

safety. For example, time restrictions on tank car unloading may prompt a chemical manufacturing facility to unload tank cars at higher pressures, at greater risk, in order to expedite the unloading process. Also, facilities may be forced to discontinue unloading a tank car and to disconnect the transfer lines between the tank car and the storage receptacle, or manufacturing process, simply to meet the local time restriction. This results in the more frequent exposure of employees to product remaining in the disconnected lines.

Consequently, a request for a waiver from preemption may be granted if it can be shown that a local time restriction provides an equal or greater level of protection to the public than the HMR, and does not unreasonably burden commerce.

(c) *Attendance.* Section 79.809(f) requires that the operator or another competent person attend a tank car at all times while the tank car is discharging cargo. Tank car unloading is an aspect of "handling," a covered subject. Nevertheless, § 79.809(f) is substantively the same as 49 CFR 174.67(i), which requires that a tank car be attended throughout the entire unloading process and, therefore, is not preempted except as it is applied and enforced.

A consignee that unloads tank cars containing hazardous materials may obtain a DOT exemption from the Federal attendance requirement. The DOT exemption allows the consignee to use an alternative monitoring procedure. HASA holds such an exemption (E-10552). Specifically, E-10552 permits HASA to use electronic surveillance to monitor tank car unloading, under certain conditions and restrictions, in lieu of a human observer at the unloading site.

Exemptions from Federal hazmat law and HMR requirements are issued by the Associate Administrator for Hazardous Materials Safety pursuant to 49 U.S.C. 5117 and 49 CFR 107.101-107.123. Exemptions may be issued on a showing by the applicant that procedures it proposes to adopt will achieve a level of safety that is at least equal to that specified in the regulation from which the exemption is sought. See 49 U.S.C. 5117(a)(1)(A). If the regulations do not specify a level of safety, the applicant must show that its proposed procedures will be consistent with the public interest. See 49 U.S.C. 5117(a)(1)(B).

Exemption applications are published in the **Federal Register**, and all interested parties, including States, localities and Indian tribes, are invited to submit comments. Once issued, DOT

exemptions are binding on State, local and Indian tribe authorities, and on regulated entities. See 49 CFR 171.2. To avoid conflict with Federal hazmat law and the HMR, State, local and Indian tribe authorities must implicitly or explicitly recognize a DOT exemption. See IR-31, 55 FR 25572 (June 21, 1990).

HASA claims that Los Angeles County fails to recognize that E-10552 exempts HASA not only from the Federal attendance requirements but also from the local attendance requirements (which are substantively the same as the Federal requirements). Los Angeles County's failure to recognize a DOT exemption undermines the exemption authority granted to the Secretary of Transportation under 49 U.S.C. 5117. Section 5117(A) explicitly authorizes DOT to issue exemptions when the applicant can demonstrate that it will transport or ship hazardous materials in a manner that achieves a safety level at least equal to that required under Federal hazmat law, or that the exemption is consistent with the public interest.

Los Angeles County's continued enforcement of § 79.809(f) against HASA, in spite of the fact that HASA holds DOT exemption E-10552, is an obstacle to accomplishing and carrying out Federal hazmat law and the regulations issued thereunder. Consequently, § 5125(a)(2) of Federal hazmat law, 49 U.S.C. 5125(a)(2), preempts LACoC § 79.809(f) as it is applied and enforced. However, California has incorporated the HMR by reference into its regulations (see, Title 13 California Code of Regulations, Division 2, Chapter 6). If Los Angeles County finds at any time that HASA is not in compliance with its DOT exemption, it can enforce the HMR and its own regulations.

(d) *Ventilation.* HASA asks that RSPA preempt § 80.402(b)(3)(G)(i) and § 80.402(c)(8)(A) because they apply to the unloading of hazardous materials in a manner that conflicts with Federal hazmat law and the HMR. Specifically, these LACoC provisions require the use of a gas cabinet or locally exhausted enclosure when a tank car is unloaded outdoors, and the use of a ventilated separate gas storage room or an exhausted enclosure when a portable or stationary tank is unloaded indoors.

There is insufficient information in the record regarding how the LACoC ventilation requirements are applied and enforced. RSPA, therefore, is unable to determine whether the requirements are preempted by Federal hazmat law.

f. *Packaging Design and Construction.*
(1) LACoC Requirement. HASA

challenges the following provision of LACoC Title 32:

§ 80.301(b)(1) states that containers and tanks must be designed and constructed in accordance with nationally recognized standards. Title 32, § 2.304(b) sets forth the national standards and publications recognized under that title. The most recent edition of Title 49 CFR Chapter 1 (which includes the HMR) is referenced.

(2) HASA's Arguments and Summary of Comments. HASA provides no explanation or arguments regarding how § 80.301(b)(1) is applied and enforced, or why HASA believes that it should be preempted.

(3) Analysis. Section 80.301(b)(1), on its face, requires that containers and tanks be designed and constructed in accordance with nationally recognized standards. "Nationally recognized standards" is defined at Title 32, § 2.304(b) to include the most recent edition of the HMR. There is no evidence in the record that design, construction, and performance standards other than those contained in the HMR are being applied and enforced under the LACoC, or that the containers and tanks at issue are being used to transport hazardous materials in commerce. Furthermore, LACoC § 80.101(a) exception 1 exempts "off-site hazardous materials transportation in accordance with DOT requirements" from the requirements of LACoC Article 80, including § 80.301(b)(1).

Thus, there is insufficient evidence in the record to determine whether Federal hazmat law preempts § 80.301(b)(1).

3. Ruling

Based on the above, Federal hazmat law preempts the following provisions of LACoC Titles 2 and 32:

(1) Title 2 LACoC §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170, to the extent that those provisions levy a fee on tank car unloading activities. The fees collected under those provisions are not used for purposes related to hazardous materials transportation;

(2) Title 32 LACoC § 79.809(f), as applied and enforced by Los Angeles County. Los Angeles County fails to recognize the validity of a DOT exemption that authorizes HASA to employ alternative methods of compliance with certain Federal tank car unloading requirements; and

(3) Title 32 LACoC § 79.809(c), which prohibits a tank car from remaining on a siding at point of delivery for more than 24 hours while connected for transfer operations, unless otherwise approved by the fire chief. The unloading restriction is not