

Department of Energy Federal Register

Thursday
August 11, 1988

Part IV

Department of Transportation

Research and Special Programs
Administration

Department of Energy Application for
Inconsistency Ruling Concerning
Colorado Nuclear Materials
Transportation Act of 1986 and
Implementing Regulations; Public Notice
and Invitation to Comment

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration**

[Docket No. IRA-44]

Department of Energy Application for Inconsistency Ruling Concerning Colorado Nuclear Materials Transportation Act of 1986 and Implementing Regulations**AGENCY:** Research and Special Programs Administration, DOT.**ACTION:** Public notice and invitation to comment.

SUMMARY: The United States Department of Energy (DOE) has applied for an administrative ruling determining whether the Colorado Nuclear Materials Transportation Act of 1986 and the regulations issued thereunder are inconsistent with the Hazardous Materials Transportation Act (HMTA), and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under section 112(a) of the HMTA.

DATES: Comments received on or before September 23, 1988, and rebuttal comments received on or before November 10, 1988, will be considered before an administrative ruling is issued by the Director of the Office of Hazardous Materials Transportation. 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 comment received may be reviewed in the Dockets Unit, Research and Special Programs Administration, Room 8421, Nassif Building, 400 7th Street, SW., Washington, DC 20590. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number, IRA-44. Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Mr. Lawrence H. Harmon, Director, Transportation Management Division, Office of Defense Waste and Transportation Management, U.S. Department of Energy, Washington, DC 20585 and to Public Utilities Commission, State of Colorado, 1580 Logan St., OL2, Denver, CO 80203, and that fact certified to at the time comment is submitted to the Dockets Unit. (The following format is suggested: "I hereby certify that copies of this comment have been sent to DOE and the Colorado PUC at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior

Attorney, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, SW., Washington, DC 20590, telephone 202-366-4362.

SUPPLEMENTARY INFORMATION:**1. Background**

The HMTA (49 App. U.S.C. 1801 *et seq.*) at section 112(a) (49 App. U.S.C. 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or the HMR issued thereunder.

Procedural regulations implementing section 112(a) of the HMTA and providing for the issuance of inconsistency rulings are codified at 49 CFR 107.201 through 107.211. An inconsistency ruling is an advisory administrative opinion as to the relationship between a state or political subdivision requirement and a requirement of the HMTA or HMR. Section 107.209(c) sets forth the following factors which are considered in determining whether a state or local requirement is inconsistent:

(1) Whether compliance with both the state or local requirement and the HMTA or HMR is possible (the "dual compliance" test); and

(2) The extent to which the state or local requirement is an obstacle to the accomplishment and execution of the HMTA and the HMR (the "obstacle" test).

Inconsistency rulings do not address issues of preemption under the Commerce Clause of the Constitution or under statutes other than the HMTA.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 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, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

2. The Application for Inconsistency Ruling

On July 25, 1988, Lawrence H. Harmon, Director Transportation Management Division, Office of Defense Waste and Transportation Management, U.S. Department of Energy (DOE), filed

an application on behalf of DOE for an inconsistency ruling. That application specifically requested a finding that certain provisions of Colorado's regulations implementing the Colorado Nuclear Materials Transportation Act of 1986 (CNMTA) Article 2.2 of Title 40, Colorado Revised Statutes, 1984 Repl. Vol., as amended, be determined to be inconsistent with the HMTA and the HMR.

DOE alleges that the CNMTA and its implementing regulations apply to carriers transporting through Colorado highway route controlled quantities of radioactive material (HRCQ) as defined in 49 CFR 173.403(1). DOE states that it is the Federal agency responsible for radioactive materials transportation to which the Colorado Regulations pertain under the following applicability language:

* * * radioactive materials being transported to the waste isolation pilot plant in New Mexico and radioactive materials being transported to any facility provided pursuant to section 135 of the federal 'Nuclear Waste Policy Act of 1982', 42 U.S.C. 10101, *et seq.*, or any repository licensed by the United States Nuclear Regulatory Commission that is used for the permanent, deep, geologic disposal of high-level radioactive waste and spent nuclear fuel.

DOE contends that the Colorado regulations under the CNMTA are inconsistent with the HMR insofar as they impose information and documentation requirements, classify hazardous materials, impose training requirements, specify permit requirements and impose penalties and fees.

With respect to information and documentation requirements, DOE alleges that the following Colorado regulations exceed HMR requirements and, therefore, are inconsistent with the HMR:

(1) *NT-3(a)*, which requires that the telephone number of the Colorado State Patrol (CSP) be carried with the other shipping papers within the cab of every motor vehicle with instructions to the driver or person in charge of the vehicle to call that number in the event of any incident, accident, or breakdown of equipment;

(2) *NT-5(c)(5)*, which requires that the original vehicle inspection report and any subsequent inspection report shall be retained in the vehicle while transporting nuclear materials within the State;

(3) *NT-8(f)*, which requires that each person transporting nuclear material within the State shall carry in the motor vehicle a copy of a nuclear materials transportation permit issued by the Colorado Public Utilities Commission.

(4) Appendix 8-A to the Colorado rules, which requires that the permit applicant supply additional information in order to receive a permit, including:

a. A copy of the company's driver training program, which must describe preparation for mountain driving if the route to be traveled is mountainous;

b. Proof that the applicant has obtained liability insurance required by federal rules;

c. A nuclear incident plan that demonstrates applicant's ability to respond to a nuclear incident, which must include provisions for removal of the vehicle and its cargo, prevention or minimization of releases of radioactivity, and decontamination of the environment; and

d. The carrier's plan for replacement or repair of equipment that has been placed out of service by a Port of Entry or State Patrol officer after inspection or has been inoperative due to mechanical failure or other circumstance.

(5) *NT-9*, which contains prenotification requirements in excess of those required by the HMR.

In addition, DOE asserts that Colorado Rule *NT-9* applies the Nuclear Regulatory Commission (NRC) regulation for prenotification of spent fuel shipments, 10 CFR 173.73(f), to all HRCQ shipments—instead of the less restrictive NRC regulation applicable to non-spent fuel HRCQ shipments. The

HMR (49 CFR 173.22) incorporates the NRC requirements. DOE contends that Rule *NT-9* thereby establishes a classification of hazardous materials that impermissibly differs from that of the HMR.

In the area of training, DOE alleges that Appendix 8-A to the Colorado regulations constitutes an inconsistent training requirement. DOE argues that Appendix 8-A's requirement that each permit applicant supply a copy of the company's driver training program, which must describe preparation for mountain driving if the route to be traveled is mountainous, is inconsistent with 49 CFR 177.825.

Concerning Colorado's permit requirements, DOE argues that they are inconsistent because of their extensive information requirements and their vague and discretionary standards for determining when a permit may be issued. DOE cites the required submission of a nuclear incident plan that demonstrates the applicant's ability to respond to a nuclear incident as an example of a vague standard for permit issuance. DOE further contends that the permit requirements ban transportation of HRCQ in compliance with the HMTA and the HMR unless a permit is obtained and create the likelihood of diversion of transportation to other jurisdictions.

Finally, DOE contends that the Colorado regulations providing for civil penalties for violations of the regulations (Rule *NT-4*) and providing annual and single-trip permit fees (Rules *NT-8* (c) and (e)) are inconsistent insofar as they relate to inconsistent regulations or support an inconsistent permit system.

3. Public Comment

Comments should be restricted to the issue of whether the requirements of the CNMTA or its implementing regulations are inconsistent with the HMTA or the HMR. They should specifically address the "dual compliance" and "obstacle" tests described above under "Background."

Persons intending to comment on the application should examine the complete application in the RSPA Dockets Branch, including the text of the CNMTA, the regulations issued thereunder, and the procedures governing the Department's consideration of applications for inconsistency rulings (49 CFR 107.201-107.211).

Alan I. Roberts,
Director, Office of Hazardous Materials Transportation.

Issued in Washington, DC on August 5, 1988.

[FR Doc. 88-18220 Filed 8-10-88; 8:45 am]
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H.R. 2615/Pub. L. 100-381

To provide that certain lands shall be in trust for the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California. (Aug. 8, 1988; 102 Stat. 897; 1 page) Price: \$1.00

H.J. Res. 90/Pub. L. 100-382

To authorize and request the President to call and conduct a White House Conference on Library and Information Services to be held not earlier than September 1, 1989, and not later than September 30, 1991, and for other purposes. (Aug. 8, 1988; 102 Stat. 898; 5 pages) Price: \$1.00

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