

preempted by the Federal hazmat law because they: (1) are an obstacle to accomplishing and carrying out Federal hazmat law and the HMR; and (2) apply to a covered subject area and are not substantively the same as the Federal requirements.

ATA agrees with SPCMA's position and arguments regarding the LACoC packaging design and construction requirements to the extent that the requirements "pertain to actual transportation of hazardous materials." Nevertheless, ATA believes that the LACoC requirements are not in conflict with Federal hazmat law and the HMR where transportation has concluded. ATA notes that "strict storage of materials for use on the consignee's property is not governed by [Federal hazmat law] and HMRs. Regulations pertaining to storage of materials are within the purview of [OSHA] at the Federal level and similar agencies within the states."

(3) Analysis. Federal hazmat law and the HMR apply to the design and construction of containers used to transport hazardous materials in commerce. This authority is exclusive to the Federal Government. See 49 U.S.C. 5125(b)(1)(E). Federal hazmat law provides that the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified or sold as qualified for use in transporting hazardous material" is a covered subject area. *Id.* A State, local or Indian tribe requirement that is not substantively the same as the Federal requirements, therefore, is preempted unless otherwise authorized by Federal law.

The packaging design and construction requirements under the LACoC apply to packagings used to transport hazardous materials within the gates of a facility. Federal hazmat law and the HMR do not apply to packagings that are intended for use solely on private property, *i.e.*, packagings that are not intended for the transportation of hazardous materials in commerce. The record does not reflect that the containers, equipment and devices regulated under §§ 75.105 (a) and (b) are used to store, handle or transport cryogenic fluids that are in transportation in commerce.

Consequently, Federal hazmat law does not preempt §§ 75.105 (a) and (b).

3. Ruling

Based on the above, Federal hazmat law does not preempt any of the following provisions of Title 32 LACoC: § 4.108(c)(8), § 9.105, § 75.101, § 75.103(a), Table 75.103-A, § 75.104,

§§ 75.105 (a) and (b), § 75.108, § 75.205, and §§ 75.602 (a), (b) and (c).

D. PD-11(R) (Docket PDA-11(R))

Los Angeles County, California
Requirements for The On-Site
Transportation of Compressed Gases

Applicant: Swimming Pool Chemical
Manufacturers' Association
(SPCMA)

Local Laws Affected: Los Angeles
County Code (LACoC), Title 32
§ 4.108.c.7

Summary: Federal hazardous material transportation law, 49 U.S.C. 5101-5127, does not preempt LACoC § 4.108.7 because the substantive permit application requirements are 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.* and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r).

1. Application for Preemption Determination

On January 12, 1993, SPCMA applied for a determination that Federal hazmat law preempts the permit requirement under LACoC Title 32 as it applies to the on-site transportation of compressed gases. On February 12, 1993, the Research and Special Programs Administration (RSPA) published a Public Notice and Invitation to Comment on SPCMA's application in the **Federal Register**, 58 FR 8488. That Notice set forth the text of SPCMA's application. Following publication of this Public Notice, comments were submitted by the American Trucking Associations, the County of Los Angeles Fire Department, and the Compressed Gas Association. Rebuttal comments were submitted by SPCMA.

In response to RSPA's October 14, 1993, Public Notice re-opening the comment period in Docket PDA-11(R), comments were submitted by SPCMA, HASA and the County of Los Angeles Fire Department.

2. Discussion Regarding Permits

a. LACoC Requirement. SPCMA challenges the following provision under LACoC Title 32:

§ 4.108.c.7 requires a permit to be obtained from the Bureau of Fire Prevention prior to engaging in the storage, on-site transportation, dispensing, use or handling of a compressed gas, at normal temperatures and pressures, in excess of specified amounts listed in Table 4.108-A.

b. SPCMA's Arguments and Summary of Comments. SPCMA states that a

permit is required "for the 'on-site' transportation of compressed gases, *i.e.*, movement on property owned, leased, or otherwise under the control of the consignor, consignee, manufacturer, transporter, etc." SPCMA further asserts that "[i]n almost all cases, both 'loading' and 'unloading' of compressed gases occur 'on-site.' Therefore, the permit requirement in the LACoC is applicable to such activities."

SPCMA asserts that "there is no assurance in the LACoC that a permit can be obtained from the bureau of fire prevention and/or obtained without prior compliance with the LACoC. Moreover, a permit can be revoked or cancelled where a change in ownership of the business occurs, change in use of the property, noncompliance with the fire code, change in operations, etc." SPCMA believes that "the permit system is an unauthorized prior restraint on shipment of compressed gases in commerce which are presumptively safe based on compliance with [Federal hazmat law and the HMR], and therefore, constitutes an obstacle to the accomplishment and execution of [Federal hazmat law]."

The County of Los Angeles Fire Department opposes preemption of § 4.108.c.7, stating that the permit requirement does not apply to the transportation of hazardous materials in commerce. It asserts that:

"transportation" as stated in 49 CFR 107.3, means any movement of property by any mode, and any loading, unloading or storage incidental thereto, as related to intrastate and interstate commerce. Under [Title 32 of the LACoC] the * * * meaning of transport is defined as 'handle.' Title 32 * * * regulates the 'storage,' 'handling' and 'use' of hazardous substances, materials and devices that may prove to be hazardous to life or property in the use or occupancy of buildings or premises. [The permit requirement for compressed gases] specifically states the exemption of the permitting requirement for those facilities [where] Federal or State regulations apply.

c. Analysis. In PDA-7(R), HASA challenged LACoC § 4.108.c.7. A discussion of the LACoC permit requirement under § 4.108.c.7, and the rationale for RSPA's finding that Federal hazmat law does not preempt § 4.108.c.7, are at PD-8(R), above.

3. Ruling

Based on the above, Federal hazmat law does not preempt § 4.108.7 because the substantive permit application requirements are otherwise authorized by Federal law, specifically SARA Title III and § 112(r) of the CAA Amendments.