

Storage that is incidental to transportation includes storage by a carrier that may occur between the time a hazardous material is offered for transportation to a carrier and the time it reaches its intended destination and is accepted by the consignee. See 49 CFR 174.204(a)(2) (requirements for tank car delivery, including storage, of gases). Consequently, while consignor and consignee storage of hazardous material is not incidental to transportation in commerce, IR-28, *City of San Jose, California; Restrictions on Storage of Hazardous Materials*, 55 FR 8884 (Mar. 8, 1990), rail carrier storage of hazardous materials is incidental to transportation in commerce and is regulated under Federal hazmat law and the HMR. See 49 CFR 174.204. On the other hand, when a shipment is consigned by the offeror to a storage facility rather than to an end user, the shipment is out of transportation once received and then unloaded, or stored loaded, at the storage facility.

Other Federal agencies also regulate hazardous materials. For example, EPA regulates hazardous materials to ensure that they are not unintentionally or unlawfully released into the environment (see, e.g., SARA Title III, 42 U.S.C. 1101, *et seq.*) and the Department of Labor's Occupational Safety and Health Administration (OSHA) regulates hazardous materials in the workplace to ensure worker safety (see, e.g., the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*).

II. Preemption Determinations

A. PD-8(R) (Docket PDA-9(R))

California Requirements for the Handling and Storage of Hazardous Materials

Applicant: Swimming Pool Chemical Manufacturers' Association (SPCMA)
State Laws Affected: California Health and Safety Code (CHSC), Chapter 6.95, §§ 25501.3 and 25503.7

Summary: Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101-5127, does not preempt § 25501.3 because that section is otherwise authorized by Federal law, specifically Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. §§ 11001, *et seq.* (also known as the Emergency Planning and Community Right to Know Act of 1986 (EPCRA)), and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r). There is insufficient information in the record to determine whether Federal hazmat law preempts § 25503.7, which provides

that certain bulk containers (including railroad tank cars) are deemed "stored" if they are expected to remain, or actually remain, at a facility for more than 30 days.

1. Application for Preemption Determination

In its application, SPCMA argues that Federal hazmat law preempts certain on-site storage and handling provisions of Chapter 6.95 as they pertain to transportation in commerce of hazardous materials in railroad tank cars. SPCMA alleges that the original intent of Chapter 6.95 was to minimize the release of hazardous materials from a fixed facility and to establish efficient evacuation plans for those localities in the event of such a release. SPCMA contends that, as originally enacted, Chapter 6.95 did not address or apply to the transportation of hazardous materials. SPCMA alleges that the subsequent addition of § 25501.3 and § 25503.7 expanded the reach of Chapter 6.95 to transportation in commerce.

SPCMA believes that Federal hazmat law preempts these provisions "irrespective of where or when such transportation of hazardous materials including loading, unloading, and storage incidental thereto, occurs, *i.e.*, either in transit or on private property owned, leased, and/or otherwise under the control of the consignor, consignee, and/or transporter." SPCMA asserts that if the Research and Special Programs Administration (RSPA) preempts these two provisions, the remaining requirements in Chapter 6.95 no longer will apply to the transportation of hazardous materials, and loading, unloading and storage incidental thereto. In the event that RSPA does not preempt the amendments, SPCMA asks that RSPA review the remaining 63 provisions of Chapter 6.95 to determine whether they are preempted by Federal hazmat law.

In response to RSPA's February 12, 1993 Public Notice and Invitation to Comment, 58 FR 8494, which set forth the text of SPCMA's application, comments were submitted by the Chemical Waste Transportation Institute (CWTI), the City of California City Fire Department, Contra Costa County Health Services Department (Contra Costa), the American Trucking Associations (ATA), the Compressed Gas Association, the Carpinteria-Summerland Fire Protection District, the State of California Chemical Emergency Planning and Response Commission, the Kern County Fire Department, Congressman George Miller, California State Assemblyman Robert J. Campbell and 23 other State

legislators, and the State of California Governor's Office of Emergency Services (California OES). SPCMA filed rebuttal comments.

In response to RSPA's October 14, 1993 Public Notice re-opening the comment period in Docket PDA-9(R), SPCMA, HASA, California OES, and the County of Los Angeles Fire Department submitted comments.

2. Discussion

a. Handling of Hazardous Materials.

(1) CHSC Requirement. SPCMA challenges the following CHSC provision:

Chapter 6.95, § 25501.3 defines the term "handle" to include the use or potential for use of a quantity of hazardous material by the connection of any marine vessel, tank vehicle, tank car, or container to a system or process for any purpose other than the immediate transfer to or from an approved atmospheric tank or approved portable tank. (Section 25501(i), the general definition section of Chapter 6.95, states that "handle" means "to use, generate, process, produce, package, treat, store, emit, discharge, or dispose of a hazardous material in any fashion." Section 25501.3 expanded that definition to include, in certain instances, tank car unloading to a system or process.)

(2) SPCMA's Arguments and Comments Supporting Preemption. SPCMA asserts that § 25501.3 extends all of the requirements of Chapter 6.95 to facilities that handle hazardous materials, including facilities that unload compressed gases incidental to transportation in commerce. SPCMA states that the exception in § 25501.3 for immediate transfers to or from approved atmospheric tanks or approved portable tanks is not applicable to the handling of compressed gases because compressed gases "cannot be unloaded to or loaded from atmospheric tanks, *i.e.*, tanks which are open to the atmosphere, or to or from portable tanks which are not pressure vessels, *i.e.*, cylinders."

SPCMA states that until a facility is in compliance with Chapter 6.95, the facility is not permitted to "load, unload, or store hazardous materials incidental thereto." Furthermore, it states that transporters are prohibited from unloading and consignees are prohibited from accepting hazardous materials shipments until the receiving facility is in compliance with the State requirements. SPCMA contends that, as a practical matter, none of its member companies with facilities in California is in compliance with Chapter 6.95, and that it is not aware of any company