the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2000–8418) and must be submitted in triplicate to the Docket Clerk, DOT Central Docket Management Facility, Room Pl-401, Washington, DC. 20590–0001. Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room Pl-401 (Plaza Level), 400 Seventh Street SW., Washington, DC. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at http://dms.dot.gov.

Issued in Washington, DC on December 20, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–98–3577 (PDA–18 (R))]

Preemption Determination No. PD–18(R); Broward County, Florida's Requirements on the Transportation of Certain Hazardous Materials to or From Points in the County

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Applicant: Association of Waste Hazardous Materials Transporters (AWHMT) and American Trucking Associations (ATA).

Local Laws Affected: Broward County, Florida Code of Ordinance No. 1999–53 §§ 27–352; 27–355(a)(1); 27–356(b)(4)d.1; 27–436; 27–439(b); 27–439(e)(2); 27–439(e)(3); 27–439(e)(4); 27–439(f)(1); 27–439(g)(1) and 27–439(g)(2).

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.* and the Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180.

Modes Affected: Highway and rail.

SUMMARY: Federal hazardous material transportation law preempts Broward County, Florida's requirements pertaining to certain hazardous material definitions and all requirements that rely on those definitions, written notification of a hazardous material release, shipping paper retention for certain hazardous materials transporters, licensing fees for hazardous waste transporters and monthly transportation activity reporting. Federal hazardous material transportation law does not preempt Broward County, Florida's requirements pertaining to oral notification of a hazardous material release, packaging standards for hazardous waste transport vehicles, shipping paper retention for hazardous waste transporters, periodic vehicle inspection and vehicle marking.

FOR FURTHER INFORMATION CONTACT: Donna L. O'Berry, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001 (Tel. No. 202–366–6136).

I. Background

On April 9, 1998, AWHMT applied for a determination that the Federal hazardous material transportation law preempts the following provisions of the Broward County Ordinance (Ordinance) 93–47, Chapter 27:

—Ordinance 27–352 containing the definition of ''Hazardous Materials'',
—Ordinance 27–355(a)(1) containing release reporting requirements,
—Ordinance 27–356(b)(4) d.1 and Ordinance 27–356(d)(4) a.1 containing shipping paper retention requirements,
—Ordinance 27–356(d)(4) a.2 containing standards for waste-hauling vehicles,
—Ordinance 27–356(d)(4) a.3 containing periodic vehicle inspection requirements,
—Ordinance 27–356(d)(4) a.4 containing requirements that waste-hauling vehicles be marked with an identification tag issued by the County,
—Ordinance 27–356(d)(4) a.6 containing training requirements for drivers and other appropriate personnel,
—Ordinance 27–356(d)(4) a.7 containing fee requirements for a license to transport discarded hazardous material within the County,
—Ordinance 27–356(d)(4) b.1 containing requirements to request a modification from the County prior to utilizing a vehicle for transporting a type of waste that is not specified on the current license, and
—Ordinance 27–356(d)(4) c.1 containing reporting requirements for monthly activity reports to be submitted to the County.

On August 6, 1998, RSPA published a public notice and invitation to comment on AWHMT's application (63 FR 42098). The notice set forth the text of AWHMT's application and asked that comments be filed with RSPA on or before September 21, 1998, and that rebuttal comments be filed on or before November 4, 1998. Comments were submitted by Nufarm, the Hazardous Materials Advisory Council (HMAC), Freehold Cartage, Inc., the Association of American Railroads (AAR), Mr. Tony Tweedale, and the Institute of Makers of Explosives (IME). AWHMT submitted rebuttal comments.

On October 26, 1998, the County requested that RSPA stay its review of AWHMT's application for six to eight months. The County requested a stay because it was proposing changes to the Ordinance that would possibly resolve the preemption issues raised in AWHMT's application. In a December 23, 1998 letter, AWHMT opposed the County's request for a stay and requested that RSPA proceed to issue a ruling in the matter. On March 15, 1999, RSPA granted the County's request for a stay. The stay was effective until July 1, 1999.

On September 28, 1999, the Broward County Commissioners adopted Ordinance No. 1999–53 (the revised Ordinance), which amended Chapter 27. In the previous version of the Ordinance, all of the regulations at issue in this proceeding were contained in Chapter 27, Article XII, ''Hazardous Material.'' In the revised Ordinance, the County retained a modified version of Article XII and created a new article, Chapter 27, Article XVII, ''Waste Transporters.'' Article XVII applies solely to waste transporters. Some of the regulations originally challenged in this proceeding were modified and moved to Article XVII, some were deleted from the revised Ordinance, and others remained where they were in the previous Ordinance.

On November 2, 1999, RSPA published a public notice reopening the comment period and invited interested parties to comment on the County's revised Ordinance (64 FR 59231). Comments were due by December 17, 1999, and rebuttal comments were due by January 31, 2000. RSPA limited additional comments to a discussion of

the revised Ordinance. Because it appeared that the County had substantially modified the Ordinance, RSPA requested that AWHMT supplement its application to reflect the revisions to the Ordinance. ATA, on behalf of AWHMT, submitted the revised application (herein referred to as ATA/AWHMT). In addition, IME and AAR submitted comments. On March 22, 2000, the County submitted its comments to the revised Ordinance. On May 5, 2000, ATA/AWHMT submitted rebuttal comments to the County's comments.

As a result of the County's changes in the revised Ordinance, ATA/AWHMT withdrew its challenge to four of the County's requirements. ATA/AWHMT continues to challenge the County's definitions of certain hazardous materials and the County's requirements pertaining to release reporting, standards for packaging, fees, monthly reporting, and vehicle inspection. In addition, AAR continues to challenge the County's shipping paper and vehicle marking requirements. This decision addresses only the challenges to the revised Ordinance.

II. Federal Preemption

The Hazardous Materials Transportation Act (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.'' Pub. L. 93–633 Section 102, 88 Stat. 2156, amended by Pub. L. 103–272 and codified as revised in 49 U.S.C. 5101. The HMTA ''replace[d] a patchwork of state and federal laws and regulations * * * with a scheme of uniform, national regulations.'' *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n,* 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted ''without substantive change'' by Public Law 103–272, 108 Stat. 745. The Federal hazardous materials transportation law is now found at 49 U.S.C. 5101 *et seq.*

A statutory provision for Federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee ''endorse[d] the principle of preemption 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 materials transportation.'' S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). A Federal Court of Appeals affirmed that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments that expanded the preemption provisions. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

The 1990 amendments to the HMTA codified the ''dual compliance'' and ''obstacle'' criteria that RSPA had applied in issuing inconsistency rulings before 1990.[1] The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151 (1978). As now set forth in 49 U.S.C. 5125(a), these criteria provide that, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e) or unless it is authorized by another Federal law, ''a requirement of a State, political subdivision of a State, or Indian tribe'' is explicitly preempted if:

> (1) Complying with a requirement of the State, political subdivision or tribe and a requirement of [Federal hazardous materials transportation law] or a regulation prescribed under [Federal hazardous materials transportation law] is not possible; or
>
> (2) The requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out [Federal hazardous materials transportation law] or a regulation prescribed under [Federal hazardous materials transportation law].

In the 1990 amendments to the HMTA, Congress also added preemption provisions on the following subject areas:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing, of a package or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

49 U.S.C. 5125(b)(1). Unless it is authorized by another Federal law or a DOT waiver of preemption, a non-Federal requirement on any of these subjects is preempted when it is not ''substantively the same'' as a provision of this chapter or a regulation prescribed under this chapter. 49 U.S.C. 5125(b)(1). REPA has 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).

In addition, 49 U.S.C. 5125(g)(1) provides that a State, political subdivision, or Indian tribe may

> impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

Under 49 U.S.C. 5125(d)(1), 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. The Secretary of Transportation has delegated authority to issue preemption determinations that concern highway routing to the Federal Motor Carrier Safety Administration (FMSCA) and those concerning all other hazardous materials transportation issues to RSPA. 49 CFR 1.53(b) and 1.73(d)(2). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination be published in the **Federal Register**. 49 U.S.C. 5125(d)(1). Following the receipt and consideration of written comments, RSPA publishes its determination in the **Federal Register**. *See* 49 CFR 107.209(d). A 20-day period is allowed for filing petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

RSPA's authority to issue preemption determinations does not provide a means for review or appeal of State enforcement proceedings, nor does RSPA consider any of the State's procedural requirements applied in an enforcement proceeding. The filing of an application for a preemption determination does not operate to stay a State enforcement proceeding.

Preemption determinations do not address issues of preemption arising

[1] While advisory in nature, these inconsistency rulings were ''an alternative to litigation for a determination of the relationship of Federal and State or local requirements'' and also a possible ''basis for an application . . . [for] a waiver of preemption.'' Inconsistency Ruling (IR), No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, 44 FR 75566, 76657 (Dec. 20, 1979).

under the Commerce Clause of the Constitution or under statutes other than the Federal hazardous materials transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon,* above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 13132, entitled ''Federalism'' (64 FR 43255, Aug. 4, 1999). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions that RSPA has implemented through its regulations.

One commenter to this proceeding urges DOT to ''interpret its discretionary or implied preemption authorities narrowly, specifically its obstacle criteria.'' He states that DOT ''should only allow [preemption] if it believes it is specifically statutorily required to, or if there is an evident obstacle to the purpose of a federal HMT regulatory requirement.'' The commenter contends that ''[i]f the question is ambiguous but can be resolved by subdividing, that is better than preempting the entire issue.'' This, he argues, is the intent of Congress and the Federalism Executive Order.

RSPA must consider ATA/AWHMT's application under the express preemption standards of 49 U.S.C. 5125. RSPA will analyze each issue raised in this proceeding to determine if any of the non-Federal requirements meet the preemption criteria in 49 U.S.C. 5125. If preemption of a non-Federal regulation is required, RSPA, to the extent possible, will only preempt that portion of the non-Federal regulation that conflicts with the Federal regulation.

III. Comments and Decision

A. Definition of a Hazardous Material

1. County Definitions

The County, in §§ 27–352 and 27–436 of the revised Ordinance, defines the challenged definitions as follows:

Biomedical waste—also referred to as ''biohazardous waste,'' has the meaning given it in Chapter 27, Article VI, Section 214, of the Code, as Amended.

Section 27–352. [The definition in 27–214 is substantially the same as the definition for biomedical waste contained in 27–436, below.]

Biomedical waste—means any solid or liquid waste which may present a threat of infection to humans. Examples include non-liquid tissue and body parts from humans and other primates; laboratory and veterinary waste which may contain human disease-causing agents; discarded sharps; and blood, blood products and body fluids from humans and other primates. The following are also included;

(a) Used, absorbent materials saturated with blood, body fluids, or excretions or secretions contaminated with blood and absorbent materials saturated with blood or blood products that have dried. Absorbent material includes items such as bandages, gauzes and sponges.

(b) Non-absorbent disposable devices that have been contaminated with blood, body fluids or blood contaminated secretions or excretions and have not been sterilized or disinfected by an approved method.

(c) Other contaminated solid waste materials which represent a significant risk of infection because they are generated in medical facilities which care for persons suffering from diseases requiring Strict Isolation Criteria and used by the U.S. Department of Health and Human Services, Centers for Disease Control, CDC Guideline for Isolation Precautions in Hospitals, July/August 1983.

Section 27–436.

Combustible liquid—is defined as a liquid having a flash point at or above one hundred (100) degrees Fahrenheit (37.8 degrees Celsius).

Section 27–352 (as posted on the County's Internet site on June 1, 2000).

Discarded hazardous material—means any hazardous material which has served its original intended purpose and has been or is in the process of being rejected, disposed of or recycled, or hazardous material stored or accumulated in order to be eventually rejected, disposed of or recycled. Such material may include, but is not limited to, hazardous waste, used oil, used oil filters, waste radiator fluid, industrial wastewater, petroleum contaminated media and water, contaminated soils, waste fuel, leachate, or waste photographic fixer.

Section 27–352 and Section 37–436 (with one minor variation that does not affect the definition).

Flammable liquid—is a liquid having a flash point below one hundred (100) degrees Fahrenheit (37.8 degrees Celsius) and having a vapor pressure not exceeding forty (40) pounds per square inch (absolute) (2,068 mm Hg) at one hundred (100) degrees Fahrenheit (37.8 degrees Celsius).

Section 27–352 (as posted on the County's Internet site on June 1, 2000).

Hazardous Material—is defined as any substance or mixture of substances which meets any one (1) of the following criteria:

(1) Hazardous waste as defined in this article.[2]

(2) Any substance listed in article XIII, appendix A of this chapter.[3]

(3) any petroleum product or any material or substance containing discarded petroleum products.

(4) Any substance identified as hazardous in the most current version of the following regulations:

a. Comprehensive Environmental Response Compensation, and Liability Act (42 U.S.C. § 9601, *et seq.*).

b. Emergency Planning and Community Right-to-Know Act (42 U.S.C. § 11001, *et seq.*).

c. Hazardous Material Transportation Act (49 U.S.C. § 1801, *et seq.*).

d. Federal Insecticide, Fungicide, and rodenticide Act (7 U.S.C. § 136(a)–(y)).

Section 27–352 (as posted on the County's Internet site on June 1, 2000).

Sludge—means a solid waste pollution control residual which is generated by any industrial or domestic wastewater treatment plant, water supply treatment plant, air pollution control facility, septic tank, grease trap, portable toilet or related operation, or any other such waste having similar characteristics. Sludge may be solid, liquid, or semisolid waste but does not include the treated effluent from a wastewater treatment plant.

Section 27–436.

2. Comments

Several commenters argue that some of the County's definitions are not substantively the same as the definitions in the HMR. Specifically, ATA/AWHMT points out that the County's definition of ''hazardous material'' is broader than ''hazardous material'' as defined in the HMR. In addition, ATA/AWHMT contends that the County's definitions for ''combustible liquid,'' ''flammable liquid'' and ''biomedical waste'' are not substantively the same as the HMR definitions of these materials. AAR notes that the County's definitions of ''biomedical waste'' and ''discarded hazardous materials'' also differ from the HMR. In addition, AAR points out that the County's definition of ''sludge'' does not have a counterpart in the HMR. Nufarm argues that the County's inclusion in its definition of ''hazardous material'' of (1) any petroleum product

[2] The County defines Hazardous Waste as ''any substance defined or identified as a hazardous waste in 40 CFR parts 260–265 and appendices, promulgated pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, as amended, and rule 730, F.A.C., as amended.'' 27–352.

[3] Article XII regulates Wellfield Protection. Appendix A to Article XIII contains a list of regulated substances, an indication whether the particular substance is or is not an EPA toxic pollutant, and EPA signal word for the substance, and the amount, in gallons and pounds, required for a reportable spill.

or any material or substance containing discarded petroleum products and (2) any substance identified as hazardous in the most current version of the Federal Insecticide, Fungicide and rodenticide Act are two examples of how the County's definition is too broad and, therefore, not substantively the same as the HMR definition.

The County explains that the definitions in Article XVII, § 27–436, were modified to recognize other federal, state, municipal and county agencies that have adopted rules regulating waste transporters. In addition, the County points out that the transportation of hazardous material in its virgin state, as product rather than waste, is not regulated under Article XVII. In article XII, § 27–352, the County modified its definition of a hazardous material by removing one of its five criteria. The County states that this revised definition is now consistent with the Federal regulations.

3. Decision

Federal hazardous material transportation law preempts a non-Federal requirement on the ''designation, description, and classification of hazardous material'' that is not ''substantively the same as'' the HMR. 49 U.S.C. 5125(b)(1)(A). RSPA agrees that the six definitions of concern to the industry commenters are not ''substantively the same as'' their counterparts in the HMR or do not have counterparts in the HMR.

Specifically:

• The HMR definition of ''regulated medical waste'' at 49 CFR 173.134 appears to be most comparable to the County's definition of ''biomedical waste''. However, the County's definition is broader in scope than the HMR definition.

• The HMR define ''combustible liquid'' as ''any liquid that does not meet the definition of any other hazard class specified in [the HMR] and has a flash point above 60.5°C (141°F) and below 93°C (200°F). 49 CFR 173.120(b). Under the County's definition, a combustible liquid must have a flash point at or above 37.8°C (1090°F).

• The HMR define ''flammable liquid'' as ''having a flash point of not more than 60.5°C (141°F), or any material in a liquid phase with a flash point at or above 37.8°C (100°F) that is intentionally heated and offered for transportation or transported at or above its flash point in a bulk packaging,'' with certain exceptions. 49 CFR 173.120(a). Under the County's definition, a flammable liquid must have a flash point below 37.8°C (100°F) and a vapor pressure that does not exceed 40 psi at 37.8°C.

• The HMR define ''hazardous material'' as

> a substance or material, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated. The term includes hazardous substances, hazardous wastes, marine pollutants, and elevated temperature materials as defined in this section, materials designated as hazardous under the provisions of § 172.101 of [the HMR], and materials that meet the defining criteria for hazard classes and divisions in part 173 of [the HMR]. 49 CFR 171.8.

As previously mentioned, the County's definition of hazardous material includes substances or mixtures of substances that are hazardous wastes (as defined by the County), substances listed by the County, petroleum products, or substances ''identified as hazardous'' in certain listed Federal ''regulations,'' which actually are Federal statutes. The references to the ''Hazardous Materials Transportation Act (49 U.S.C. § 1801, *et seq.*)'' is over five years out of date and should have been the ''Federal hazardous materials transportation law (49 U.S.C. § 5101 *et seq.*).''

• Discarded hazardous material and sludge do not have counterparts in the HMR.

The Six County definitions challenged by AWHTA/ATA are not ''substantively the same as'' the Federal definitions. The differences between the County's definitions and the HMR definitions are not *de minimis,* nor are they mere editorial changes. However, in order to be preempted under the Federal hazardous materials transportation law, the definitions as applied and enforced must relate to the areas regulated by DOT, as set forth above.

Article XII regulates the ''generation, use, storage, handling, processing, manufacturing, and disposal of hazardous materials.'' Revised Ordinance 27–351. The Department of Planning and Environmental Protection (DPEP) is authorized to license, evaluate, review and administer all hazardous materials activities * * * performed in Broward County. *Id.* Article XVII regulates the transportation of discarded hazardous material, sludge, and biomedical waste and applies to ''all persons conducting activities within geographic boundaries of Broward County, who transport discarded hazardous material, sludge, or biomedical waste to, from, and within Broward County.'' Revised Ordinance 27–435.

These two sections indicate that the County uses the challenged definitions in defining the applicability of its regulation of transportation in commerce. Therefore, the County's definitions of biomedical waste, combustible liquid, discarded hazardous materials, flammable liquid, hazardous materials and sludge are preempted under the ''substantively the same as'' test to the extent that they relate to transportation in commerce. In addition, all County hazardous materials requirements that apply these six definitions are also preempted.[4]

This holding is consistent with prior RSPA decisions and with case law. RSPA has consistently held that state and local hazard class and hazardous material definitions differing from those in the HMR and used to regulate in areas regulated by DOT are preempted because the Federal role is exclusive.[5] In addition, RSPA has previously determined that non-Federal definitions

[4] In discussing these requirements later in this document, RSPA ignores this definitional problem and assumes that the County's definitions pertaining to hazardous materials and hazardous materials transportation in commerce would be made consistent with the HMR.

[5] *See generally*, IR–18, Prince George's County, MD; Code Section Governing Transportation of Radioactive Materials, 52 FR 200 (Jan. 2, 1987); IR–18(A) Prince George's County, MD; Code Section Governing Transportation of Radioactive Materials, Decision on Appeal, 53 FR 28850 (July 29, 1988); IR–19, Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials, 52 FR 24404 (June 30, 1987); IR–19(A), Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials, Decision on Appeal, 53 FR 11600 (April 7, 1988); IR–20, Triborough Bridge and Tunnel Authority Regulations Governing Transportation of Radioactive Materials and Explosives, 52 FR 24396 (June 30, 1987), correction, 52 FR 29468 (Aug. 7, 1987); IR–21, Connecticut Statute and Regulations Governing Transportation of Radioactive Materials, 53 FR 37072 (Oct. 2, 1987), Decision on Appeal, 53 FR 46735 (Nov. 18, 1988); IR–26, California Department of Motor Vehicles Regulations on Training Requirements for Operators on Vehicles Carrying Hazardous Materials, 54 FR 16314 (Apr. 21, 1989), correction, 54 FR 21526 (May 19, 1989); IR–28, City of San Jose, California; Restrictions on Storage of Hazardous Materials, 55 FR 8884, (Mar. 8, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992); IR–29, State of Maine Statutes and Regulations on Transportation of Hazardous Materials, 55 FR 9304 (Mar. 12, 1990); IR–30, Oakland, California; Nuclear Free Zone Act, 55 FR 9676 (Mar. 14, 1990), correction, 55 FR 12111 (Mar. 30, 1990); IR–31, State of Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992); IR–32, City of Montevallo, Alabama Ordinance on Hazardous Waste Transportation, 55 FR 36736 (Sept. 6, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992). *See also, Missouri Pacific R.R. Co.* v. *Railroad Commission of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), *aff'd on other grounds*, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 794 (1989).

and classifications that result in regulating the transportation, including loading, unloading or storage incidental thereto, of more, fewer or different hazardous materials than the HMR, are obstacles to uniformity in transportation regulation and thus are preempted.[6] Recently, a Federal district court found that states are precluded from designating, describing or classifying hazardous materials in a manner that differs substantively from the Federal designation, description or classification. *Union Pacific R.R.* v. *California Publ. Util. Comm'n,* No. C–97–3660–THE (N.D. Cal. June 18, 1998), *vacated in part on other grounds,* (N.D. Cal. Dec. 14, 1998).

B. Release-reporting Requirements

1. County Requirements

The revised Ordinance contains two release-reporting sections, § 27–355(a)(1) in Article XII and § 27–439(f)(1) in Article XVII.

Section 27–355(a)(1) provides:

[i]n the event of an unauthorized release of a hazardous material to the environment in an amount that is above the reportable quantity threshold * * * the responsible party shall * * * immediately report such incidents by telephone to DPEP. Written notification of verbal reports to DPEP must be provided within seven (7) calendar days. Written notification shall include at a minimum the location of the release, a brief description of the incident that caused the release or discovery, a brief description of the action taken to stabilize the situation, and any laboratory analysis, if available.

Section 27–439(f)(1) provides:

[t]he owner or operator shall report any unintentional releases during transportation to the local emergency operator (911) immediately upon learning of the release in accordance with federal and state regulations. All other releases shall be reported to the DPEP in accordance with the requirements set forth in § 27–355(a)(1) of the Code, as amended.

2. Comments

ATA/AWHMT and IME challenge the County's written release-notification requirement. They argue that the County's requirement for a ''responsible party'' to provide written notification of an unauthorized release that is above the reportable quantity threshold should be preempted because it is not ''substantively the same as'' DOT's notification requirements.

ATA/AWHMT and AAR challenge the County's telephonic release notification requirement. While ATA/AWHMT does not challenge the County's 911 telephonic notification requirement, it does object to the requirement to telephonically notify a DPEP operator in the absence of a 911 emergency telephone number. ATA/AWHMT argues that if this practice is permitted and other local jurisdictions adopt this policy, it would result in transporters being required to maintain and continuously update a directory of emergency numbers for local jurisdictions. ATA/AWHMT maintains that it would take years to compile such a directory and the task would create a tremendous burden on the transporter.

AAR contends that the County's requirement to immediately notify a 911 operator of a hazardous material release is not the same as DOT's immediate notification requirement. AAR states that 911 notification satisfies the Environmental Protection Agency's (EPA) requirements but that the HMR require immediate notification to DOT of a release of a hazardous material that is not an EPA hazardous substance. Therefore, AAR argues that the 911 telephonic notification requirement should be preempted under the ''substantively the same as'' test.

The County points out that it no longer requires all transporters to notify DPEP of transportation-related releases. Section 27–439(f)(1) requires that the owner/operator of a motor vehicle carrying hazardous waste immediately notify the ''911-operator or in the absence of a 911-emergency telephone number * * * the * * * DPEP operator.'' The County states that releases of all other materials that do not involve transportation are regulated by Article XII. The commenters do not discuss how the County regulations are applied and enforced.

3. Decision

RSPA has consistently held that Federal hazardous material transportation law generally preempts only non-Federal regulations pertaining to written reporting and not those pertaining to oral reporting. This decision will address each type of release reporting separately.

a. *Written release reporting.*

Federal hazardous material transportation law preempts a non-Federal requirement on the ''written notification, recording, and reporting of the unintentional release in transportation of hazardous material'' that is not ''substantively the same as'' the HMR. 49 U.S.C. 5125(b)(1)(D). The Federal written incident-reporting requirements are in 49 CFR 171.16. Section 171.16 requires a carrier that transports hazardous material to submit to RSPA, within 30 days from the date of discovery, a written report on certain incidents that occur during the course of transportation. Such incidents include the ''unintentional release of hazardous materials from a package (including a tank) or [when] any quantity of hazardous waste has been discharged during transportation.'' The report must be submitted directly to RSPA on DOT Form F 5800.1. 49 CFR 171.16(a).[7]

As previously mentioned, § 27–355(a)(1) requires a ''responsible party'' to provide written notification of verbal reports to the County of hazardous material releases. The written reports must be submitted within seven calendar days and must contain specified information about the release and any laboratory analysis that is available. The portion of Section 27–355(a)(1) pertaining to written notification of a release is not substantively the same as 49 CFR 171.16. The County states in its comments that Article XII regulates releases that do not involve transportation. However, that is not apparent from the face of the revised Ordinance, Article XII could be construed as applying to hazardous materials transportation or storage incidental to transportation.

Therefore, RSPA finds that § 27–355(a)(1), as it pertains to written notification, is preempted, but only to the extent that it relates to transportation in commerce, including storage incidental to transportation in commerce.

This determination is consistent with previous RSPA decisions involving non-Federal requirements for submission of written incident reports. In Preemption Determination (PD)–21, RSPA held that a state may require a carrier to file a written incident report with RSPA under the same conditions specified in 49 CFR 171.16 but that it may not require the carrier to file a copy of the Federal form or a separate incident report directly with the State. Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 FR 54474, 54481 (Oct. 6, 1999), judicial review pending, *Tennessee* v. *U.S. Dept. of Transportation,* Civil Action No. 3–99cv–1126 (M.D. Tenn.).

In IR–2, RSPA determined that a state requirement for immediate notification of a hazardous materials incident to

[6] IR–5, City of New York Administrative Code Governing Definitions of Certain Hazardous Materials, 47 FR 51991 (Nov. 18, 1982); IR–6, City of Covington Ordinance Governing Transportation of Hazardous Materials by Rail, Barge, and Highway Within the City, 48 FR 760 (Jan. 6, 1983); IR–28 (San Jose), above; IR–29 (Maine), above; IR–31 (Louisiana), above; and (IR–32 (Montevallo), above.

[7] RSPA has initiated a rulemaking to propose changes to the incident reporting requirements and to DOT Form F 5800.1. *See* RSPA's advance notice of proposed rulemaking, 64 FR 13943 (March 23, 1999).

local emergency responders was not preempted but that the follow-up written report was. RSPA stated that:

> The written notice required to be supplied to [DOT] pursuant to 49 CFR 171.16 precludes the State from requiring additional written notice directed to hazardous materials carriers. * * * In light of the Federal written notice requirement * * * it is inappropriate for a State to impose an additional written notice requirement to apply solely to carriers already subject to the Hazardous Materials Regulations. The detailed hazardous materials incident reports files with [DOT] are available to the public.

64 FR at 54480, *quoting,* IR–2 (Rhode Island), above, affirmed on appeal in IR–2(A), 45 FR 71881, 71884 (Oct. 30, 1980), and 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).

In IR–3, RSPA stated that a State or locality could not require a carrier to directly submit a copy of DOT Form F 5800.1. RSPA said:

> Subsequent written reports required within 15 days by DOT are not necessary to local emergency response. The reports themselves are publicly available, and [RSPA] is prepared to routinely send copies of written reports to a designated State agency on request. Copies of written reports required by DOT under 49 CFR 171.15 may not be required by [the City's ordinance].

64 FR at 54480, *quoting from,* IR–3, City of Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City, 46 FR 18918, 18924 (Mar. 26, 1981). On appeal, RSPA reaffirmed its position that Boston's requirement for a carrier to submit written reports was redundant, unnecessary, and inconsistent with the HMTA and HMR. 64 FR at 54480, *citing to,* IR–3(A), 47 FR 18457, 18462 (Apr. 28, 1982).

b. *Oral release reporting.*

The legislative history of the 1990 amendments to the HMTA discloses that Congress did not intend 49 U.S.C. 5125 (b)(1)(D) to cover oral incident reporting. In a report, the House Committee on Energy and Commerce stated that:

> *Written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.*—The Committee believes uniform requirements for written notices and reports describing hazardous materials incidents will allow for the development of an improved informational database, which in turn may be used to assess problems in the transportation of hazardous materials. Without consistency in this area, data related to hazardous materials incidents may be misleading and confusing. Additional State and local requirements would also be burdensome on those involved in such incidents and may lead to liability for minor deviations. *The oral notification and reporting of unintentional releases has specifically been excluded from this paragraph in order to permit State and local jurisdictions to develop the full range of possible alternatives in emergency response capabilities (such as requiring carriers to telephone local emergency responders).*

H.R. Report No. 101–444, Par I, at 34–35 (1990) (emphasis added).

In following Congress' intent, RSPA and the courts have consistently held that requirements for immediate, oral accident/incident reports for emergency response purposes generally are consistent with Federal law and regulations and, thus, not preempted. *See,* IR–2 (Rhode Island), above; IR–3 (Boston), above; *National Tank Truck Carriers, Inc.* v. *Burke,* above; *Union Pacific R.R.* v. *California Public Util. Comm'n,* above.[8] In IR–2 (Rhode Island), RSPA sustained a state requirement to immediately notify the state police and two specific state agencies of any accident. RSPA determined that ''[although the Federal Government can regulate in order to avert situations where emergency response is necessary, and can aid in local and State planning and preparation, when an accident does occur, response is, of necessity, a local responsibility.'' 44 FR at 75568. RSPA further concluded that ''a requirement for immediate notification in certain situations furthers the State's activity in protecting persons and property through emergency response measures.'' *Id.* at 75572.

In IR–3 (Boston), RSPA sustained a city requirement for carriers to immediately notify the city of a hazardous material incident. RSPA stated:

> Any immediate reporting requirement, applied differentially to carriers of hazardous materials, that is necessary to support an emergency response effort is not inconsistent with the HMTA. Thus [Boston's ordinance] in requiring immediate reports for incidents that must immediately be reported to DOT under 49 CFR 171.15 is not inconsistent with the HMTA.

46 FR at 18924. RSPA affirmed its position on appeal by holding that ''[f]or an incident that requires the City to undertake emergency response, we reiterate our agreement that the City must be able to require the carrier to notify it immediately. If the City wishes to conduct a thorough investigation of the events at the scene, it may do so then.'' 47 FR 18924.

Federal telephonic reporting requirements (49 CFR 171.15) are not designed to elicit immediate on-the-scene emergency response, but rather to assist the Federal Government in investigating and collecting data on such incidents. In *Union Pacific R.R.* v. *California Public Util. Comm'n*, above, at 7, the court held that ''the very substance of the federal regulations reflect that they are not intended to address the area of emergency 'first response' but are designed to facilitate the government's ability to promptly investigate and compile data on major incidents involving hazardous materials.''

For the reasons discussed above, the portion of the County's requirements in §§ 27–355(a)(1) and 27–439(f)(1) pertaining to immediate notification to a 911 operator of a hazardous materials release are not preempted. However, 911 notification does not eliminate the obligation to comply with Federal accident/incident notification requirements.

In addition, Section 27–439(f)(1) contains a requirement that ''[a]ll other releases shall be reported to the DPEP in accordance with the requirements set forth in Section 27–355(a)(1) of the Code, as amended.'' RSPA has determined that the written reporting requirement in § 27–355(a)(1), as it relates to the transportation of hazardous materials in commerce, is preempted. Therefore, the requirement in § 27–439(f)(1) to report in accordance with written reporting requirement in § 27–355(a)(1) is also preempted to the extent that it relates to transportation of hazardous materials in commerce, including loading, unloading and storage incidental to transportation.

In its comment, that County indicates that § 27–439(f)(1) contains a provision for reporting directly to DPEP in the absence of 911 emergency telephone number. ATA/AWHMT objects to this provision because of the potential burden it would create for a transporter to compile a list of secondary emergency response numbers for the various jurisdiction in which it operates. It is not clear to RSPA what regulation the parties are referring to. The provision for notifying a DPEP operator in the absence of a 911 operator is not in the current version of the revised Ordinance, which was submitted by the County to RSPA on October 12, 1999. In addition, RSPA consulted the version of § 27–439(f)(1) currently listed on the County's Internet site and did not find any language that was different from the County's October 1999 version of the revised Ordinance. Because RSPA does not have any evidence that this regulation is in effect, RSPA will not address the issue.

[8] *See also,* IR–28 (San Jose), above; IR–31 (Louisiana), above; and IR–32 (Montevallo), above.

C. Shipping paper requirements.

1. County requirement.

The revised Ordinance has two sections that address recordkeeping, including shipping paper retention requirements, § 27–356(b)(4)d.1 in Article XII and § 27–439(g)(1) in Article XVII. Section 27–356, in general, sets forth the requirements for obtaining and operating under certain types of licenses and approvals. This section applies to (1) hazardous materials facility licenses, (2) sludge, discarded hazardous material and biomedical waste transfer station licenses, (3) environmental assessment and remediation licenses, and (4) special licenses. Section 27–356(b)(4)d.1 sets forth the specific recordkeeping and reporting requirements for hazardous material facilities that are subject to the licensing requirements. Section 27–356(b)(4)d.1 provides that:

[r]eports and records, including hazardous waste manifests, bills of lading, or other equivalent manifesting for all hazardous material disposal, shall be maintained on-site for five (5) years, and shall be available upon request for inspection by DPEP. The records, at a minimum, must identify the facility name and address, type and quantity of waste, the shipping date of the waste, and the hauler's name and address.

Section 27–439(g) contains the requirements and standards for obtaining and operating under a waste transporter license. Section 27–439(g)(1) requires that the owner or operator shall:

[m]aintain reports, and records, including waste manifest, bills of lading, or other equivalent manifesting for all discarded hazardous material, sludge, and biomedical waste disposal. Reports and records shall be maintained for three (3) years, and shall be available upon request for inspection by DPEP. The records, at a minimum must identify the generator's name and address, type and quantity of waste, the shipping date of the waste.

2. Comments

AAR argues that the County's recordkeeping requirements in § 27–439(g)(1) should be preempted as they apply to rail transporters of hazardous waste. AAR states that neither RSPA nor the EPA imposes any recordkeeping requirements on intermediate rail transporters of hazardous waste. In addition, AAR states that the County has not addressed AWHMT's initial objections to § 27–356(b)(4)d.1. Initially, AWHMT, HMAC and Freehold Cartage, Inc. objected to the County's five-year requirement for waste manifest retention. These organizations did not reassert their objections to the revised Ordinance.

3. Decision

Federal hazardous material transportation law preempts a non-Federal requirement on ''the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents'' that is not ''substantively the same as'' the HMR. 49 U.S.C. 5125(b)(1)(C). RSPA has determined that a hazardous waste manifest is a shipping document covered by 49 U.S.C. 5125(b)(1)(C). PD–2(R), Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest, 58 FR 11176 (Feb. 23, 1993). In addition, 49 CFR 172.205(h) provides that ''[a] hazardous waste manifest required by 40 CFR part 262, containing all of the information required by this subpart, may be used as the shipping paper required by this subpart.'' Therefore, any non-Federal requirements pertaining to hazardous waste manifests that are not ''substantively the same'' as the Federal requirements are preempted.

The Federal requirements for hazardous waste manifests are at 49 CFR § 172.205. This section requires, among other things, that a copy of the manifest * * * must be ''[r]etained by the shipper (generator) and by the initial and each subsequent carrier for three years from the date the waste was accepted by the initial carrier.'' 49 CFR § 172.205(e)(5). EPA also requires a three-year waste manifest retention period for hazardous waste generators and transporters. *See* 40 CFR 262.40 and 263.22. Neither RSPA nor EPA specifies where a manifest must be kept.

Section 172.205(f) of 49 CFR applies to the transportation of hazardous waste by rail. This section requires, among other things, that rail carriers ''[r]etain one copy of the manifest and rail shipping paper in accordance with 40 CFR § 263.22.'' 49 CFR 172.205(f)(iv). Section 263.22 states that ''[i]ntermediate rail transporters are not required to keep records pursuant to these regulations.''

As mentioned above, § 27–356(b)(4)d.1 requires that specified licensees maintain waste manifests, bills of lading or other equivalent manifesting, for all hazardous material disposal on-site for five years. Since the County's requirement imposes a longer retention period than does the HMR, five years instead of three years, and it applies to intermediate rail transporters, which are exempt from this type of record retention under the HMR, the County's requirement is preempted under the ''substantively the same as'' test to the extent that the requirement differs from the HMR (and EPA) requirements for hazardous waste manifest retention.

Section 27–439(g)(1) requires that hazardous waste transporters maintain for three years waste manifests, bills of lading, or other equivalent manifesting for all hazardous material, sludge, and biomedical waste disposal. This regulation is ''substantively the same as'' the Federal requirements for motor vehicle transporters and, therefore, is not preempted. However, this section is not ''substantively the same'' as the HMR requirements for record retention by intermediate rail transporters and, therefore, is preempted as it relates to intermediate rail transporters.

D. Standards for Packaging

1. County Requirement

The County requirement provides that:

[a]ll waste transport vehicles shall be designed to effectively contain any release of discarded hazardous material, sludge, or biomedical waste during transportation. Routine maintenance to ensure the integrity of transport vehicles shall be performed by the owner or operator. Revised Ordinance 27–439(e)(2).

2. Comments

ATA/AWHMT opposes the County's requirement for packaging standards on the basis that DOT-required packagings are intended to effectively contain releases of hazardous materials during transport. ATA/AWHMT argues that the County cannot be allowed to impose packaging standards on vehicles because it believes DOT-required packagings may fail.

ATA/AWHMT contends that it is unclear how the standards will apply to packagings mounted on vehicles, such as cargo tanks, because they are equipped with pressure relief valves. In addition, ATA/AWHMT argues that the County's requirement virtually eliminates the use of flatbed trailers and other vehicles that cannot be sealed for transportation. ATA/AWHMT asserts that the requirement implies that a standard trailer design is unacceptable and vehicle modifications are necessary to use trailers for hazardous waste shipments. Finally, ATA/AWHMT states that, since there is no equivalent regulation for carriers of virgin hazardous material, the County is unfairly burdening waste hazardous materials transporters.

The County states that it deleted the reference to the term ''product-tight'' in the revised Ordinance to be consistent with DOT's packagings standards. The County contends that its revised

regulation is now consistent with DOT's requirements for packaging standards.

3. Decision

Federal hazardous material transportation law preempts a non-Federal requirement on ''the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material'' that is not ''substantively the same as'' the HMR. 49 U.S.C. 5125(b)(1)(E). The HMR contain specific packaging requirements for various types of hazardous materials packagings. *See generally*, 49 CFR Parts 173, 178, 179 and 180. These provisions prescribe specific design, manufacturing and testing requirements for the hazardous material packagings.

On its face, the County's requirement appears to be more general than the specification packaging requirements contained in the HMR and, therefore, is not ''substantively the same as'' the Federal requirements. However, there is no information that the County is applying or enforcing its requirement in a manner that conflicts with packaging provisions contained in HMR.

ATA/AWHMT raises the issue of whether certain vehicles, such as DOT-authorized cargo tanks, flatbed trailers and other vehicles that cannot be sealed for transportation, would meet the County's standard. However, ATA/AWHMT has not provided any evidence that the County has applied or enforced its packaging standard in 27–439(e)(2) to deny a license to cargo tank motor vehicles, flatbed trailers, or any other type of vehicle that cannot be sealed for transportation. RSPA has developed standards for the design, manufacturing, and fabrication of specific types of packages, such as cargo tanks. If the County's requirement, as applied or enforced, differs from RSPA's regulations, then the County's requirement will be preempted under the ''substantively the same as'' test.

Additionally, ATA/AWHMT initially argued that the County keys its requirements to ''vehicles,'' which suggests that vehicles not authorized as packagings, such as trailers, must meet packaging standards. Again, ATA/AWHMT has not provided any evidence that the County's packaging standards have been applied to vehicles that are not packagings. Since there does not appear to be an actual controversy over this issue, RSPA will not address this issue at this time.

Finally, ATA/AWHMT claims that the County's regulation imposes an unfair burden on hazardous waste transporters because it applies only to them and not to carriers of virgin hazardous materials. Again, RSPA does not have sufficient evidence on how this regulation is applied and enforced to determine if any actual burden exists. However, RSPA has previously determined that a State or locality may regulate hazardous materials in a manner that is consistent with the HMR even if it does not reach as broadly as the HMR.[9]

E. Periodic Vehicle Inspection Requirements

1. County Requirement

The County's vehicle inspection requirement provides that:

[t]he owner or operator shall, upon request of DPEP, provide to DPEP the licensed vehicle for inspection for compliance with the provision of this section at any reasonable time, interval, or location. Revised Ordinance 27–439(e)(3).

2. Comments

In its revised application, ATA/AWHMT states that it understands that the County now waives the vehicle inspection requirement at § 27–439(e)(3) when a motor carrier supplies proof of compliance with the Federal periodic inspection provision at 49 CFR § 396.17 and 49 CFR part 180. Assuming that is so, ATA/AWHMT withdraws its objection to the requirement. However, ATA/AWHMT states that it continues to oppose multiple vehicle inspection requirements. AAR continues to object to the revised Ordinance as it is written. Although AAR does not believe that rail cars are considered ''vehicles'' under the statute, it contends that the regulation should be preempted for the reasons presented in AWHMT's original application.

The County states in its comments that Article XVII no longer requires vehicle inspections prior to utilizing a vehicle for waste transportation.

3. Decision

This issue appears to be moot. The County states that it no longer requires inspections prior to using a vehicle for waste transportation. The applicant and commenters provide no evidence or information to the contrary. Additionally, ATA/AWHMT states that it understands the County now waives the inspection requirements when a carrier demonstrates compliance with 49 CFR § 396.17 and Part 180. Since there is no information or evidence that the County requirement is being applied or enforced, a preemption determination concerning this requirement is not appropriate at this time. If, in the future, there is evidence that the County has begun applying or enforcing this requirement, then interested parties may request a preemption determination.

F. Vehicle Marking Requirements

1. County Requirement

The County's marking requirement in § 27–439(e)(4) provides that:

[t]he owner or operator shall obtain an identification tag from DPEP prior to utilizing a vehicle for hauling discarded hazardous material, sludge, or biomedical waste. The identification tag must be clearly displayed on the rear of the hauling vehicle at all times. If the tag is lost or destroyed, the owner or operator must apply for a new tag accompanied by the appropriate replacement fee. This section does not apply to vehicles which solely transport hazardous waste.

2. Comments

ATA/AWHMT did not challenge the County's marking requirement in its revised application. AAR asserts that the County's marking requirement should be preempted because it is not ''substantively the same as'' the Federal marking requirements. However, AAR does not identify the allegedly different Federal requirements.

HMAC and Freehold Cartage initially challenged the County's requirement. Both organizations raised a concern about the regulation's applicability to a tank truck containing certain materials in the ''heel'' of the truck. HMAC and Freehold Cartage pointed out that the County requirement pertains to vehicles used to transport discarded hazardous waste, which the County defines as products which have served their original intended purpose and are in the process of being rejected, disposed of or recycled. HMAC and Freehold Cartage argued that ''the 'heel' in a tank truck that has unloaded its cargo and is returning to the chemical plant or proceeding to a cleaning facility for processing the residue could be considered a 'discarded hazardous waste' and the vehicle required to display a County identification tag.'' Both organizations contended that this would be unreasonable and impractical. However, neither organization reiterated this objection to the revised Ordinance. The County did not address its vehicle marking requirement in its comments.

3. Decision

Federal hazardous material transportation law preempts a non-Federal requirement on the ''design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container

[9] For a historical discussion of this issue *see* PD–13, Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases, Decision on Petition for Reconsideration (publication pending).

represented, marked, certified, or sold as qualified for use in transportation hazardous material'' that is not ''substantively the same as'' the HMR. 49 U.S.C. § 5125(b)(1)(E). The issue here is whether the marking requirement at issue is designed to represent that a packaging or container is qualified for use in transporting hazardous material or whether it is intended to certify that the vehicle itself has passed inspection.

RSPA held in PD–13 that a permit sticker placed on a vehicle, rather than on a cargo tank, is not a hazardous materials marking and is not preempted in the absence of information that the sticker is an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR. Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases, 63 FR 45283, 45287 (Aug. 25, 1998). Nassau County, New York, was not a ''marking'' of hazardous material as contemplated in 49 U.S.C. 5125(b)(1)(B), as the applicant had claimed. RSPA reiterated this position in its decision on reconsideration. PD–13 (Nassau County), above, n.7.

RSPA reaches a similar conclusion in this case. According to the information provided with AWHMT's initial application, the identification tag is a license identification tag that is required for haulers of biomedical waste, discarded hazardous material or sludge. *See* Attachment E to AWHMT's initial application. The identification tag must be displayed on the rear of the vehicle. *Id.* Based on the limited information provided, it appears that the County is not attempting to identify the contents of, or qualify the hazardous materials packaging, but rather the transport vehicle. Thus, the identification tag at issue does not appear to be a ''marking'' as contemplated in 49 U.S.C. 5125(b)(1)(E) and therefore is not subject to the ''substantively the same as'' test.

Anticipating this outcome, AWHMT, in a subsequent letter, requested that RSPA evaluate the County's requirement under the ''obstacle'' test if RSPA determined that the ''substantively the same as'' test did not apply. RSPA has made this analysis and has determined that the County's marking requirement does not create an obstacle to carrying out Federal hazardous material transportation law or the HMR. As in PD–13, the applicant and industry commenters have not provided evidence that the requirement to obtain and display the required identification tag creates any obstacle. AWHMT argued that RSPA ''has to anticipate that without restraint more and more non-federal entities will require such marking turning vehicles into bulletin boards and drawing attention away from the most important marking—namely that which is required by DOT.'' RSPA does not find this argument a sufficient basis for justifying preemption. Therefore, based on the evidence submitted, RSPA determines that there is insufficient information to find that the Federal hazardous material transportation law preempts the County's marking requirement in § 27–439(e)(4).

G. Fee Requirements

1. County Requirement

Section 27–439(a) the revised Ordinance requires that ''[u]nless otherwise exempted by this article, prior to any person transporting to, from, and within Broward County any discarded hazardous material, sludge, or biomedical waste, that person shall first obtain a waste transporter license.'' Section 27–439(b) provides, in part, that ''[a]pplications [for a waste transporter license] shall be accompanied by required fee(s) as established by the Board in Chapter 41 of the Broward County Code of Ordinances, as amended.'' AWHMT stated that the current fee is $175 annually per vehicle for all applicants.

2. Comments

In its original application, AWHMT argued that the County's fee structure was inherently ''unfair'' and should be preempted under the ''obstacle'' test in 49 U.S.C. 5125(a)(2). AWHMT stated that the County's per-vehicle fee was flat and unapportioned and pointed out that the *American Trucking Ass'ns* v. *Scheiner,* 483 U.S. 266, 97 S. Ct 2829 (1987), the Supreme Court held that flat and unapportioned fees violated the Commerce Clause ''internal consistency'' test and were therefore unconstitutional. In addition, AWHMT asserted that because they are unapportioned, flat fees could not be considered to be ''fairly related'' to a fee-payer's level of presence or activity in the fee-assessing jurisdiction. *Id.* AWHMT cited several subsequent court decisions that relied on these holdings to invalidate hazardous materials flat fees and taxes.

AWHMT also argued that a flat fee structure violates Federal hazardous materials transportation law, because some motor carriers would not be able to afford multiple flat fees and would be excluded from operating in some jurisdictions. AWHMT provided affidavits from carriers that claimed to have limited their operations in Broward County because of the per-vehicle fees. AWHMT argues that if the County's fee scheme is allowed, similar fees must be allowed in the other 30,000 non-federal jurisdictions. AWHMT stated that ''[t]he cumulative effect of such outcome would be not only a general undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation and attendant, unnecessary handling of hazardous materials as these materials are transferred from one company to another at jurisdictional borders.''

Finally, AWHMT argued that the County was unfairly burdening motor carriers of hazardous waste. AWHMT stated that it had reviewed the hazardous materials incident reports filed with DOT from 1992 to 1996 and found that none of the reports involved hazardous waste releases. AWHMT indicated that there were, however, 160 non-waste hazardous materials incidents reported. AWHMT stated that 21 percent of these incidents resulted from shipments traveling through the County. Of these shipments, 12 involved air transportation and two involved rail transportation. Thus, AWHMT asserted that the regulation and fee burdens placed on hazardous waste motor carriers were not supported by the risks to the County.

In its revised application, ATA/AWHMT continues to challenge the County's licensing fees requirement for hazardous waste transporters. ATA/AWHMT contends that ''the County's per-vehicle, flat, annual fee is not 'fair' within the meaning of 49 U.S.C. 5125(g)(1) because it is unapportioned and thus not based on some fair approximation of use of the services provided by the County and should be preempted.'' In addition, ATA/AWHMT states that the County still has not provided information about how it uses the fee. ATA/AWHMT reiterates its request that the County provide an account of the fee usage and it reserves the right to challenge the County's fee system under the ''used for'' test once the County provides this information.

The County states that its fee structure for a hazardous waste transporter license is currently being revised. The County anticipates that the revised fees will be based on ''use of service.''

3. Decision

Federal hazardous materials transportation law provides that ''A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and

planning, developing, and maintaining a capability for emergency response.'' 49 U.S.C. 5125(g)(1).

a. *Fairness test.* In PD–21, RSPA held that an annual remedial action fee that transporters must pay to pick up or deliver hazardous waste within the State is preempted as not ''fair'' when (1) it is the same for both interstate and intrastate transporters and has no approximation to the transporter's use of roads or other facilities within the State and (2) genuine administrative burdens do not prevent the application of a more finely graduated user fee. Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, above. In that case, Tennessee imposed a $650 annual remedial action fee on hazardous waste transporters picking up or delivering in Tennessee, regardless of whether they were intrastate or interstate transporters. RSPA determined that Tennessee's remedial action fee was not fair under 49 U.S.C. 5125(g)(1), and therefore was preempted, because the fee was not based on some fair approximation of the use of facilities and it discriminated against interstate commerce. *Id.* at 54478 RSPA noted that ''it is not simply a potential for multiple fees, but the lack of any relationship between the fees paid and the respective benefits received by interstate and intrastate carriers, that establishes discrimination against interstate commerce.'' *Id.*

The present case presents a similar situation. As mentioned previously, the County requires that any person transporting discarded hazardous material, sludge or biomedical waste ''to, from and within'' the County must obtain a waste transporter license. The fee for obtaining the waste transport license apparently is the same for every transporter. Thus, the County's fee is not fair as contemplated in 49 U.S.C. 5125(g)(1) because it is not based on some fair approximation of use of facilities and because it discriminates against interstate commerce. Therefore, the County's fee requirement in 27–439(b) is preempted. The County states that it anticipates its revised fee structure will be based on the use of service. However, that is not currently the case, and the existing regulation is preempted.

b. *''Used for'' test.* As previously mentioned, Federal hazardous material transportation law requires that a State, local or Indian tribe fee related to hazardous material transportation must be used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. 49 U.S.C. 5125(g)(1). ATA/AWHMT stated that it has asked the County on several occasions to provide an explanation of how it used the fee at issue, but the County never responded. However, AWHMT did allege in a previous letter that the County used the fee as ''reimburse[ment] * * * for a variety of administrative and other unidentified costs related to its general regulation of hazardous materials transporters.'' The County has not provided any evidence of how it uses the waste transporter licensing fees that it collects. In the absence of any evidence from the County on this issue, RSPA cannot find that the fees are used for purposes related to hazardous materials transportation, and therefore the County's fee requirement is preempted under the ''used for'' test.

c. *''Obstacle'' test.* Because the County's requirement fails the fairness and ''used for'' tests in 49 U.S.C. § 5125(g)(1), it creates an obstacle to carrying out the Federal hazardous materials transportation law and thus fails the ''obstacle'' test in 49 U.S.C. § 5125(a)(2).

H. Reporting Requirements

1. County Requirement

The County requirement in § 27–439(g)(2) requires that the owner or operator:

[s]ubmit a monthly report to DPEP no later than the fifteenth (15) day of the succeeding month. If no waste is transported during the reporting month, the owner or operator shall send in a report stating such.

The report shall include:

a. The waste transporter name and license number;

b. The month covered by the report;

c. The total quantity of material picked up by type;

d. The total quantity of material delivered, by type, to a licensed disposal facility and identify the disposal location(s); and

e. In addition to the requirements specified in a. through d. above, waste transporters which solely transport hazardous waste shall include in the monthly report the generator's name and address, type and quantity of waste, and the date the waste was collected.

2. Comments

ATA/AWHMT contends that the County's monthly reporting requirement should be preempted under the ''obstacle'' test because it presents an obstacle to the safe and efficient transportation of hazardous materials. ATA/AWHMT cites the legislative history of Federal hazardous materials transportation law and the holding in *Colorado Pub. Util. Comm'n* v. *Harmon,* above, as justification for its claim. Furthermore, ATA/AWHMT points out that, with the exception of one item (the monthly totals), all of the information required in the report can be obtained from the Uniform Hazardous Waste Manifest.

The County asserts that it requires monthly reports so that it can better track the transportation and disposal activities in the County. In addition, the County states that it will use the information from the reports to assess license fees.

3. Decision

Under the ''obstacle'' test, a non-Federal requirement, as applied or enforced, is preempted if it creates an obstacle to accomplishing and carrying out Federal hazardous materials law or regulations. 49 U.S.C. 5125(a)(2). RSPA and the courts have held numerous times that requirements for information or documentation in excess of Federal requirements create potential delay, constitute an obstacle to execution of the Federal hazardous materials law and the HMR, and thus are preempted.[10] There is no *de minimis* exception to the ''obstacle'' test because thousands of jurisdictions could impose *de minimis* information requirements. IR–8(A), Decision on Appeal; State of Michigan Rules and Regulations Affecting Radioactive Materials Transportation, 52 FR 13000, 13004 (Apr. 20, 1987).

The Court of Appeals held in *Colorado Pub. Utilities Comm'n* v. *Harmon,* above, that:

[t]he Secretary's regulations contain hundreds of information and documentation requirements, all of which have been established by the Secretary to ensure the health and safety of citizens in every jurisdiction. Congress specifically found that additional documentation and information requirements in one jurisdiction create 'unreasonable hazards in other jurisdictions' and could confound 'shippers and carriers which attempt to comply with multiple and conflicting regulations.' [Pub. L. 101–615 § 2, formerly 49 U.S.C. app. § 1801].* * * In addition to obstructing Congress' objective that safety be achieved through uniformity, the expense of burdensome documentation and information requirements also is contrary to Congress' intent that regulation of hazardous materials be as cost-effective as possible. (951 F.2d at 1581).

As ATA/AWHMT points out, the County can get all of the information,

[10] *See* IR–2 (Rhode Island), above; IR–6 (Covington), above; IR–8, State of Michigan; Radioactive Materials Transportation Regulations of the State Fire Safety Board and the Department of Public Health, 49 FR 46637 (Nov. 27, 1984); IR–8(A) (Michigan), above; IR–15, State of Vermont; Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste, 49 FR 46660 (Nov. 27, 1984); IR–15(A), State of Vermont; Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste, Decision on Appeal, 52 FR 13062 (Apr. 20, 1987); IR–18 (Prince Georges County, MD, above; IR–18(A) (Prince Georges County, MD), above; IR–19 (Nevada), above; IR–19(A) (Nevada), above); IR–21 (Connecticut) above; IR–26 California DMV), above; IR–27, Colorado Regulations on Transportation of Radioactive Materials, 54 FR 16326 (Apr. 21, 1989), correction, 54 FR 20001 (May 9, 1989); IR–28 (San Jose), above; IR–30 (Oakland), above; *Chem-Nuclear Systems, Inc.* v. *City of Missoula,* No. 80–18–M (D. Mont. 1984); *Southern Pac. Transport. Co.* v. *Public Serv. Comm'n of Nevada,* 909 F.2d 352 (9th Cir. 1990), *reversing* No. CV–N–86–444–BRT (D. Nev. 1988); *Colorado Pub. Utilities Comm'n* v. *Harmon,* above, *reversing* No. 88–Z–1524 (D. Colo. 1989).

except for the monthly totals, from the Uniform Hazardous Waste Manifest. To require a transporter to provide all of the information again could create the type of confusion and lack of cost-effectiveness contemplated in the *Harmon* case discussed above. Therefore, the County's monthly reporting requirement under § 27–439(g)(2) is preempted under the ''obstacle'' test because it is in excess of the Federal requirements.

IV. Ruling

Federal hazardous materials transportation law preempts the following Broward County Code of Ordinances:

• Portions of Ordinances 27–352 and 27–436 containing hazardous material definitions. The definitions of biomedical waste, combustible liquid, discarded hazardous materials, flammable liquid, hazardous materials and sludge are preempted to the extent that they relate to transportation in commerce. In addition, all County hazardous materials transportation requirements that rely on these definitions are also preempted.

• Portions of Ordinances 27–355(a)(1) and 27–439(b)(1) containing release reporting requirements. The written notification requirements of these sections are preempted to the extent that they relate to transportation in commerce. The oral notification requirements of these sections are not preempted, as discussed below.

• Ordinance 27–356(b)(4)d.1 containing shipping paper retention requirements. The shipping paper requirements in this section are preempted to the extent that they differ from HMR or EPA requirements for shipping paper and waste manifest retention.

• Ordinance 27–439(b) containing a fee requirement for obtaining a waste transport license.

• Ordinance 27–439(g)(2) containing monthly reporting requirements. The reporting requirements in this section are preempted to the extent that they relate to transportation in commerce.

Federal hazardous materials transportation law does not preempt the following Broward County Code of Ordinances:

• Portions of Ordinance 27–355(a)(1) and 27–439(f)(1) containing release reporting requirements. The oral notification requirements of these sections are not preempted. However, as discussed above, the written notification requirement sections are preempted to the extent that they relate to transportation in commerce.

• Ordinance 27–439(g)(1) containing shipping paper retention requirements for motor vehicle waste transporters. However, this requirement is preempted to the extent that it applies to intermediate rail transporters.

• Ordinance 27–439(e)(2) containing standards for waste transport vehicles.

• Ordinance 27–439(e)(3) containing vehicle inspection requirements.

• Ordinance 27–439(e)(4) containing vehicle marking requirements.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register.** Any party to this proceeding may seek review of RSPA's decision ''in any appropriate district court of the United States * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after publication in the **Federal Register** 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 of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register,** the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, DC on December 20, 2000.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

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