NEW SPECIAL PERMITS—Continued

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14801–N	.....	CVS Transportation, L.L.C., Woon-socket, RI.	49 CFR 171.8 Materials of Trade.	To authorize the transportation in commerce of certain hazardous materials as Materials of Trade when transported by a dedicated contract carrier and meet all the provisions of 49 CFR 173.6. (mode 1)
14802–N	.....	Sporting Arms and Ammunition Manufacturers' Institute, Inc. Newtown, CT.	49 CFR 173.6	To authorize the transportation in commerce of certain Division 1.4S explosives under the Materials of Trade exception in 49 CFR 173.6. (mode 1)

[FR Doc. E9–1176 Filed 1–22–09; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. RSPA–00–8026 (PD–26(R))]

Massachusetts' Definitions of Hazardous Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

Applicant: Boston and Maine Corporation (Boston and Maine).

Local Laws Affected: Massachusetts General Laws (M.G.L.) chapter 21 E, section 2 (ch. 21 E); and chapter 21 K, section 1 (ch. 21 K).

Applicable Federal Requirements: The Federal Hazardous Material Transportation Law (Federal Hazmat Law), 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180.

Modes Affected: Rail and Highway.

SUMMARY: The Federal Hazmat Law does not preempt the definitions of ''hazardous material'' in M.G.L. chs. 21 E and 21 K. As applied and enforced, the challenged provisions of Massachusetts' laws are not an ''obstacle'' to accomplishing and carrying out the Federal Hazmat Law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security. Because a regulated entity may comply with the State and Federal requirements at the same time the Massachusetts' laws are not preempted under the ''dual compliance'' test. These definitions and State requirements also do not concern any of the five subject areas in which State Authority is expressly preempted by the Federal Hazmat Law, and State enforcement of these laws does not otherwise frustrate Congressional intent.

FOR FURTHER INFORMATION CONTACT: Thomas D. Seymour, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, (202) 366–4400, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room E26–322, Washington, DC 20590; e-mail: *tom.seymour@dot.gov*.

SUPPLEMENTARY INFORMATION:

I. Issues Under Consideration

In this determination, PHMSA considers the definitions of ''hazardous material'' as contained in M.G.L. chs. 21 E and 21 K. Chapter 21 E and entitled ''Massachusetts Oil and Hazardous Materials Release Prevention and Response Act'' to be parallel with the Federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 *et seq.* (''CERCLA'' or ''Superfund law''). Chapter 21 K, ''Mitigation of Hazardous Materials,'' governs the State's emergency mitigation response to a release, or threat of release, of materials determined by the state to pose a risk of contamination to the local environment. This statute authorizes the Massachusetts Department of Fire Services to deploy personnel and equipment for emergency mitigation response caused by a release, or threat of release, of materials determined to be a potential environment contaminant. Chapter 21 K also provides for the dispatch of trained personnel to evaluate a potential risk of contamination to the environment.

Both M.G.L. chs. 21 E and 21 K use the term ''hazardous material'' to refer to substances triggering the laws' requirements. Under Chapter 21 E a ''hazardous material'' is defined as:

> A material including but not limited to, any material, in whatever form, which because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment, when improperly stored, treated, transported, disposed of, used, or otherwise managed.

Chapter 21 K contains the same definition except that it expressly identifies ''oil'' as a hazardous material.

II. Background

A. Summary of Facts

On June 27, 1999, six railcars from a Boston and Maine train derailed in the Charlemont, MA area, causing an unidentified material to leak into the ground and nearby Deerfield River. The Charlemont Fire Department responded to the incident and, when it could not identify the material, called the Massachusetts Hazardous Material Response Team. When the Response team identified the material, and determined it did not pose a risk to the environment, the team abandoned further cleanup efforts and turned the scene over to Boston and Maine's personnel.

Massachusetts later presented an invoice to Boston and Maine for the cost of the response and the discontinued cleanup. Boston and Maine objected and sought relief through state administrative procedures. Subsequently, Boston and Maine filed a complaint in Massachusetts Superior Court for Middlesex County, alleging errors in law associated with the Massachusetts Department of Fire Services' assessment of the response costs. While the State civil action was pending, Boston and Maine filed the present request for an Administrative determination of preemption. (The petition was filed with the Research and Special Programs Administration (RSPA) the predecessor of the Pipeline and Hazardous Materials Safety Administration (PHMSA)). For ease of reading, this publication will refer to PHMSA in describing the agency's conduct during this proceeding.

B. Application for Preemption

Boston and Maine applied for a determination of preemption, contending the Federal Hazmat Law preempts the definitions of ''hazardous material'' contained in M.G.L. chs. 21 E and 21 K. Boston and Maine makes three arguments for preemption: (1) The definitions of ''hazardous material'' in the Massachusetts laws are not substantively the same as those in the Federal Hazmat Law; (2) the definitions pose an obstacle to the uniform regulation of transportation; and (3) by passing 49 U.S.C. 5125(b), Congress intended the Federal Hazmat Law to encompass all aspects of a response to a release or threat of release of a hazardous material while in transportation.

On November 16, 2000, PHMSA published a Notice in the **Federal Register** inviting interested parties to comment on the application (65 FR 69365). In response to requests from Massachusetts, and to give the parties an opportunity to research and analyze the issues, PHMSA twice extended the time for public comment (65 FR 79458 (Dec. 19, 2000), 66 FR 8845 (Feb. 2, 2001)).

C. Federal Preemption

In the absence of a waiver of preemption by DOT (49 U.S.C. 5125(e)) or a grant of specific authority in another Federal law, the Federal Hazmat Law preempts a requirement of a State, political subdivision of a State, or Indian tribe if:

(1) Complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security 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 this chapter or a regulation prescribed under this chapter or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (49 U.S.C. 5125(a)).

The two paragraphs in 49 U.S.C. 5125(a) set forth the ''dual compliance'' and ''obstacle'' tests. Prior to the 1990 codification of these two tests, PHMSA applied the tests when issuing inconsistency rulings under the original preemption provisions in the Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 112(a), 88 Stat. 2161 (1975)). The two tests evolved from U.S. Supreme Court decisions (See *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)).

PHMSA also has preemption authority under a ''substantively the same'' test (49 U.S.C. 5125(b)(1)). A non-Federal requirement concerning any of the subjects listed in 49 U.S.C. 5125(b)(1), which is not ''substantively the same as'' a provision of the Federal Hazmat Law or a regulation prescribed under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption. Section 5125(b)(1) of 49 U.S.C. lists the following categories:

(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; and

(E) 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.

These areas ''are critical both to the safe transportation of hazardous materials and the free flow of commerce,'' and any non-Federal law or requirement falling within one of these areas creates an obstacle if the non-Federal requirement is substantively different (PD–23 (RF); *Morrisville, PA, Requirements for Transportation of ''Dangerous Waste,'' Decision on Petition for Reconsideration*, 67 FR 2948, 2949 (Jan. 22, 2002), internal quotes omitted). The non-Federal requirement must ''conform in every significant respect to the Federal requirement to be considered substantively the same. Editorial and other similar *de minimis* changes are permitted'' (49 C.F.R. 107.202(d)).

The preemption provisions in 49 U.S.C. 5125 are intended to promote the safe movement of goods in interstate commerce by ''preclude[ing] 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)). When amending the HMTA in 1990, Congress specifically found:

(1) Many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(2) Because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(3) In order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable (Pub. L. 101–615, 2, 104 Stat. 3244).

Uniformity is the ''linchpin'' in the design of the HMTA, including the 1990 amendments expanding the original preemption provisions (*Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991)). (In 1994, Congress revised, codified, and enacted the HMTA ''without substantive change,'' at 49 U.S.C. Chapter 51 (Pub. L. 103–272, 108, Stat. 745)).

Any person directly affected by a non-Federal law or regulation may apply to the Secretary of Transportation for a determination whether a State, local or tribal requirement is preempted (49 U.S.C. 5125(d)(1)). The Secretary of Transportation delegated to PHMSA the authority to make determinations of preemption concerning hazardous materials transportation issues, except for issues concerning highway routing, which the Secretary delegated to the Federal Motor Carrier Safety Administration (49 CFR 1.53(b) and 1.73(d)(2)).

PHMSA Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution. Preemption determinations issued by PHMSA also do not address questions arising under other Federal statutes unless it becomes necessary to determine whether the requirement questioned in the preemption request is authorized or required by another Federal law.

In making preemption determinations, PHMSA is guided by the principles of Federalism and the policies set forth in Executive Order No. 13132 (64 FR 43255 (August 10, 1999)). PHMSA may preempt a State law only if a Federal 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. The Federal Hazmat Law contains an express preemption provision at section 5125, and PHMSA implemented this provision through its regulations.

PHMSA must publish a notice of an application for a preemption determination in the **Federal Register** (49 U.S.C. 5125(d)(1)). Following the receipt and consideration of written comments, PHMSA must publish its determination in the **Federal Register** (49 CFR 107.209(d) and 107.211(d)).

D. Summary of Comments to Application for Preemption

Nufarm, Inc (Nufarm), and the National Tank Truck Carriers, Inc. (NTTC) provided comments in support of Boston and Maine's application (RSPA–2000–8026–8 and RSPA–2000–8026–10 respectively). Nufarm and NTTC urge PHMSA to declare the Massachusetts provisions preempted on the ground that the definitions in question are not substantively the same as the definition found in the Federal Hazmat Law.

PHMSA received comments in opposition to Boston and Maine's application from: (1) The Massachusetts Attorney General (AG), on behalf of (a) The Commonwealth of Massachusetts, (b) Massachusetts Department of Fire Services, and (c) Department of Environmental Protection; (2) the State of New York (Department of Environmental Conservation and the Attorney General); (3) the Fire Chief for Devens, Massachusetts; (4) the Fire Chiefs' Association of Massachusetts, Inc.; (5) the State of Vermont; (6) the State of Connecticut; and (7) the Massachusetts Public Interest Group (MASSPRG).

The Massachusetts AG argues the intention of Congress in passing the Federal Hazmat Law was not to preempt the entire field of a State's emergency response necessitated by the threat of environmental contamination. Accordingly, the AG argues, the State laws in question do not frustrate, and are not an obstacle to, the accomplishment of the goals of the Federal Hazmat Law or the regulations promulgated thereunder.

Likewise, the AG asserts that PHMSA should not find that the Federal Hazmat Law preempts State requirements under the dual-compliance test, because a person may simultaneously comply with both the Federal and non-Federal laws and regulations. MASSPRG agrees with the Commonwealth's dual-compliance argument (RSPA–2000–8026–12).

In the alternative, the AG challenges the applicability of the preemption standards. The AG contends that the Federal Hazmat Law has no application to the subjects addressed in M.G.L. Chs. 21 E and 21 K, because once a release occurs, the materials are no longer in transportation (See also letters from MASSPRG, The State of New York (RSPA–2000–8026–14); Deven's Fire Chief (RSPA–2000–80226–15) and the Fire Chiefs' Association of Massachusetts (RSPA–2000–8026–16)).

Lastly, the AG argues preemption is not appropriate because other Federal laws, such as CERCLA and Superfund Amendments and Reauthorization Act (SARA), title III, require States to respond to releases of potentially hazardous materials or environmental contaminants. The existence of such laws, the AG argues, shows Congress did not intend for the Federal Hazmat Law to apply to emergency response situations.

III. Discussion

A. ''Substantively the Same'' Test

In the Federal Hazmat Law, Congress provided for express preemption of a non-Federal requirement ''about * * * the designation, description, and classification of hazardous materials'' not ''substantively the same'' as the provisions of Title 49, Chapter 51 of the United States Code (49 U.S.C. 5125(b)). In order to fully evaluate Boston and Maine's claim, PHMSA must look at the goals and objectives of the Federal Hazmat Law and the State laws in question. When reviewing the goals and objectives of these laws, PHMSA ''start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal [Hazmat Law] unless that was the clear and manifest purpose of Congress'' *Rice* v. *Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)*. Physical cleanup after a release of a material is traditionally a police power of the State (Inconsistency Ruling No. 2; *State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended To Be Used by a Public Utility* (44 FR 75566, 75568, Dec. 20, 1979)).

The purpose of the Federal Hazmat Law is to ''provide adequate protection against the risk to life and property inherent in the transportation of hazardous materials in commerce'' (49 U.S.C. 5103(b)). Massachusetts General Law ch. 21 K is intended to provide for the quick, efficient, and effective cleanup of releases of environmental contaminants and the evaluation of threats of releases of materials possibly posing a threat to the environment. It provides the mechanism by which the State or private individuals may seek recompense for the costs of response and cleanup caused by a release of certain materials into the environment. The focus of ch. 21 K is environmental protection, not the transportation of hazardous materials.

Massachusetts General Law ch. 21 E focuses on the State response to, and cleanup of, a release of environmental contaminants and, to that end, requires the identification of materials that may contaminate the local environment. This statute allows proper state authorities to determine which materials cause, or might cause, a contamination to the local environment if released. The Federal Hazmat Law requires the DOT to also identify materials that pose a risk to the environment. However, in contrast to the Massachusetts laws, the Federal Hazmat Law endeavors to ensure that materials are transported without release. With a primary focus on preventing a release, the Federal Hazmat Law serves a more limited environmental role after a release that necessitates a cleanup or mediation. For example, if a release of a hazardous material occurs during transportation, the Federal Hazmat Law, through the HMR, ensures that first responders receive adequate information concerning the materials listed in the HMR, and it also requires the reporting of release information to the appropriate authorities.

The Massachusetts laws do not directly or indirectly affect or conflict with the transportation of hazardous materials or with transportation in general. The State's use of the term ''hazardous material'' to describe materials that may contaminate the local environment does not bring it into conflict with Federal law and is not a basis for preemption.

Given the distinct purposes served by the Federal Hazmat Law and the State laws, the lack of direct or indirect effect or conflict between them, and the States' traditional police powers in matters involving environmental protection, the Massachusetts laws are not preempted under 49 U.S.C. 5125(b). Accordingly, we need not address the question of whether a material remains in transportation after a release has occurred.

B. Obstacle Test

In applying the ''obstacle'' test, we consider any and all requirements imposed by the HMR, including those governing packaging; the marking and labeling of packages; and the reporting of a release occurring during

transportation. We next consider whether the non-Federal requirement ''as applied and enforced'' stands in the way of compliance with, or enforcement of, the Federal Hazmat Law.

The State laws currently under consideration provide authority to respond to a release or threat of release of materials that Massachusetts found to pose a risk to the soil, water, or environment of Massachusetts. These laws also allow for the cleanup of contaminants and the recovery of the cleanup and response costs. No evidence in the record suggests that ch. 21 E or 21 K, as applied and enforced, interferes with accomplishing the packaging, marking, labeling, reporting, or any other provision of the HMR. Neither Boston and Maine, nor any commenter, has alleged or shown Massachusetts to be applying or enforcing either ch. 21 E or 21 K in a manner imposing different or additional requirements on a carrier, or any other persons subject to the HMR. Accordingly, M.G.L. chs. 21 E and 21 K are not preempted by the Federal Hazmat Law by operation of the ''obstacle'' test.

C. Dual Compliance Test

For similar reasons, we do not find M.G.L. chs. 21 E or 21 K preempted under the ''dual compliance'' test. Nothing in those laws, including the subject definitions, affects either: (1) The manner in which a shipper must package, label, or mark a hazardous material for transportation; (2) the duties of a carrier when it accepts a shipment of hazardous materials complying with the HMR; or (3) a carrier's obligation to report a release of a material determined by the Secretary of Transportation to be a ''hazardous material.'' Therefore, the facts presented in this matter show a person can simultaneously comply with the requirements of the Federal Hazmat Law and the State laws.

D. Intent of Congress

Finally, we consider the contention of Boston and Maine that the Massachusetts laws fall within a regulatory field that Congress intended would be exclusively reserved to PHMSA. We conclude to the contrary. On matters concerning the physical response and cleanup of contamination, Congress left room for States and localities to exercise their traditional authority.

PHMSA enters this field in limited respects, imposing certain requirements related to the release of designated hazardous materials in or in connection with transportation. Other Federal agencies regulate aspects of releases or threats of releases of hazardous materials and any other materials posing a risk to the environment. Congress granted the Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA) authority to regulate aspects of the response to a release or threat of release of hazardous materials. Furthermore, States have retained their traditional authority relating to the release or threat of release of materials occurring within State borders.

Under the Federal Hazmat Law, PHMSA promulgates regulations requiring a person offering hazardous materials for transportation to provide carriers with certain emergency response information to accompany the hazardous materials while in transportation. The mandatory information includes: (1) Information regarding the materials present in the shipment, (2) what hazards the materials may present, (3) how to treat the materials, (4) preliminary first aid measures, and (5) how to avoid risk of injury. This information is conveyed by the placarding of the transport vehicle, the marking and labeling of the packaging, and the content of shipping papers. PHMSA also regulates incident reporting and recording, prescribing when, how, and to whom reports must be made of hazardous materials releases occurring during transportation.

PHMSA has long recognized that the actual physical response and cleanup after a release of materials during transportation is a local responsibility. In Inconsistency Ruling No. 2; *State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended To Be Used by a Public Utility* (44 FR 75566, Dec. 20, 1979), PHMSA identified subjects as to which the need for national uniformity is so crucial and the scope of the HMTA (now Federal Hazmat Law) is so pervasive that State or local regulations would present obstacles to the HMTA. PHMSA also identified subjects as to which the Federal Hazmat Law and HMR did not (and still do not) apply. Specifically, PHMSA stated:

> Despite the dominant role that Congress contemplated for the Departmental standards, there are certain aspects of hazardous materials transportation that are not amenable to effective nationwide regulation. One example is safety hazards that are peculiar to a local area. * * * Another example is emergency response activity. 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 preparing, when an accident does occur, response is, of necessity, a local responsibility (44 FR at 75568).

The HMR also prescribe requirements for written notification, recording, and reporting after a release of a material the Secretary of Transportation has deemed poses ''an unreasonable risk to health and safety or property'' when the material is in transportation or in storage incidental to its movement in transportation. The Secretary of Transportation lists these materials in 49 CFR 172.101. Even as to those materials, the Federal Hazmat Law does not authorize PHMSA to regulate the cleanup, assessment, remediation, evaluation of releases of such materials, or to seek reimbursement for the costs caused by a release of such materials.

In short, in the area of response and cleanup of materials released during transportation, the Federal Hazmat Law does not provide PHMSA authority that ''is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it.'' Accordingly, we do not find that the Massachusetts laws regulate a field reserved to PHMSA by Federal law and are not otherwise persuaded that in adopting the Federal Hazmat Law, Congress intended to preempt laws such as the Massachusetts laws under consideration here.

V. Ruling

The Federal Hazmat Law does not preempt Massachusetts' definitions of hazardous materials contained in M.G.L., Ch. 21 E, section 2 and Ch. 21 K, section 1 because these definitions relate solely to environmental response and cleanup requirements. The State requirements as applied and enforced are not an obstacle to accomplishing and carrying any provision of the Federal Hazmat Law, the HMR, or a transportation security regulation or directive issued by the Secretary of Homeland Security and do not concern any of the five subject areas reserved to federal jurisdiction under 49 U.S.C. 5125(b) or 49 CFR 171.202(a).

VI. Petition for Reconsideration/ Judicial Review

This determination is a final agency action upon publication in the **Federal Register** (49 CFR 107.209(c), as amended at 71 FR 30067 [May 25, 2006]), except with respect to a person who files a timely petition for reconsideration. In accordance with 49 CFR 107.211(a) (as amended at 71 FR 30068 [May 25, 2006]), a person aggrieved by this determination may file a petition for reconsideration within 20 days of publication of this

determination in the **Federal Register**. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review under 49 U.S.C. 5127(a).

A person who is adversely affected or aggrieved by a preemption determination may file a petition for judicial review of that determination in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Issued in Washington, DC on this 15th day of January, 2009.

David E. Kunz,

Chief Counsel.

[FR Doc. E9–1419 Filed 1–22–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–99–3599 (PD–19(R))]

New York State Department of Environmental Conservation Requirements on Gasoline Transport Vehicles

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

Local Laws Affected: New York Codes, Rules and Regulations (NYCRR), Chapter 6, Sections 230.4(a)(3), 230.6(b) & (c).

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.

SUMMARY: Federal hazardous material transportation law does not preempt that part of 6 NYCRR 230.4(a)(3) requiring that a gasoline transport vehicle must be marked, near the U.S. DOT specification plate, with the date on which the tank was last tested for vapor tightness. Federal hazardous material transportation law preempts (1) the provisions in 6 NYCRR 230.4(a)(3) which require that the marking be a minimum two inches and contain ''NYS DEC''; (2) the requirement in 6 NYCRR 230.6(b) for maintaining a copy of the most recent pressure-vacuum test results with the gasoline transport vehicle; and (3) the requirement in 6 NYCRR 230.6(c) to retain pressure-vacuum test and repair results for two years, because these requirements are not substantively the same as requirements in the HMR on the marking, maintaining, repairing, or testing of a package or container that is represented, marked, certified, or sold as qualified for transporting hazardous material.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Background

A. Application

In this determination, PHMSA considers whether the Federal hazardous material transportation law preempts the following requirements of the New York State Department of Environmental Conservation (NYSDEC):

—Marking a gasoline transport vehicle, ''near with U.S. Department of Transportation certificate plate, in letters and numerals at least two inches high, which reads: NYS DEC and the date on which the gasoline transport vehicle was last tested'' for vapor tightness (6 NYCRR 230.4(a)(3));

—Maintaining a copy of the ''most recent pressure-vacuum test results * * * with the gasoline transport vehicle'' (6 NYCRR 230.6(b)); and

—Retaining test and repair records ''for two years after the testing occurred'' (6 NYCRR 230.6(c)).

In February 1998, the National Tank Truck Carriers, Inc. (NTTC) applied for a determination that the Federal hazardous materials transportation law preempts these marking and record keeping requirements. NTTC has not challenged the underlying requirement in 6 NYCRR 230.4(b) that gasoline transport vehicles undergo the annual pressure-vacuum test set forth in ''Reference method 27 in Appendix A of 40 CFR'' (EPA Method 27). NTTC also stated it has no quarrel with the requirement in 6 NYCRR 230.6(a) to ''maintain records of pressure-vacuum testing and repairs.''

In a notice published in the **Federal Register** on June 2, 1998 (63 FR 30032), the Research and Special Programs Administration (PHMSA's predecessor agency) [1] invited interested persons to submit comments on NTTC's application. In response to this notice, comments were submitted by NYSDEC; the environmental agencies of three other States (Connecticut, Delaware, and Pennsylvania); Region 2 of the U.S. Environmental Protection Agency (Region 2); and four industry associations: Association of American Railroads (AAR), Empire State Petroleum Association, Inc. (ESPA), National Propane Gas Association (NPGA), and Petroleum Marketers Association of America (PMAA). NYSDEC, NTTC, and AAR submitted rebuttal comments. PHMSA denied NYSDEC's request to formally extend or reopen the comment period, but advised NYSDEC that an interested person may always bring new developments or address a newly raised issue under the procedural regulations which provide that ''Late-filed comments are considered so far as practicable.'' 49 CFR 107.205(c).

In its application, NTTC stated that its members had received citations for violations of these requirements. ESPA confirmed that these requirements were being actively enforced and stated that, in January and February 1998, NYSDEC ''conducted separate enforcement details outside the ports of Albany and Rensselaer in upstate New York. Numerous citations were issued alleging the failure to post a mandated DEC label and the failure to keep a copy of the tank test results with the cargo tank or transport vehicle.''

PHMSA's decision on NTTC's application has been delayed in order for PHMSA to:

1. Consult with the U.S. Environmental Protection Agency (EPA) whether the NYSDEC marking and record keeping requirements are authorized by the Clean Air Act, 42 U.S.C. 7401 *et seq.*, EPA's December 1978 control technology guidance document ''Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems'' (EPA 1978 CTG), and Region 2's approval of New York's State Implementation Plan (SIP) (see 51 FR 21577 [June 13, 1986]), as contended by NYSDEC, the Connecticut, Delaware,

[1] Effective February 20, 2005, PHMSA was created to further the ''highest degree of safety in pipeline transportation and hazardous materials transportation,'' and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C. 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108–426, § 2, 118 Stat. 2423 (Nov. 30, 2004)); and 49 CFR 1.53(b), as amended at 70 FR 8301–02 (Feb. 18, 2005). For consistency, the terms ''PHMSA'' and ''we'' are used in the remainder of this determination, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.