

hazardous materials is necessary and desirable.

(5) 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.

P.L. 101-615, § 2, 104 Stat. 3244 (1990).

In order to promote consistency in laws and regulations governing the transportation of hazardous material, to achieve greater uniformity among those laws, and to promote the public health, welfare, and safety at all levels, Congress gave DOT the authority to preempt a requirement of a State, political subdivision of a State or Indian tribe where:

(1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law] is not possible; or

(2) The requirement of the State, political subdivision, or tribe, as applied and enforced, is an obstacle to accomplishing and carrying out [Federal hazmat law] or a regulation prescribed under [Federal hazmat law].

49 U.S.C. 5125.

The two paragraphs set forth the "dual compliance" and "obstacle" criteria that RSPA had applied in issuing inconsistency rulings (IRs) prior to the 1990 amendments to the HMTA. While advisory in nature, these IRs 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 pursuant to section 112(b) of the HMTA." Inconsistency Ruling (IR)-2, 44 FR 75566, 76657 (Dec. 20, 1979). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *E.g., Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Federal hazmat law also explicitly preempts:

A law, regulation, order or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects that is not substantively the same as a provision of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law]:

(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, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

49 U.S.C. 5125(b).

RSPA has defined "substantively the same" to mean "conforms in every significant respect to the Federal requirement. 57 FR 20424, 20428. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

The HMTA explicitly exempted from preemption those non-Federal requirements that were authorized by other Federal law. See 49 App. U.S.C. 1804(a)(4)(A) and 1811(a) (a non-Federal requirement will not be preempted if it is "otherwise authorized by Federal law"). A non-Federal requirement is not authorized by Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Utilities Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991). The phrase "unless otherwise authorized by Federal law" was omitted inadvertently as "surplus" when Sections 1804(a)(4)(A) and 1811(A) of the HMTA were codified at 49 U.S.C. 5101 by P.L. 103-272. See H.R. Rep. No. 180, 103d Cong., 1st Sess., at 32 (1993). It was later reinstated by P.L. 103-429, October 31, 1994.

The Secretary of Transportation has delegated to RSPA the authority to make preemption determinations, except for those concerning highway routing, which are delegated to the Federal Highway Administration. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a). Federal hazmat law provides that the Department may waive a finding of preemption upon application by a State, political subdivision or Indian tribe, pursuant to 49 CFR 107.215 through 107.227, if the Department finds that the non-Federal requirement provides the public at least as much protection as Federal hazmat law and the HMR, and the requirement does not unreasonably burden commerce. 49 U.S.C. 5125(e). Alternatively, the jurisdiction may petition under 49 CFR 106.31 for adoption of a uniform Federal rule.

Preemption determinations under Federal hazmat law are consistent with the principles and policy set forth in Executive Order No. 12,612

("Federalism"), 52 FR 41685 (Oct. 30, 1987). 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 of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Federal hazmat law contains an express preemption provision, which RSPA has implemented through its regulations. Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under Federal law, other than Federal hazmat law, unless it is necessary to do so in order to determine whether a requirement is "otherwise authorized by Federal law."

E. General Authority Under Federal Hazmat Law

The four PDAs filed with RSPA raise the issues of whether California's and Los Angeles County's regulation of a consignee's transportation of hazardous materials within the gates of its facility, and the consignee's unloading and storage of that hazardous material at its facility, conflict with Federal hazmat law and the HMR.

The HMR have been promulgated in accordance with the direction in 49 U.S.C. 5103(b) that the Secretary of Transportation "prescribe regulations for the safe transportation of hazardous material in intrastate, interstate and foreign commerce." "Transportation" is defined as "the movement of property, and any loading, unloading, or storage incidental to the movement." 49 U.S.C. 5102(12). Ground transportation is "in commerce" when it takes place on, across, or along a public road. Consequently, the HMR, issued under the authority of 49 U.S.C. 5103(b), apply to the ground transportation of hazardous material on, across, or along a public road, including loading, unloading and storage incidental to that transportation.

Federal hazmat law and the HMR do not apply to the movement of hazardous material exclusively at a consignee's facility. On the other hand, Federal hazmat law and the HMR regulate certain specific carrier and consignee handling of hazardous materials, including unloading of railroad tank cars, incidental to transportation in commerce, even when that unloading takes place exclusively at a consignee's facility. See 49 CFR 174.67.

Unloading that is incidental to transportation includes consignee unloading of tank cars containing hazardous materials. See 49 CFR 174.67 (requirements for tank car unloading).