



U.S. Department  
of Transportation

**Pipeline and Hazardous  
Materials Safety Administration**

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MAY 9 2007

Mr. Michael Ritchie  
Hazardous Materials Specialist  
Minnesota Department of Transportation  
Office of Freight and Commercial Motor Vehicle Operations  
Transportation Building, M.S. 460  
395 John Ireland Blvd.  
St. Paul, MN 55155

Dear Mr. Ritchie:

This responds to your inquiries about the Hazardous Waste Management Ordinance of Washington County, Minnesota (Ordinance No. 166) as applied to transporters of hazardous waste. Based on the information you forwarded from a Washington County official, it appears that Ordinance No. 166 applies to transporters who maintain a "transfer facility" within the County where hazardous wastes are stored on or off a vehicle for more than 24 hours (but less than 10 days). The County also indicates it does not apply Ordinance No. 166 to transporters who do not have a "home base" within the County and only stop at rest stops or truck stops within the County.

According to the documents you provided, including a copy of Ordinance No. 166, a hazardous waste transporter must obtain an annual permit or license for its transfer facility, and the permit application form must be accompanied by:

-A "Closure Cost Worksheet" on the basis of which the County will notify the applicant of the required amount to be placed in a bond or letter of credit (in favor of the County) to cover the estimated costs of (1) disposing of the maximum amount of hazardous waste that will be at the facility at any one time; (2) decontaminating the facility or disposing of equipment that cannot be decontaminated; (3) performing any other activities to assure the facility does not pose a threat to human health or the environment; and (4) an additional 30% to cover unanticipated costs that the County might occur.

-Proof of insurance with specified minimum coverage for (1) general liability for death, bodily injury, and property damage; (2) environmental impairment liability,

including remediation and cleanup; (3) automobile liability; (4) workers compensation, and (5) commercial truckers insurance with endorsements for cargo pollution coverage and a "BUYBACK endorsement that deletes the exclusion caused by cargo as respects bodily injury and property damage."

-Payment of the application fee and annual license fee.

In your November 3, 2005 email, you indicated that a hazardous waste transporter with a facility in Washington County had raised concerns whether the requirement in Ordinance No. 166 for a facility permit is consistent with the Interstate Commerce Clause of the Constitution and the preemption provisions in the Federal Hazardous Material Transportation Law, 49 U.S.C. § 5101 *et seq.* You have also advised that the County is interested in clarifying this matter without formal administrative or judicial proceedings.

I believe all the parties understand that the Department of Transportation does not have sufficient resources to conduct thorough reviews of State and local requirements outside of the preemption determination process set forth in 49 C.F.R. parts 107 (subpart C, beginning at § 107.201) and 397 (subpart E, beginning at § 397.201). Informal reviews are also hindered by the absence of public input that we receive under the formal determination process established in 49 U.S.C. § 5125(d)(1). Nonetheless, at your request, this letter discusses prior administrative and judicial decisions that appear relevant to the transfer facility permit requirements in Ordinance No. 166. I also refer you to the most recent index and summary of administrative determinations and court decisions on hazardous materials preemption at our website: <http://phmsa-atty.dot.gov> (click on "Preemption" and then "Preemption of State and Local Laws").

The criteria for preemption of non-Federal requirements concerning the transportation of hazardous materials are set forth in 49 U.S.C. § 5125. In summary, a non-Federal requirement is preempted (unless it is specifically authorized by another Federal law) when:

- a. It is not possible to comply with both the non-Federal requirement and the Federal hazardous material transportation law, the regulations issued under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (DHS).
- b. The non-Federal requirement is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law, the regulations issued under that law, or a DHS hazardous materials transportation security regulation or directive.
- c. The non-Federal requirement concerns any of five subjects and is not "substantively the same as" a provision in the Federal hazardous material transportation law, the regulations issued under that law, or a DHS hazardous materials transportation security regulation or directive.

- d. A non-Federal highway routing requirement does not comply with regulations of the Federal Motor Carrier Safety Administration in 49 C.F.R. part 397 (subparts D and E).
- e. A fee related to the transportation of hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material (including enforcement and planning, developing, and maintaining a capability for emergency response).

PHMSA and its predecessor agency, the Research and Special Programs Administration (RSPA), have consistently found that the Federal hazardous material transportation law and the regulations issued under that law apply to a transporter's temporary storage of hazardous materials, including hazardous wastes, during transportation. *See* 49 C.F.R. § 171.1(c)(4) and, for example, Inconsistency Ruling No. 28, San Jose, California Restrictions on Storage of Hazardous Materials, 55 Fed. Reg. 8884, 8889 (Mar. 8, 1990), appeal dismissed as moot, 57 Fed. Reg. 41165 (Sept. 9, 1992); Preemption Determination (PD) No. 12(R), New York Dep't of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation, 60 Fed. Reg. 62527 (Dec. 6, 1995), decision on petition for reconsideration, 62 Fed. Reg. 15970 (Apr. 3, 1997), *aff'd*, New York v. U.S. Dep't of Transp., 37 F. Supp. 2d 152 (N.D.N.Y. 1999); PD-30(R), Houston, TX Requirements on Storage of Hazardous Materials During Transportation, 71 Fed. Reg. 9413, 9414 (Feb. 23, 2006).

State requirements for a financial bond were considered in PD-1(R), Maryland, Massachusetts, and Pennsylvania Bonding Requirements for Vehicles Carrying Hazardous Wastes, 57 Fed. Reg. 58848 (Dec. 11, 1992), decision on petition for reconsideration, 58 Fed. Reg. 32418 (June 9, 1993), *rev'd*, Massachusetts v. U.S. Dep't of Transp., 93 F.3d 890 (D.C. Cir. 1996). In that case, the United States Court of Appeals for the District of Columbia held that State bonding requirements are not preempted by the Federal hazardous material transportation law "[i]n the absence of federal requirements in this area of bonding requirements." 93 F.3d at 892. The Court distinguished "the bonding requirement from other forms of liability insurance requirements." *Id.*

In its initial decision in PD-1(R), RSPA discussed insurance and indemnification requirements which had been considered in earlier inconsistency rulings. In those decisions, RSPA found that the insurance levels required by the Federal Motor Carrier Safety Regulations (49 C.F.R. part 387) and the Price-Anderson Act (42 U.S.C. § 2210, with respect to radioactive materials) contain the applicable requirements for carriers of hazardous materials to carry insurance (or self-insure), and State or local requirements for additional coverage are preempted. *See* 57 Fed. Reg. at 58853-54.

Issues concerning annual fees were considered in PD-21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 Fed. Reg. 54474 (Oct. 6, 1999), affirmed, Tennessee v. U.S. Dep't of Transp., 326 F.3d 729 (6<sup>th</sup> Cir. 2003). In that proceeding, RSPA found that Federal hazardous material transportation law preempts a State's "remedial action fee" because the flat annual fee "is not based on some fair approximation of the use of facilities and discriminates against interstate commerce," 64 Fed. Reg. at 54478, and the

State had failed to show that the fees collected from transporters were being spent only for purposes related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. *Id.* at 54479. However, in PD-22(R), New Mexico Requirements for the Transportation of Liquefied Petroleum Gas, 67 Fed. Reg. 59397, 59404 (Sept. 20, 2002), decision on petition for reconsideration, 68 Fed. Reg. 55080, 55084 (Sept. 22, 2003), RSPA distinguished an annual licensing fee, which was not related to the amount of the carrier's activity within the State, from an inspection fee which "appears to be related, in some manner, to the work involved in performing the inspection required."

DOT's preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution unless it is necessary to determine whether a fee is "fair" within the meaning of 49 U.S.C. § 5125(f)(1). *See, e.g.*, PD-30(R), 71 Fed. Reg. at 9415. Therefore, I have not attempted to analyze whether Ordinance No. 166 conflicts with the Commerce Clause.

In summary, with respect to the transfer facility permit requirement in Ordinance No. 166, agency precedent supports the following conclusions:

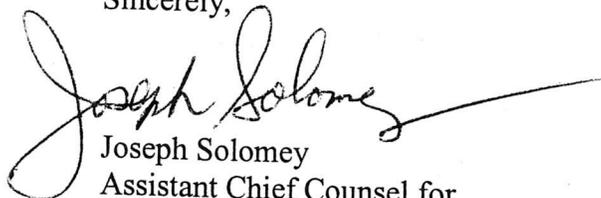
--Federal hazardous material transportation law does not preempt the requirement to submit a "Closure Cost Worksheet" and, thereafter, post a bond or letter of credit (in favor of the County).

--To the extent that the required insurance exceeds the scope or amount of insurance or indemnity coverage required under 49 C.F.R. part 387, the requirement to provide proof of such insurance is preempted under 49 U.S.C. § 5125(a)(2).

--To the extent that the annual license fee is not related to the transporter's level of activity with the County; the initial application fee is not related to the work involved in processing the transporter's application and issuing a transporter facility permit; or the fees collected are not used for purposes related to the transportation of hazardous material, these fees are preempted under 49 U.S.C. § 5125(f)(1).

I hope this information is helpful. If you have further questions, you may contact me or Frazer Hilder of my staff at the above address, by telephone at 202-366-4400, or by fax to 202-366-7041.

Sincerely,



Joseph Solomey  
Assistant Chief Counsel for  
Hazardous Materials Safety Law