125 tons of sodium hydroxide, 90,000 gallons of water, and 900 tons of ice (or equivalent).

Cost estimates for construction of the structure and the treatment system range from \$1MM–2.5MM, just for our site for unloading a single tank car of liquefied chlorine. The county fire code regulation is applicable to all toxic and highly toxic compressed gases at every use site in the county. Implemented county-wide, the transportation of compressed gases in railroad tank cars will come to an immediate halt.

Railroad tank cars containing liquefied chlorine range in size from 45 to 90 tons capacity. Liquefied chlorine is always unloaded for repackaging into cylinders, portable tanks, or cargo tanks or to process. Liquefied chlorine contained in railroad tank cars is never unloaded to stationary storage facilities. It follows that if "on-site transportation" is regulated under the county fire code, all unloading operations of liquefied chlorine from rail road tank cars are subject to regulation under the county fire code.

The fire code system for classification of hazardous materials is in addition to and different from the Federal system. As the situation presents itself, hazardous materials are classified in accordance with Federal requirements for "off-site transportation" and in accordance with the county fire code for "on-site transportation."

XI

HASA, Inc. requests an administrative determination (1) that regulation of the transportation of chlorine in rail road tank cars, including loading, unloading, and storage incidental thereto at our facility in Santa Clarita, California, is exclusive to the Federal government pursuant to the HMTA and regulation thereunder; (2) that the term "transportation" as defined in the HMTA

includes both "on-site" and "off-site" transportation of hazardous materials in commerce including loading, unloading, and storage incidental thereto; and (3) that Sections 2.20.140 through 2.20.170 of Part 2, Title 2; Sections 4.108 c. 6., 80.101, EXCEPTION 1; 80.103 (a), (c), (d), (e); 80.103 (a), (f), (g); 80.201, 80.202 (a) and (b); 80.303 (b) (1), 80.402 (c) (8) (A); and Appendix VI-A of Title 32 of the LACoC are pre-empted by the HMTA and regulation promulgated thereunder with respect to both "off-site" and "on-site" transportation of chlorine in rail road tank cars, including loading, unloading, and storage incidental thereto.

Executed on December 22, 1992 at Santa Clarita, California.

HASA, Inc. by Ms. Mary Flynn, Director, Government Affairs and Public Relations

II. Background

The HMTA was enacted in 1975 to give the Department of Transportation greater authority " * * * to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 App. U.S.C. 1801. It replaced a patchwork of State and local laws.

" * * * [U]niformity was the linchpin in the design of [the HMTA]." *Colorado Public Utilities Comm. v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). Unless otherwise authorized by Federal law or unless a waiver of preemption is granted by DOT, the HMTA explicitly preempts " * * * any requirement of a State or political subdivision thereof or Indian tribe " * * * if:

(1) Compliance with both the State or political subdivision or Indian tribe requirement and any requirement of (the HMTA) or of any regulation issued under (the HMTA) is not possible;

(2) The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of (the HMTA) or the regulations issued under (the HMTA); or

(3) It is preempted under section 105(a)(4) (49 App. U.S.C. 1804(a)(4), describing five "covered subject" areas) or section 105(b) (49 App. U.S.C. 1804(b), dealing with highway routing requirements). 49 App. U.S.C. 1811(a).

With two exceptions, section 1804(a)(4) preempts " * * * any law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof or an Indian tribe " * * * which concerns a "covered subject" and "is not substantively the same" as a provision in the HMTA or regulations promulgated pursuant to the HMTA. The two exceptions are State and Indian tribe hazardous materials highway routing requirements governed by 49 App. U.S.C. 1804(b) and

requirements "otherwise authorized by Federal law." The "covered subjects" defined in section 1804(a)(4) are the:

(i) Designation, description, and classification of hazardous materials;

(ii) Packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(iii) Preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents;

(iv) Written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and

(v) Design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

In a final rule published in the *Federal Register* on May 13, 1992 (57 FR 20424, 20428), RSPA defined "substantively the same" to mean "conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d). The HMTA provides that any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision, or Indian tribe requirement is preempted by the HMTA. Notice of the application must be published in the *Federal Register*, and the applicant is precluded from seeking judicial relief on the "same or substantially the same issue" of preemption for 180 days after the application, or until the Secretary takes final action on the application, whichever occurs first. 49 App. U.S.C. 1811(c)(1). A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final. 49 App. U.S.C. 1811(e).

The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing, which were delegated to the Federal Highway Administration. 49 CFR 1.53(b). RSPA's regulations concerning preemption determinations are set forth at 49 CFR 107.201-107.211 (including amendments of February 28, 1991 (56 FR 8616), April 17, 1991 (56 FR 15510), and May 13, 1992 (57 FR 20424)). Under these regulations, RSPA's Associate Administrator for Hazardous Materials Safety issues preemption determinations. Any person aggrieved by RSPA's decision on an application

for a preemption determination may file a petition for reconsideration within 20 days of service of that decision. 49 CFR 107.211(a).

The decision by RSPA's Associate Administrator for Hazardous Materials Safety becomes RSPA's final decision 20 days after service if no petition for reconsideration is filed within that time; the filing of a petition for reconsideration is not a prerequisite to seeking judicial review under 49 U.S.C. 1811(e). If a petition for reconsideration is filed, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration is RSPA's final agency action. 49 CFR 107.211(d).

In making decisions on applications for preemption determinations, RSPA is guided by the principles and policy set forth in Executive Order No. 12,612, entitled "Federalism" (52 FR 41685 (Oct. 30, 1987)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. The HMTA contains express provisions, which RSPA has implemented through its regulations.

III. Further Comments

All comments should be limited to the issue of whether the Los Angeles County codes relating to the transportation of hazardous materials on private property owned, leased, or under the control of the consignor, consignee, or transporter of hazardous materials are preempted by the HMTA. Comments should specifically address the "substantively the same," "dual compliance," and "obstacle" tests described in Part II above. Comments should also address the issue of whether Los Angeles County's hazardous materials-related ordinances and codes are "otherwise authorized by Federal law."

Persons intending to comment should review the standards and procedures governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201-107.211.

Issued in Washington, DC on January 17, 1993.

Alan I. Roberts,
Associate Administrator for Hazardous
Materials Safety.

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