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Chemical Waste Transportation Institute; Application for Preemption Determination Concerning a Hazardous Waste Transportation Ordinance of the City of Chester, WV

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Research and Special Programs Administration

[Docket No. PDA-3]

Chemical Waste Transportation Institute; Application for Preemption Determination Concerning a Hazardous Waste Transportation Ordinance of the City of Chester, WV

AGENCY: Federal Highway Administration (FHWA) and the Research and Special Programs Administration (RSPA), DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The Chemical Waste Transportation Institute has applied for an administrative determination whether a City of Chester, West Virginia ordinance concerning the transportation of hazardous waste is preempted by the Hazardous Materials Transportation Act (HMTA).

DATES: Comments received on or before May 13, 1992, and rebuttal comments received on or before July 1, 1992, will be considered before administrative rulings are issued by the Associate Administrator for Safety and System Applications, Federal Highway Administration and the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration. 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, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590–0001. Telephone: (202) 366–5046. Fax number: (202) 366–3753. A copy of the application and each comment may be reviewed in the Dockets Unit, Federal Highway Administration, room 4232, HCC–10, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590–0001. Comments and rebuttal comments on the application may be submitted to the Dockets Units at the above address, and should include the Docket Number (PDA–3). Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Mr. Kevin Connors, Chairman, Chemical Waste Transportation Institute, 1730 Rhode Island Ave., NW., suite 1000, Washington, DC 20036 and to Edwin J. Adams, Esq., City Attorney, City Hall, 375 Carolina Avenue, Chester, WV 26034. A certification that a copy has been sent to each person 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. Connors and Adams at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Assistant Chief Counsel for Hazardous Materials Safety, Office of the Chief Counsel (DCC–10), Research and Special Programs Administration, 202–366–4400; Jerry W. Emerson, Traffic Control Division (HHS–32), Office of Highway Safety, 202–366–2218; or Raymond Cuprill or Eric Kuwana, Office of Chief Counsel, Federal Highway Administration, 202–366–0834, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

1. Background

The preemption provisions of the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. 1801 *et seq.*, were amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law 101–615. The Research and Special Programs Administration's (RSPA's) regulations have been revised to reflect these changes. 56 FR 8616 (Feb. 28, 1991); 56 FR 15510 (Apr. 17, 1991).

With two exceptions (discussed below), Section 105(a)(4) of the HMTA (49 App. U.S.C. 1811(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 any provision of the HMTA or any regulation under that provision concerning that subject. The "covered subjects" are defined in Section 105(a)(4) as:

(i) The designation, description, and classification of hazardous materials.

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.

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

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.

(v) The 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.

RSPA has issued a **NOTICE OF PROPOSED RULEMAKING** proposing a specific definition for the term "substantively the same." 56 FR 36992 (Aug. 1, 1991).

In addition, Section 105(b)(4) of the HMTA, 49 App. U.S.C. § 1804(b)(4), addresses the preemption standard applicable to hazardous materials routing designations. Effective two years after the issuance of regulations by the Secretary of Transportation establishing Federal standards applicable to hazardous materials routing designations, any highway routing designation not made in accordance with such Federal routing standards would be preempted by the HMTA. The statute describes the standards and factors that are to be incorporated in the regulations.

The Secretary of Transportation has delegated responsibility for all issues related to the highway routing of hazardous materials to the FHWA. 56 FR 31343 (July 10, 1991). The FHWA will issue regulations implementing the HMTUSA amendments that relate to hazardous materials highway routing, including the promulgation of Federal routing standards and procedures governing the issuance of related preemption determinations and waivers of preemption. For purposes of this notice, any preemption determination made by the FHWA will be issued pursuant to the authority granted by the HMTA and in accordance with existing regulations (49 CFR 107.203 et seq.), except that the determination will be issued by FHWA's Associate Administrator for Safety and System Applications.

Finally, section 112(a) of the HMTA, 49 app. U.S.C. 1811(a), provides that, with two exceptions discussed below, State, political subdivision and Indian tribe requirements not covered by Sections 105(a) or 105(b) provisions are preempted if—

(1) compliance with both the State or political subdivision or Indian Tribe requirement and any requirement of (the HMTA) or of a regulation issued under (the HMTA) is not possible, (or)

(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) * * *.

As indicated in the preamble to the final regulation implementing the HMTUSA preemption provisions, 56 FR

at 8617 (Feb. 28, 1991), section 112 codifies the "dual compliance" and "obstacle" standards which RSPA previously had adopted by regulation and used in issuing its advisory inconsistency rulings.

The two exceptions to preemption referred to above are for: (1) State, local or Indian tribe requirements "otherwise authorized by Federal law" and (2) State, local or Indian tribe requirements for which preemption has been waived by the Secretary of Transportation.

All of the above-described preemption standards are incorporated in 49 CFR 107.202.

Section 112(c) of the HMTA provides for issuance of binding preemption determinations to replace the advisory inconsistency rulings previously issued by RSPA. Any directly affected person may apply 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 that issue for 180 days after filing the application or until the preemption determination is issued, whichever occurs first. 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.

The Secretary of Transportation has delegated authority to issue preemption determinations concerning highway routing issues to the FHWA and those concerning all other hazardous materials transportation issues to RSPA. 56 FR 31343 (July 10, 1991). RSPA's Associate Administrator for Hazardous Materials Safety will issue RSPA's determinations, and FHWA's Associate Administrator for Safety and System Applications will issue FHWA's determinations. Regulations concerning preemption determinations were issued on February 28, 1991 (56 FR 8616), and are at 49 CFR 107.203–211 and 107.227.

Because CWTI's application concerns highway routing issues and non-highway routing issues, DOT will issue one or more preemption determinations. FHWA will address highway routing issues, and RSPA will issue non-highway routing issues. Final decisions on these issues may not be forthcoming until rulemaking to implement HMTUSA is completed.

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the HMTA unless it is necessary to do so in order to determine whether a requirement is "otherwise authorized by Federal law." A State, local or Indian tribe requirement is not "otherwise authorized by Federal law" merely because it is not preempted by another Federal statute. *Colorado Pub. Utilities Comm'n* v. *Harmon*, No. 89–1288 (10th Cir. Dec. 18, 1991), reversing No. 88–Z–1524 (D. Colo. 1989).

In issuing preemption determinations under the HMTA, RSPA and FHWA are guided by the principles enunciated 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 the 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, as discussed herein, contains several express preemption provisions. The preemption standards have been incorporated in the regulations at 49 CFR 107.202.

2. The Application for a Preemption Determination

On December 19, 1991, the Chemical Waste Transportation Institute submitted the following application for a preemption determination:

Before the United States Department of Transportation, Office of Hazardous Materials Safety

Petition for a Determination of Preemption Concerning the City of Chester, West Virginia Ordinance No. 305, Transportation of Hazardous Waste

Petitioner: National Solid Wastes Management Association on Behalf of the Chemical Waste Transportation Institute

December 19, 1991.

Introduction

The National Solid Wastes Management Association (NSWMA) is a trade association representing more than 2,000 private waste service firms in the United States and Canada. NSWMA also has a corresponding relationship with members in over a dozen countries around the globe. The membership of the Association includes firms and individuals engaged in every aspect of solid and hazardous waste management, waste reduction, transportation, recycling and reuse. The Chemical Waste Transportation Institute (CWTI) is a part of the NSWMA consisting of commercial firms specializing in the transportation of hazardous waste, by truck and rail, from its point of generation to its management destination. CWTI's members are both private and for hire carriers that operate in interstate and intrastate commerce, including points to, from and through Chester, West Virginia.

In response to the possibility of increased transportation of hazardous waste through the City of Chester, West Virginia (City) enroute to a soon to be operational hazardous waste incinerator in East Liverpool, Ohio, the City Council enacted Ordinance 305 regarding the transportation of hazardous waste (Ordinance).[1] (Copy enclosed.) While the opening of the incinerator most likely will increase hazardous waste transportation through the City, local generators of hazardous waste have been transporting such waste from the City for years. Nevertheless, no incident involving the release of hazardous waste has ever been reported in Chester.[2] In the absence of any known incidents, the City will have great difficulty showing how the requirements contained in its Ordinance will enhance safety; in fact, we believe the opposite result will likely occur.

At the same time, the City failed to consider the ramifications that might befall surrounding jurisdictions if carriers of hazardous waste chose to bypass the City rather than adhere to its requirements.[3] Neither was the City moved to reconsider its policy in light of clear Congressional intent that uniform national standards govern the transport of hazardous materials, including waste. The preemptive powers granted the Department of Transportation (DOT) pursuant to sections 105 and 112 of the Hazardous Materials Transportation Act (HMTA), as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (1990 Amendments), are intended "to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." [4] While it is true that

[1] The existence of the East Liverpool facility was cited as the reason for the Ordinance by Edwin J. Adams, City Attorney, in a telephone conversation with Cynthia Hilton, NSWMA, on November 25, 1991.

[2] See data of the Information Systems Branch, Office of Hazardous Materials Safety, US Department of Transportation (1977–1990).

[3] Despite the Secretary's July 10, 1991 delegation of authority which defers matters involving the selection of routes, including limitations and restrictions, to the FHWA, nowhere in the Ordinance does the word "route" appear. We submit that unless and until FHWA finalizes its routing criteria pursuant to section 105(b) of the HMTA, as amended, the matters in this petition are appropriate for consideration by OHMS even if one or more of them result in motor carriers voluntarily "routing" around the city.

[4] S. Rept. No. 1192, 93rd Cong., 2d Sess. 37 (1974).

the HMTA does not "totally preclude state or local action in this area, Congress intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the [Hazardous Materials Regulations (HMR)], issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity." [5]

Applying these principles to the numerous requirements in the City Ordinance set forth below, we submit that the following requirements of the Ordinance must be preempted.

• Definition of Covered Materials

Section 1 defines the term "hazardous waste" to mean "*any waste* or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such waste or combination of wastes are non-degradable or persistent in nature or because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause or tend to cause detrimental cumulative effects, *and any substance* that is defined as a hazardous waste by the federal government or by the laws of this state." (Emphasis added.) The use of the conjunction "and" and the distinction between "any waste" and "any substance" suggests that the City intends a definition of hazardous waste far broader than that listed and regulated by the federal government. In fact, the Ordinance, as it applies to every "hauler" of "City-defined hazardous waste" regardless of quantity, could mean that an auto owner transporting waste oil to a collection site would need a $20 million bond to travel at night as well as a police escort, and would forfeit he/r car if the taillight was burned out.

Congress felt so strongly about the federal prerogative to regulate hazardous materials in certain areas, including the designation of hazardous materials, that a new standard of preemption was crafted in the 1990 Amendments.[6] The standard preempts any political subdivision requirement in the listed subject areas that is not "substantively the same as" the federal standard or regulation. Section 1 fails to meet the "substantively the same as" test with regard to the designation of hazardous materials.

• Pre-notification

Section 2 provides that each transporter of hazardous waste must notify the chief of police 24 hours in advance of entering the City's limits. On numerous occasions, DOT has found that advance notice requirements of hazardous materials transportation are inconsistent with the HMTA and the HMRs.[7] Local requirements have the potential to delay and redirect traffic. In fact, section 2 goes on to mandate that transporters proceed to a "staging area." Even if no further activities transpire at the "staging area," the subject vehicle would be detoured from the direct route of travel. "Delay in such (hazardous materials) transportation is incongruous with safe transportation." [8] DOT has also ruled that "the mere threat of delay may redirect commercial hazardous materials traffic into other jurisdictions that may not be aware of or prepared for a sudden, possible permanent, change in traffic patterns." [9]

• Vehicle Inspection

Section 3(A) requires all vehicles transporting hazardous waste to be inspected for leaks and defects each and every time the vehicle transits the City.

While what constitutes "defects" is not spelled out in the Ordinance, we assume "defects" refers to the physical condition of the vehicle. Even so, the authority to search for unnamed "defects" could provide the City with unfettered discretion in areas exclusively reversed to the Federal Government.[10] 49 CFR part 396 provides for periodic vehicle inspections and, pursuant to section 210 of the Motor Carrier Act of 1984, vehicles which pass the inspection provided for in 49 CFR part 396 must be recognized as valid in all other jurisdictions for one year from the date of the inspection. While 49 CFR part 396 is technically a part of the Federal Motor Carrier Safety Regulations (FMCSRs) and not the HMRs, the HMRs do reference and compel compliance with the FMCSRs.[11] Moreover, OHMS has recently proposed to assert direct authority over the FMCSRs when hazardous materials transportation is involved.[12] Other federal regulations cover procedures to insure that package failures do not occur and procedures to follow in the event of a release.[13] The City has not shown how the federal requirements have been deficient. Indeed, as noted above, no incidents involving hazardous waste have ever been reported to the Department. Since the City has not established unique conditions that may exist in Chester, we must assume that a finding of consistency for this requirement would invite similar actions by any or all of the 30,000 political jurisdictions in the United States. Such a result would be at odds with a primary goal of the HMTA, as amended, namely, to "preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." Consequently, section 3(A) of the Ordinance should be preempted under the "obstacle" test.

• Bonding

The Ordinance prescribes several conditions when bonds must be posted. In section 3(A), a transporter of hazardous waste must post a $10 million cash bond, or a bond in like amount guaranteed by a corporate surety if during the vehicle inspection a leak or defect is discovered. In section 3(C), transporters traveling on City roads from sundown to dawn must post a $20 million cash bond, or a bond in like amount guaranteed by a corporate surety.

The City does not give credit to transporters of hazardous waste for the financial responsibility requirements imposed pursuant to 49 CFR 387.7 and 387.9. In recognition of these requirements, DOT has earlier found that the absence of a bonding, insurance, or indemnity requirement in the HMR is a "a reflection of (DOT's) determination that no such requirement is necessary and that any such requirement imposed at the state or local level is inconsistent with the HMRs."[14] Moreover, the clearly excessive bond requirements, almost confiscatory, expose the Ordinance for what it truly is—a bald attempt to stop transportation of hazardous wastes through the City unrelated to any legitimate local, public health or safety needs.

• Police Escort

Section 3(B) forbids transporters to travel in the City without a police escort.

DOT has found that requirements for carriers to delay for escorts involving radioactive materials (RAM) transportation is inconsistent.[15] If DOT

[5] See 55 FR 36, 737 (Sept. 6, 1990).

[6] See P.L. 101-615 section 105(a)(4)(B) (i) and (a)(4)(A).

[7] See Inconsistency Rulings (IR)-6; IR-8(A); IR-16; IR-28; IR-30; and IR-32.

[8] See IR-2, 44 FR 75566, 75571.

[9] See IR-3, 46 FR 18919, 19821.

[10] See IR-22, 52 FR 46582 (December 6, 1987).

[11] See 49 CFR 177.804.

[12] See HM-166X, 56 FR 37505 (August 7, 1991).

[13] See 49 CFR 173.24; 49 CFR 171.15 & .16; 49 CFR 177.854; 49 CFR 172 subpart G; 40 CFR 302.6; and 40 CFR 355.40.

[14] See IR-25, 54 FR 16308, 16311.

[15] See IR-15.

can find state and/or local requirements for escorts inconsistent and preempted for RAM shipments, surely the Department will find preemption for such escort requirements and the delay they impose for other types of less hazardous materials, including wastes which are usually the spent byproduct of pure materials.

• Time-of-Day, Condition-of-Weather Restrictions

Section 3(C) provides that transporters may travel only during times dictated by the chief of police, but in no case may travel be authorized during periods of air inversion or during periods of inclement weather or within 48-hours of when these weather conditions have occurred or are forecast to occur. Nor may transporters travel through the City during the period commencing one hour before and ending one hour after any elementary or secondary school within the City is in session. Also, any travel between sunset and surise is subject to "extra safety precautions." While inclement weather is defined as "rain, sleet, snow, freezing conditions, and winds of forty miles per hour or more, including gusts," there is no explanation of what "extra safety precautions" might entail.

The City can claim no unique status with regard to weather conditions. If any of the conditions suggested by the City were upheld by the Department then federal regulations should be adjusted so that all United States citizens may benefit from the enhanced safety conditions, not just those resident in the City. In fact, the predictable delays at the City limits—in some cases stretching into days—and/or redirection of commerical hazardous materials traffic into other jurisdications that will result from the imposition of these weather condition restrictions impose unacceptable safety risks on those non-City jurisdictions. The City has made no assessment of where diverted or delayed hazardous waste traffic would go, nor has it considered the burdens on commerce because of these delays. For these reasons, DOT has already found such requirements inconsistent and preempted.[16] The City can always petition for a change in the rules pursuant to 49 CFR 106.31 and/or 49 CFR 389.31 if it wants to pursue this matter.

Again, the City's assertion of unfettered authority to determine at will what "extra safety precautions" might be imposed with no opportunity for public review and comment should be preempted. Clearly, the burden is on the City to disclose what "extra safety precautions" it has in mind and to demonstrate how safety is, if at all, improved.

• Following Distances

Section 3(F), among other things, prohibits a motor carrier's vehicle from following within 150 feet of any vehicle other than the police escort vehicles." In the first place, we submit that, for the most part, the requirement for following distances is unnecessary inasmuch as section 3(B) provides that "hauler(s) may *only* travel with a police escort* * *" (Emphasis added.)

However, the City's Ordinance may require vehicles to observe a 150 foot following distance to the extent that vehicles travel to the City's "designated staging area" (DSA) where the vehicle inspection will take place and the police escort assigned. Since the Ordinance does not specify where the DSA will be—at a place outside City limits, at the corporate limits, or inside the City—we cannot know to what extent the 150 foot following distance may apply. We are aware that in the matter of Montevallo, Al (IR–32) DOT found requirements for following distances consistent.[17] However, if following distance provision is applicable, we believe that safety is not served and that the requirement fails the "obstacle" test and should be rejected for the reasons articulated in the NSWMA/CWTI partial appeal of IR–32. (Copy attached.) Furthermore, we would suggest that the burden to show how a 150 foot following distance enhances safety rests with the City. Absent such a showing by the City, the requirement clearly is a burden on commerce and should be preempted.

Finally, if DOT reaches the same conclusion we did that the City's definition of hazardous waste is preempted because it is not substantively the same as the federal standard then "(a) requirement for compliance with an inconsistent provision is itself inconsistent." [18]

• Speed Limits

Section 3(F) provides that vehicles may not travel at speeds in excess of 10 miles below the posted speed limit. DOT has issued opinions in the past that local traffic controls, including speed limits, are presumed valid.[19] On its face, it seems that no issue exists. However, we submit that inasmuch as the City has singled out hazardous waste from all other hazardous materials for this requirement, that it has less to do with safety and more to do with obstacles to the transportation of hazardous materials which happen to be wastes—shipments that are presumptively safe based on their compliance with federal regulations.

• Weight Limits

Section 3(G) provides that no transporter's vehicle may be authorized to travel within the City "if the vehicle weighs within 10,000 pounds of *any* posted weight limitation, including weight imitations for bridges, tunnels, and roads." (Emphasis added.) We submit that a vehicle need not be subject to a weight limitation if the vehicle is not going to travel on that section of road, or through that tunnel, or over that bridge. More so than speed limits, this requirement must simply be exposed as an authorized restraint on the transportation of hazardous materials. Since no travel is authorized without escort, it is unlikely that a vehicle, with escort, would travel over weight-limited bridges, tunnels and roads in the City. Vehicles should only be required to satisfy the weight requirements that exist on the route taken into, through, or out of the City.

Moreover, the effect of the weigh limit might also artifically reduce the quantity of cargo that may be carried in the vehicle while it is within City limits. No justification is given for this limitation other than to generically assert that the requirements of the Ordinance as a whole are "intended to protect the health and safety of the (City's) citizens from unnecessary dangers posed by the transportation of hazardous waste* * *"

However, the action of the City might in fact increase hazardous waste truck traffic in the City because it will take more trucks to carry the same load. On the other hand, if a transporter were to undertake "break and bulk" activities [20], as a response to the City's weight restriction, the City has not considered the larger potential of release and damage that results from loading and unloading operations associated with break and bulk activities as cargos enter or leave the City. Incidents most frequently occur during loading and unloading

[16] See IR–32, 55 FR 36744 (September 6, 1990). Only on a case-by-case basis may weather conditions be a factor to divert or halt hazardous materials shipments in transportation.

[17] The NSWMA/CWTI is appealing DOT's funding that following distance requirements are consistent.

[18] See IR–5(A), 52 FR 13000, 13006.

[19] See IR–20; and IR–23; and IR–32.

[20] "Break and bulk" activities refer to steps involving the off-loading of cargo and steps to consolidate cargo.

operations.[21] To the extent that hazardous wastes are packed and repacked during bulk and break activities, not for the purpose of increasing transportation efficiencies, but merely to comply with the City's Ordinance, the requirement is preempted pursuant to section 105(a)(4)(A) of the HMTA, as amended.

• Fees

Aside from the steep costs associated with the bonding requirements, the Ordinance also provides that transporters must pay, in advance, for the costs of the vehicle inspection and the police escort. The fees are to be determined and set by the chief of police.

The Ordinance provides no advance notice and opportunity for public comment on the fee schedules; nor, apparently, are the fee schedules subject to approval by the City Council. Worse, the Ordinance contains no guidance suggesting that the amount of the fees should be limited to the actual costs of performing the vehicle inspection or providing the police escort. One can assume, therefore, that the chief of police is free to arbitrarily set and change fees at will.[22] Furthermore, the fees only apply to the shipment of hazardous waste, as opposed to all hazardous materials in the same hazard classes. Section 112(b) of the HMTA, as amended, provides that fees collected in connection with the transportation of hazardous materials must be "equitable." The dictionary defines "equitable" to mean "dealing fairly and equally and with all concerned." We submit that the standard-less grant of authority to the chief of police to set fee schedules which apply only to select hazardous materials simply because they are wastes cannot be "equatable" because materials posing similar risks in transportation are treated differently and no measures exist to insure that the fee schedules are in fact applied fairly and equally. The provisions of the Ordinance respecting the levying of fees should be preempted pursuant to Section 112(b).

• Penalties

Section 4 provides for penalties. Of particular concern is the penalty that provides for vehicle forfeiture to the City if any vehicle used to transport any hazardous waste enters in violation of the Ordinance.

While DOT may not have a duty to concern itself with the fact that there are no due process procedures spelled out in the Ordinance, DOT is concerned with compliance because safety is enhanced as compliance rises. An underlying premise of the HMTA, as amended, is to foster compliance. Congress realized that compliance is not advanced when state and local requirements "vary from Federal laws and regulations * * * thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting * * * requirements." [23] Yet, the City gives no indication of how transporters will be notified of the requirements so that a transporter might comply.

If the City actually implements its vehicle forfeiture requirements, we would respectfully request that its compliance as a transporter of hazardous waste be affirmed. We do not believe that the City has considered its liabilities and the environmental risks that it assumes by confiscating vehicles carrying hazardous waste. We question whether the City has registered with the US Environmental Protection Agency (EPA) and otherwise complies with the requirements of 40 CFR part 263. Likewise, we question whether the City has insurance or other means to cover liability similar to that required by 49 CFR 387, as well as whether the City has the necessary state permits to transport the hazardous waste carried in the confiscated vehicles. There are no permitted TSDFs in West Virginia, so the City will have to engage in interstate transportation to move the hazardous waste to an approved treatment or disposal site. Each of the states surrounding West Virginia require carriers of hazardous waste to obtain a separate and distinct permit. If the City does not intend to transport the waste in the confiscated vehicle, then it creates for itself a loading/unloading scenario with its attendant risks. If the waste in the confiscated vehicles is held more than ten days while the City arranges alternate transportation, the City must apply to the US Environmental Protection Agency for a storage permit. We question whether the rights of the generator of the hazardous waste have been adequately protected. The generator carries "cradle to grave" responsibility for he/r waste. The generator should be consulted as to the disposition of the waste if the City confiscates the vehicle. In short, the City may seriously impair safety if no plans exist to manage the cargos of the vehicles which are confiscated.

Conclusion

At some time in the past, DOT has already found each of the requirements of the Ordinance preempted with the exception of requirements to mark vehicles according to DOT requirements,[24] to produce a copy of the Uniform Manifest shipping document when requested, and requirements related to vehicle traffic control. We have no quarrel with the provisions to mark vehicles according to DOT requirements and to produce a copy of shipping papers when requested by City officials. We see these requirements as a reaffirmation of federal standards. After careful review of the facts of the situation, we believe DOT will find as we do that the provisions dealing with traffic controls have more to do with restricting transportation of hazardous waste than with improvement in safety.

In all other matters, we see no reason for the Department to retreat from its previously held positions, particularly in light of Congress's reaffirmation of DOT's primacy in the regulation of hazardous materials transportation and the strengthening of DOT's authority to deal with questions of preemption. Again, we do not see how the Ordinance promotes uniformity with Federal laws and regulations, how it assists shippers and carriers to comply, or how safety is enhanced in a reasonable, adequate and cost-effective way.

Finally, the City has failed to justify its singling out of hazardous waste, which is found in all DOT hazard classes, from all other hazardous materials. If shipments of waste Class 3 materials should be subject to these requirements, then all Class 3 materials should be subject. DOT has recognized

[21] Transportation of Hazardous Materials, Office of Technology Assessment, 1986, p. 25.

[22] This standard-less provision is fraught with abuse. Courts have applied the void for vagueness doctrine to invalidate statutes, administrative regulations and municipal ordinances which utilize over-broad or unclear standards. The US Supreme Court has long held that "(a) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process of law." *Conolly* v. *General Construction Col.* 269 U.S. 385, 391 (1926). See also, *Geo-Tech Reclomotion Industries, Inc.* v. *West Virginio Depart. of Notural Resources*, 886 F.2d. 662 (4th Cir. 1989) (Voiding for vagueness a landfill citing law that allowed permit denial based on "public sentiment."); *Stote ex rel Cosey's General Stores, Inc.* v. *City Council of Salem*, 699 S.W.2d. 775 (MO. App. 1985) (Void for vagueness doctrine applied to repudiate a liquor license ordinance which prohibited its issuance to stores "located outside the business district of the City." "Business district" was not defined.

[23] See Public Law 101-615, section 2(3).

[24] The Ordinance also requires vehicle marking "according to * * * the Resource Conservation and Recovery Act (RCRA)." We are unaware of any vehicle marking requirements prescribed by RCRA. Consequently, we are at a loss to know what marking the City is referencing.

the inequity of certain state or political subdivision requirements that treat hazardous waste differently from hazardous materials generally simply because they are hazardous wastes.[25] It has also found that combinations of requirements when applied to selected hazardous materials, constitute unauthorized prior restraints on shipments of such materials "that are presumptively safe based on their compliance with federal regulations." [26] Cumulatively, the requirements imposed by the Ordiance constitute unauthorized prior restraints on shipments of hazardous materials that are presumptively safe based on their compliance with federal regulations.

Therefore, the NSWMA/CWTI believes that DOT should find the requirements of the City Ordinance numbered 1 and 3(G) should be preempted for failing to be "substantively the same" as the federal standard pursuant to section 105, and the requirements contained in sections 2, 3(A), 3(B), 3(C), 3(F), and 4 preempted for failing the or the "obstacle" test pursuant to section 112 of the HMTA, as amended.

Certification

I hereby certify that a copy of this document has been forwarded to Edwin J. Adams, City Attorney, City Hall, 375 Carolina Ave., Chester, West Virginia, 26034.

Respectfully submitted,

Kevin Connors,

Chairman, Chemical Waste Transportation Institute.

Attachments

- Ordinance of the City of Chester, West Virginia Regarding the Transportation of Hazardous Waste
- Letter to DOT Regarding Partial Appeal of Inconsistency Ruling No. IR–32, Docket No. IRA–46

An Ordinance of the City of Chester, West Virginia Regarding the Transportation of Hazardous Wastes

Be it Ordained by the City Council of the City of Chester:

This enactment is intended to protect the health and safety of the municipality's citizens from unnecessary dangers posed by the transportation of hazardous waste by ensuring that (i) the transportation is effectuated in the safest possible manner, and (ii) in the event of an accident, that emergency response resources are in place, prepared, and informed of the hazardous waste cargo, to enable such emergency response resources to respond quickly and efficiently.

1. The term hazardous waste includes any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such waste or combination of wastes are nondegradable or persistent in nature or because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause or tend to cause detrimental cumulative effects, and any substance that is defined as a hazardous waste by the federal government or by the laws of this state.

2. Each hauler of hazardous waste (hereinafter referred to as a "hauler") must notify the chief of police twenty-four hours in advance of any hauling of hazardous waste within the municipality's limits, and then report to the police designated staging area as directed.

3. Other than travelling to the designated staging area, the hauler may not haul any hazardous waste within the municipality's limits unless the following conditions are met.

A. The chief of police, or his designated representative, must inspect the transporting vehicle for leaks and defects. The cost of such inspection must be paid in advance by the hauler according to a rate schedule established by the chief of police. In the event that any leak or defect is discovered, the transporting vehicle may not be moved unless one of the following events occur: (i) Any leak or defect is repaired to the satisfaction of the chief of police or his designated agent; or (ii) The hauler posts a ten million dollar cash bond, or a bond in a like amount guaranteed by a corporate surety acceptable to the chief of police or his designated representative. Nothwithstanding the foregoing, if the chief of police or his designated representative determines that any leak or defect will pose an unreasonable risk to the health and safety of the populace, then the transporting vehicle will not be permitted to leave the staging area until the requisite repairs are completed. In the event that the hauler elects to repair any leak or defect, it must do so within a reasonable amount of time to be determined under the circumstances by the chief of police or his designated representative, taking into account any condition that may adversely affect the health and safety of the community. If the hauler fails to repair any leak or defect within a reasonable amount of time as determined by the chief of police or his designated representative, the chief of police or his designated representative may cause the necessary repair to be effectuated with the cost of such repair to be borne directly by the hauler.

B. The hauler may only travel with a police escort, made up of one or more police vehicles as determined necessary by the chief of police or his designated representative. The cost of such escort shall be paid in advance by the hauler according to a schedule of costs established by the chief of police or his designated representative.

C. The hauler may only travel during times directed by the chief of police or his designated representative. Provided however, that the chief of police may not authorize the hauler to travel through the municipality during periods of air inversion or during periods of inclement weather, such as rain, sleet, snow, freezing conditions, and winds of forty miles per hour or more, including gusts. Nor shall the hauler be authorized to travel through the community when any of the foregoing weather conditions have occurred or are forecast to occur within forty-eight hours of the transportation. Nor shall the hauler be authorized to travel through the community during the period commencing one hour before and ending one hour after any elementary or secondary school within the municipality is in session. Nor shall the hauler be authorized to travel during the period commencing at sundown and ending at dawn unless such extra safety precautions deemed necessary by the chief of police or his designated representative are complied with, and the hauler posts a twenty million dollar cash bond, or a bond in a like amount guarenteed by a corporate surety acceptable to the chief of police or his designated representative.

D. The hauler's vehicle must be marked according to United States Department of Transportation and the federal Resource Conservation and Recovery Act (hereinafter "RCRA") rules and regulations.

E. The hauler's driver must have and exhibit upon request the hauler's RCRA manifest to the chief of police or his designated representative.

F. The hauler must travel in a safe manner as determined by the chief of police or his designated representative. Provided, the chief of police or his designated representative may not authorize the hauler's vehicle to travel within 150 feet of any vehicle other than the police escort vehicles. Provided further that the chief of police or his designated representative may not authorize a hauler's vehicle to travel in excess of ten miles per hour below the applicable posted speed limit. Provided further that the chief of police or his designated representative may not authorize any hauler's vehicle to travel within the municipality if the vehicle weighs within ten thousand pounds of any posted weight limitation, including weight limitations for bridges, tunnels, and roads.

4. Penalties: A. Any hauler that violates this enactment shall be fined not more than $5000 per violation, and shall pay the municipality three times the cost incurred by the municipality in disposing of the hazardous waste transported into this municipality by the hauler.

B. Any vehicle used to transport any hazardous waste into this municipality in violation of this enactment shall be forfeited to the municipality.

C. Upon the first conviction of any hauler for violating this provision, such hauler shall be prohibited from transporting any hazardous waste in this municipality for a period of one year; upon the second conviction, the hauler shall be prohibited from transporting any hazardous waste in this municipality for a period of two years; upon the third conviction, the hauler shall be permanently prohibited from transporting any hazardous waste in this municipality.

D. Any person, including any driver, who aids and abets any violation of this

[25] See 49 CFR 171.3(c).

[26] See IR–19, 52 FR 24404.

enactment shall be fined not more than $5000 per violation, or be imprisoned for a period not to exceed six months, or both.

5. Separability: A. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

First Reading: November 18, 1991.
Second Reading: December 2, 1991.
Passed and Adopted: December 2, 1991.

Sally Riley,
Mayor.

Carla Simcox,
City Clerk.

September 25, 1990

Travis P. Dungan,
Administrator, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh St., SW., Washington, DC 20590–0001

RE: Partial Appeal of Inconsistency Ruling No. IR–32, Docket No. IRA–46

Dear Mr. Dungan: Enclosed please find a partial appeal submitted by the National Solid Wastes Management Association on behalf of its Chemical Waste Transportation Institute. The partial appeal requests that the Department initiate a proceeding to reverse two of the findings of consistency announced in inconsistency ruling no. IR–32 concerning the City of Montevallo, Alabama Code sections 7–44 and 7–46(d). I would appreciate your including a notice in the **Federal Register** inviting public comment on IR–32 for the purpose of the appeal.

If you or your staff have questions regarding the partial appeal, please contact me or John Turner.

Sincerely,

Cynthia Hilton,
Manager, Hazardous Waste Programs.

Enclosure.

cc:Steven R. Sears, City Attorney.

Before the United States Department of Transportation Research and Special Programs Administration

In the Matter of Docket No. IRA–46—Partial Appeal of Inconsistency Ruling No. IR–32, Docket No. IRA–46: Concerning City of Montevallo, Alabama Code, Sections 7–40 through 7–50

Partial Appeal of Petitioner, Chemical Waste Transportation Institute, of Inconsistency Ruling No. IR–32, Docket No. IRA–46

September 27, 1990.

I. Introduction

The Chemical Waste Transportation Institute ("CWTI"),[1] a component of the National Solid Wastes Management Association ("NSWMA") hereby appeals in part the August 28, 1990 decision of the Director, Office of Hazardous Material Transportation (Inconsistency Ruling No. 32). The CWTI requests that the Administrator of the Research and Special Programs Administration ("RSPA") find that a vehicle separation distance requirement, contained in section 7–44 of the Montevallo, Alabama Code, and a citizens band radio equipment requirement, found in section 7–46(d) of the Code, are inconsistent with and thus preempted by section 112(a) of the Hazardous Materials Transportation Act ("HMTA").

In the Inconsistency Ruling, see 55 FR 36736 (Sept. 6, 1990), the Director appropriately noted that the HMTA dramatically altered the traditional roles of political authorities with regard to hazardous materials transportation:

> In the HMTA's Declaration of Policy (section 102, 49 U.S.C. app. 1801) and in the Senate Commerce Committee report on section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation (S. Rep. No. 1192, 93rd Cong., 2d Sess. 37 (1974)). Under the HMTA, DOT has the authority to promulgate uniform national standards. While the HMTA did not totally preclude State or local action in this area, Congress intended, to the extent possible, to make such State or local action unnecessary. The comprehensiveness of the (Hazardous Materials Regulations ("HMR")), issued to implement the HMTA, severely restricts the scope of historically permissible State or local activity.

Id. at 36,737.

Applying these principles to the numerous requirements set forth in the Montevallo Code relating to the transportation of hazardous waste, the Director found several of the provisions to be inconsistent with the HMTA. The CWTI submits that the Director erred, however, in finding two local requirements—those imposing a 150-foot separation distance for hazardous waste-carrying vehicles and requiring that such vehicles be equipped with citizens band radios tuned to Channel 9—to be consistent with the Act and its implementing regulations.

II. The Separation Distance Requirement is Inconsistent With, and Accordingly Preempted by, the HMTA

Section 7–44 of the Montevallo Code requires that:

> No hazardous waste-carrying vehicle shall follow within 150 feet of any other vehicle when within the City limits, provided, that this section shall not apply to vehicles following state, county or city police vehicles.

The Director determined that the requirement is consistent with the HMTA, reasoning that "the HMR do not specify a separation distance for motor vehicles carrying hazardous materials" and that "no basis (exists) in this record for concluding that (the requirement) is inconsistent with the HMR." For the reasons that follow, the Administrator should find the separation distance requirement to be an impermissible obstacle to compliance with the terms and goals of the HMTA.

The absence of a separation distance provision in the federal Hazardous Materials Regulations does support a finding that the local ordinance satisfies the "dual compliance" test applied to preemption/inconsistency examinations under the HMTA. It is, clearly, possible to comply both with the HMR and the local requirement. The RSPA has, however, in light of the rulings of the United States Supreme Court, consistently acknowledged the existence of a second criterion—the "obstacle test"—for determining whether a state or local requirement is inconsistent with, and thus preempted by the HMTA. See 49 CFR 107.209(c)(2) (requiring that the test be applied under the Act). The obstacle test, like the dual compliance analysis, is "based upon, and supported by, United States Supreme Court decisions on preemption." 55 FR at 36737. As the Director noted:

> Application of this second criterion (the obstacle test) requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through RSPA's regulatory program.

Id.

While Congress did not expressly prohibit State or local regulation of the transportation of hazardous materials or unequivocally declare DOT's authority to be exclusive, a determination that non-federal measures are inconsistent may nevertheless be made through application of the obstacle test. The key factors in such a finding of preemption are the following:

(1) The aim and intent of Congress as revealed by the statute and its legislative history;

(2) The pervasiveness of the federal regulatory scheme as reflected in the

[1] Formerly the Chemical Waste Transportation Council.

legislation and as put into effect by the Department;

(3) The nature of the subject matter regulated and whether it demands exclusive federal regulation or uniformity in order to achieve national interests; and

(4) Whether the local requirement interferes with "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 V.S. 52, 54 (1941); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Although no federal requirement addresses separation distances for motor vehicles carrying hazardous materials, an examination of the four factors enumerated above clearly justifies a finding that the unique local requirement is inconsistent. First, both the HMTA and its legislative history make clear that uniform, national safety standards were Congress' goal. The explicit purpose of the HMTA was "to improve the regulatory enforcement authority of the Secretary of Transportation to Protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. 1801; *id.* 1804(a) (DOT to issue regulations governing "any safety aspect" of the transportation of hazardous materials). Congress emphasized that a proliferation of disparate local rules for transporters engaged in interstate commerce would hinder achievement of the goals of increased safety and regulatory uniformity. See S. Rep. No. 1192, *supra*, at 37; *Kappelmann* v. *Delta Air Lines*, 539 F.2d 165, 169–70 (D.C. Cir. 1976) (need for national uniformity).

Second, the pervasiveness of the federal regulatory scheme is reflected in the scope and breadth of the Act. In *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), aff'd, 698 F.2d 559 (1st Cir. 1983), the First Circuit Court of Appeals held that while a local safety regulation did not directly conflict with the terms of the HMTA, it was nonetheless inconsistent with "congressional purposes to secure a general pattern of uniform, national regulations, and to preclude multiplicity of State and local regulations and the potential for varying as well as conflicting regulations concerning hazardous materials transportation." The legislation issued a mandate to DOT to "eliminate the safety risks associated with every mode and aspect of transportation. Thus, DOT now regulates everything from the integrity of shipping boxes to the crash resistance of tank trunks, from the training of vehicle operators to the routing of radioactive cargos." Comment, Hazardous Waste at the Crossroads: Federal and State Transit Rules Confront Legal Roadblocks, 12 ELR 10075, 10078 (1982). Congress recognized that safety concerns were to be specifically addressed in federal regulations, and expected that the DOT would promulgate rules affecting every aspect of the transportation of hazardous materials. Accordingly, the Department in previous inconsistency rulings has correctly noted that "the absence of a federal regulation addressing the same subject as a challenged state requirement is not determinative of the requirement's consistency." Inconsistency Ruling 8, 49 FR 46637 (Nov. 27, 1984).

Third, in view of the intercity and interstate framework within which transportation companies operate, consistent safety requirements are necessary in order to "achieve the uniformity vital to national interests." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). Finally, locally-established distance separation requirements which vary from community to community and are based exclusively upon local interests clearly operate as obstacles to the accomplishment of the full purposes and objectives of Congress. Congress authorized DOT to pervasively regulate the field and to issue regulations governing every aspect of the transporation of hazardous materials. It did not envision the frustration of a natinal policy of uniformity by the promotion of disparate local requirements concerning matters not yet specifically addressed in federal regulations implementing the Act.

The Montevallo requirement cannot stand. If states or localities were to create a patchwork of different separation distance regulations—ostensibly in order to promote safety—the congressional purposes would be frustrated and transport safety would, in fact, be hampered. An interpretation of the HMTA as preempting only local regulations that actually conflict with the HMR would render the Act's preemption provisions and procedures essentially meaningless.

Accordingly, and in view of the federal interests discussed above, the Department has upheld only those occasional community-specific measures that can be justified as legitimate and necessary controls. See, e.g., Inconsistency Ruling No. 3, *infra*. Consistent with Congress' insistence that local regulation of hazardous waste transportation be, to the extent possible, made unnecessary, *Preamble to Inconsistency Rulings IR–7 through IR–15*, 49 FR 46632, 46633 (1984), the burden of asserting and demonstrating an adequate overall safety justification should squarely be placed upon the locality. Montevallo's only formally stated reason for adoption of the requirement was to facilitate transportation safety in order to reduce the "possibility" of a "spill" of hazardous materials. The 150–foot distance requirement applies at all times of day, in all weather and traffic conditions, and with regard to all vehicles except those operated by the State of Alabama, Shelby County, or Montevallo police. Yet a vehicle separation requirement that truly promotes the goal of traffic safety would undoubtedly recognize, as a number of studies have concluded, [2] that what constitutes a safe stopping distance depends upon factors such as speed, weight of the load carried by the vehicle, traffic road and weather conditions, and other criteria. Moreover, if 150 feet is indeed a minimum safe stopping distance, it is both illogical and unjustified to exclude state, county, or city police vehicles and to apply the provision only to hazardous waste transport vehicles. See Southern Pacific Transporation Co. v. *Public Service Commission of Nevada*. No. 88–15541 (9th Cir. July 18, 1990) (finding Nevada regulations inconsistent with HMTA; court noted that "the Nevada regulations only apply to some of the hazardous materials covered by the HMTA and HMR and not to others").

In Inconsistency Ruling 3, the RSPA questioned "the advisability of encouraging the driver to constantly direct his attention away from the proximity of his vehicle." 46 FR 18918, 18923 (Mar. 26, 1981). In order to conform with the Montevallo provision, a driver of a hazardous waste-carrying vehicle must in practice do more than constantly avert his attention from his vehicle in order to estimate distance. He must also attempt to comply with an inflexible separation requirement wholly detached from any local or site-specific condition he may encounter. In fact, the driver is forced—particularly in periods of heavy traffic in which vehicles are frequently entering and exiting from the highway—to make abrupt changes in speed and take other necessary actions which could contribute to an accident. At best, the requirement is burdensome and unfounded. At worst, it is an

[2] See, e.g., Radlinski Braking Performance of Heavy U.S. Vehicles, SAE Technical Paper Series No. 870492, 1987.

impediment to the safe transportation of hazardous materials.[3]

Finally, if uniform separation distance requirements are consistent with the HMTA, such provisions can hardly promote the national goal of safe transportation if reasonable notice is not afforded vehicle operators. If the Administrator finds the Montevallo provision to be consistent with the HMTA, the CWTI urges that the determination be stipulated on the provision of reasonable notification of the requirement to vehicle operators. See Inconsistency Ruling at 55 FR 36745 ("the 'headlights on' requirement is a valid local requirement as long as (1) reasonable notice thereof is given to vehicle operators . . .").

III. The Local Requirement That Hazardous Waste-Carrying Vehicles be Equipped With Citizens Band Radios is Inconsistent With, and Thus Preempted by, the HMTA

The CWTI believes it is essential that local emergency response authorities have access to information that will help them identify and properly respond to transportation accidents involving hazardous materials. The development of a national system of hazardous materials response teams and the successful operation of emergency information services depends upon the recognition of uniform methods of emergency notification and the participation of local authorities. This case, however, presents a local requirement that seeks to advance the laudable aim of local notification through unlawful means. Section 7–46(d) of the Montevallo Code requires that all vehicles carrying hazardous waste within the City limits be equipped with citizens band radios. The Director determined that the provision is, in the case of non-radioactive hazardous materials transportation, consistent with the HMTA. He concluded that "except for radioactive materials transportation, the HMR does not impose any Federal requirement with regard to radios." The Ruling acknowledged that "the record contains no information concerning how this local requirement enhances safety." 55 FR at 36745.

As noted above, the absence of a specific federal regulation addressing the use of citizens band radios in the case of non-radioactive hazardous materials transportation should not end the preemption inquiry. A proliferation of community-specific communications equipment measures, each insisting upon a particular type of telephone, radio, or other device, would be incompatible with the congressional insistence upon uniformity. Similarly, in light of Congress' insistence upon the development of effective nationwide regulations, the failure of Montevallo to articulate a need for the requirement arising out of demonstrable local conditions fully justifies condemnation of the provision. The City has offered no proof that the customary means of notification—the telephone—cannot serve as an effective method of emergency communication.

Section 7–46(d) is inconsistent with the HMTA for other, equally compelling, reasons. Because the vast majority of hazardous waste-carrying vehicles are not equipped with citizens band radios, the Montevallo provision effectively acts as a routing requirement. Vehicles without installed and operational citizens band radios may not be utilized for the transport of hazardous waste into or through the City. The Department has consistently ruled that atypical local vehicle equipment requirements may discourage shippers from using otherwise desirable routes. It has, accordingly, found that local measures which call for additional equipment constitute the equivalent of impermissible routing regulations. See, e.g., Inconsistency Ruling 8, 49 FR 46637, 46638 (1984). See also former 44 CFR part 177, appendix A, VI(D) (1984) (rule inconsistent with the HMTA if it requires additional or special personnel, equipment or escort); Inconsistency Ruling 6, 48 FR 760765 (1983) (even threat of delay due to unique local requirements may divert shippers into other routes, thus imposing transportation burdens on unprepared jurisdictions); Inconsistency Ruling 3, 46 FR 18918, 18921 (1983) (same).

Montevallo's requirement is, if anything, more onerous than a typical routing provision. Such regulations generally prohibit the movement of hazardous materials in certain highly populated areas while providing for alternative transportation routes. Section 7–46(d), however, renders illegal all hazardous waste transportation in vehicles not equipped with radios, irrespective of population density. Similar equipment-related restrictions have likewise been condemned by the federal courts. See, e.g., *American Trucking Ass'ns* v. *City of Boston*, No. 81–628–MA (D. Mass. 1981) (city rule requiring vehicles transporting hazardous materials to be affixed with certain decals and placards not recognized by federal regulations inconsistent with the HMTA).

Finally, the Supreme Court has emphasized that, even in the case of an unquestionable safety hazard, a state or local government may not attempt to resolve the problem by effectively exporting it to another jurisdiction. *Kassel* v. *Consolidated Freightways*, 450 U.S. 662 (1981). The Department has appropriately acknowledged that the HMTA requires State and local governments to "act through a process that adequately weighs the full consequences of its choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules." Inconsistency Ruling 3, 46 FR 18918, 18922 (1981). Montevallo did not impose an outright ban on shipments of hazardous waste in order to divert traffic elsewhere. Yet requirements such as section 46(d) significantly raise the costs of transporting through the community and put transporters to the expense of adding additional and unnecessary equipment to vehicles. Movements of hazardous waste are, accordingly, likely to be diverted randomly rather than in a planned pattern. Given that a crucial purpose of the HMTA is to prevent unnecessary diversion, the mere possibility that the Montevallo requirement will place the burdens of hazardous waste transportation onto other jurisdictions necessitates rejection of section 46(d).

Certification

I hereby certify that a copy of this document has been forwarded to Steven R. Sears, City Attorney, Montevallo, Alabama at the address previously specified in the **Federal Register.**

Respectfully submitted,

John H. Turner,

Association Counsel, National Solid Wastes Management Association.

3. Public Comment

Comments should be limited to the issue of whether the cited requirements of the City of Chester, West Virgina, are preempted by the HMTA. Comments should specifically address the "substantively the same," "dual compliance" and "obstacle" tests described in the "Background" section, as well as the highway routing standards under HMTUSA (49 App U.S.C. 1804(b)).

[3] See Inconsistency Ruling at 55 FR 36744 (finding time-of-day restrictions inconsistent with the HMTA given Montevallo's failure to demonstrate an "adequate overall safety justification"). The Montevallo separation requirement differs, both in form and effect, from the Boston provision addressed in Inconsistency Ruling 3. The Boston ordinance did not attempt to establish a universal, inflexible distance requirement. Instead, the regulation merely empowered the City to regulate "the distance that must be maintained between vehicles in transit."

Persons intending to comment on the application should review the standards and procedures governing consideration of applications for preemption determinations found at 49 CFR 107.201–107.211 (as amended at 56 FR 8616, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991).

Issued in Washington, DC, on March 26, 1992.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety Research and Special Programs Administration.

Thomas D. Larson,

Administrator, Federal Highway Administration.

[FR Doc. 92–7771 Filed 4–3–92; 8:45 am]

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