

§ 80.103(d), entitled "Risk Management and Prevention Program," (RMPP) requires that every business comply with the requirements of LACoC Title 2, Chapter 2.20, Part 2.

§ 80.103(e) states that HMBPs, RMPPs and HMISs shall be posted in an approved location and immediately available to emergency responders. Further, the fire chief may require that the information be posted at the entrance to the occupancy or property.

(2) HASA's Arguments and Summary of Comments

HASA states that § 4.108.c.7 and § 80.103(a) require any facility that stores, dispenses, uses or handles compressed gas in excess of quantities specified in Table 4.108-A to obtain a permit from the Bureau of Fire Prevention prior to engaging in the on-site storage, transportation, dispensing, use or handling of compressed gas in railroad tank cars.

HASA indicates that § 80.103(b) and § 80.103(c) require that each permit application include an HMBP and HMIS that meet the requirements contained in LACoC Title 2, Chapter 2.20, Part 2. Section 80.103(d) requires that, with respect to RMPPs, every business comply with the requirements of LACoC Title 2, Chapter 2.20, Part 2. LACoC Title 2, Chapter 2.20, Part 2 implements the administration and enforcement of CHSC Chapter 6.95, Articles 1 and 2. Permit applicants under the LACoC, therefore, must follow the requirements of CHSC Chapter 6.95 when preparing an HMBP, HMIS and RMPP. HASA asserts that—

Requirements contained in Chapter 6.95 of the [CHSC] provide *inter alia* for written notification, recording, and reporting of the unintentional release of hazardous materials. These requirements are preempted [as covered subjects].

HASA asserts that "there is no assurance that a permit for 'on-site transportation' will be issued or that it will not be revoked for reasons unrelated to the transportation of hazardous materials. Business plans and risk management plans are not only subject to approval by the administering agencies, but such approval is subject to unspecified delays."

HASA believes that the LACoC requirement that a facility obtain a permit prior to engaging in the on-site storage, transportation, dispensing, use or handling of compressed gas is preempted because: (1) it applies to "handling," which is a covered subject, and the requirement is not substantively the same as Federal regulations; (2) it applies to the "on-site" transportation of hazardous materials and, consequently,

is an obstacle to accomplishing and carrying out Federal hazmat law and the HMR; and (3) it requires permit applicants to comply with the written notification, recording and reporting requirements pertaining to unintentional releases of hazardous materials contained in CHSC Chapter 6.95, as implemented by LACoC Titles 2 and 32, which HASA believes are preempted as covered subjects.

In support of its position, HASA states that similar permit requirements have been found to be inconsistent with Federal hazmat law and the HMR, citing IR-28, *City of San Jose, California; Restrictions on Storage of Hazardous Materials*, 55 FR 8884 (Mar. 8, 1990), and *Southern Pacific Transp. Co. v. Public Service Comm'n of Nevada*, 909 F.2d 352 (9th Cir. 1990).

HASA does not discuss how § 80.103(e), which requires that HMBPs, RMPPs and HMISs be posted in an approved location and immediately available to emergency responders, conflicts with the Federal hazmat law or the HMR.

The Chlorine Institute, Inc. believes that Federal hazmat law preempts the LACoC permit requirements. It states that "the permit requirement under section 4.108.c.7 of the [LACoC] is restrictive in that it requires an application, inspection and permit prior to unloading certain quantities of hazardous materials on private property regardless of whether the activity is in compliance with DOT regulation * * *. The permit process and requirements are not consistent with [Federal hazmat law] and DOT regulations."

The Los Angeles County District Attorney's Office and the County of Los Angeles Fire Department both oppose preemption of the permit requirements, stating that the requirements are not an obstacle to accomplishing and carrying out Federal hazmat law and the HMR.

(3) Analysis

Permit requirements do not fall within any of the five covered subject areas enumerated in 49 U.S.C. 5125, described above in the General Preamble. They also do not, *per se*, make it impossible to comply with Federal hazmat law or HMR requirements, or create an obstacle to accomplishing and carrying out Federal hazmat law or the HMR. Whether or not a permit requirement is preempted depends on the steps required to obtain the permit. See IR-28, 55 FR 8884 (Mar. 8, 1990); IR-20, 52 FR 24396 (June 30, 1987); IR-3 (Appeal), 47 FR 18457 (Apr. 29, 1982); IR-2, 44 FR 75566 (Dec. 20, 1979); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir.

1984); *Colorado Public Utilities Comm'n v. Harmon*, CV 88-Z-1524 (D. Colo. 1989), *rev'd on other grounds*, 951 F.2d 1571 (10th Cir. 1991).

First, HASA asserts that Los Angeles County's regulation of "handling," through the permit process, is preempted because handling is one of the five covered subject areas established under 49 U.S.C. 5125. The LACoC permit requirements are Los Angeles County's response to the mandate in CHSC § 25502 that "every county shall implement this chapter as to the handling of hazardous materials in the county." The LACoC requires chemical manufacturers to obtain a permit "prior to engaging in the storage, on-site transportation, dispensing, use or handling, at normal temperatures and pressures, of a compressed gas in excess of specified amounts." As part of the permit process under LACoC Title 32, facilities that handle hazardous materials must submit, to the County, an HMBP, HMIS and RMPP that meet the reporting requirements in LACoC Title 2, Title 2, § 2.20.130 requires that these documents be prepared in accordance with the requirements set forth in CHSC Chapter 6.95.

As discussed above in PD-8(R), Federal hazmat law does not preempt Chapter 6.95 requirements applicable to the handling of hazardous materials because they are otherwise authorized by Federal law, Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. §§ 11001 *et seq.*, and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r). As a result, the LACoC permit program, which implements the CHSC handling requirements, is not preempted because its underlying substantive requirements are "otherwise authorized" by SARA Title III and § 112(r) of the CAA Amendments.

Second, HASA asserts that Los Angeles County's permit requirements are preempted because they apply to the on-site transportation of hazardous materials at HASA's facility and, therefore, present an obstacle to accomplishing and carrying out Federal hazmat law. Transportation that takes place entirely on private property is not transportation "in commerce." Federal hazmat law and the HMR do not apply to a consignee's transportation of hazardous materials solely within the gates of a private manufacturing facility. To the extent that the permit requirements under the LACoC provide that HASA must obtain a permit prior to transporting hazardous materials within its facility, the requirements do not apply to transportation in commerce