November 29, 2000

Dockets Office
U.S. Department of Transportation
Room PL-401
400 Seventh Street, S.W.
Washington, DC 20590-0001

RE: Docket No. RSPA-00-7906

Dear Sir or Madam:

Enclosed please find the State of Louisiana, Department of Public Safety and Corrections' comments concerning an application by ATOFINA Chemicals, Inc. for an administrative determination whether Federal hazardous material transportation law preempts certain Louisiana requirements concerning hazardous materials incident notification and reporting.

Sincerely,

Paul Schexnayder
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PS:bmg

cc: Ms. Karen P. Flynn
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COMMENTS OF STATE OF LOUISIANA, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
REGARDING ATOFINA APPLICATION (DOCKET NO. RSPA-00-7906)

For the following reasons, the State of Louisiana, Department of Public Safety and Corrections, (hereinafter, referred to as "Louisiana") strongly avers that LA R.S. 32:1510 is not preempted by 49 CFR 171.15 and 171.16.

1. Factual Background

ATOFINA'S application arose out of a hazardous materials incident which occurred on the New Orleans Public Beltway Railroad at approximately 5:00 a.m. on September 13, 1999. Two switchmen employed by the railroad inhaled ethyl acrylate which was leaking from a tank car. **ATOFINA was the manufacturer of the ethyl acrylate, as well as the shipper of the product. Burlington Northern Santa Fe was identified as the carrier. ATOFINA was notified of the leak, assumed control of the response and arranged to have an employee at the scene within five hours of its being made aware of the situation. However, upon arrival, the ATOFINA employee took no action whatsoever. More importantly, for purposes of this discussion, neither Burlington, the carrier, nor ATOFINA, the manufacturer/shipper, notified the Louisiana State Police of the incident. Thus both parties were issued notices of violation pursuant to LA R.S. 32:1510 for failure to make the required telephonic notification.**

II. Basis for Preemption

ATOFINA bases its assertion that LA R.S. 32:1510 is preempted by 49 CFR 171.15 and 171.16 on subsection (b)(1) of 49 U.S.C. 5125. This subsection provides that a state requirement that is not "substantively the same as" a provision of hazardous materials transportation law (or a regulation prescribed under that law) is preempted if it concerns any of five designated areas. Admittedly, the LA R.S.32:1510 requirement of immediate telephonic notification to the Louisiana State Police in the event of a hazardous materials incident differs substantively from the 49 CFR 171.15 requirement of notice to the National Response Center following such an incident. Thus the question to be answered is whether LA R.S. 32:1510 concerns one of the five specified areas in 49 U.S.C. 5125. ATOFINA contends that LA R.S. 32:1510 concerns the following designated area: "The written notification, recording, and reporting of the unintentional release in transportation of hazardous material." This

contention is clearly wrong, as shown by the following.

In the matter entitled "Union Pacific Railroad Company, et al v. California Public Utilities Commission, et al" No. C-97-3660-THE in the U.S. District Court for the Northern District of California, an amicus curiae brief was filed by the United States of America on behalf of the U.S. Department of Transportation (DOT). This brief presented DOT's views with regard to the preemptive scope of 49 U.S.C.§ 5125. The entire brief is attached but the following excerpts should suffice for this matter.

> **"Federal requirements do not preclude states or localities from requiring a carrier (by any mode) to make an immediate telephonic report to local emergency responders when there is a release or other incident involving the transportation of hazardous materials, since there are no Federal requirements that serve that purpose. Because states and localities have the primary responsibility for providing emergency response, it is vital that they receive immediate notification of incidents involving the transportation of hazardous materials.**
>
> **Courts are to give substantial deference to a Federal agency's interpretation of the statutes it is charged to administer and enforce, as well as the agency's interpretation of its own implementing regulation. Accordingly, the United States respectfully requests the Court to defer to DOT's interpretation of the HMTA, FRSA, and the implementing regulations, and amend its Orders consistent with that interpretation...**
>
> **The Secretary of Transportation is charged with administering the HMTA and FRSA and must, among other duties, establish Federal regulations for the safe transport of hazardous materials and for safety in all areas of railroad operations. 49 U.S.C.§§ 5101, 5103(b)(1), 20101, 20103(a). The Secretary has issued specific regulations in the Hazardous Materials Regulations ("HMR"), 49 C.F.R. Parts 171-180, concerning information that must accompany shipments of hazardous materials, to advise emergency responders of the presence and nature of hazardous materials in the event of an incident during transportation. In contrast to**

the regulations prescribing information that must be immediately available to emergency responders, however, the Secretary has not issued any regulations pertaining to the immediate reporting of incidents involving releases of hazardous materials during transportation for purposes of providing local emergency response.

The Secretary has a strong interest in the correct interpretation of Federal transportation laws and particularly their preemptive effect on state and local requirements concerning emergency response to incidents during the transportation of hazardous materials. As discussed below, DOT interprets the HMTA, 49 U.S.C. § 5125(b)(1)(D), to preempt only state and local requirements to provide notification or reports in writing..."

Also included within that brief was the following quoted section of a "report of the House Committee on Energy and Commerce which shows clearly that, when Congress amended the HMTA in 1990 to add the covered subject preemption provisions now codified at 49 U.S.C.§ 5125 (b)(1), it did not intend to preempt requirements for verbal or telephonic incident reports:

> **(iv) *Written notification, recording, and reporting of the unintentional release in transportation of hazardous materials*.-- The Committee believes uniform requirements for written notices and reports describing hazardous materials incidents will allow for the development of an improved informational database, which in turn may be used to assess problems in the transportation of hazardous materials. Without consistency in this area, data related to hazardous materials incidents may be misleading and confusing. Additional State and local requirements would also be burdensome on those involved in such incidents and may lead to liability for minor deviations. <u>The oral notification and reporting of unintentional releases has specifically been excluded from this paragraph in order to permit State and local jurisdictions to develop the full range of possible alternatives in emergency response capabilities (such as requiring carriers to telephone local emergency responders)</u>. H.R. Rep. No. 101-444, Part 1, at 34-35 (1990)." (emphasis added)**

ATOFINA's application indicates further that it objects to Louisiana's requirement that "each person involved in an incident" must make an immediate report to the State Police. ATOFINA complains that this requirement could be "confusing", is "impractical" and will be "difficult to achieve compliance". However, as clearly shown above, Louisiana's telephone reporting requirement is not in one of the enumerated areas which would necessitate that the

state requirement be substantively the same as the federal requirement. Therefore, Louisiana is not limited to requiring telephone notification from carriers only (as is required in the Federal law).

Though not urged by ATOFINA, Section 5125 of Title 49 U.S.C. contains a separate test for preemption. In the absence of a waiver of preemption by DOT or specific authority in another Federal law, a state requirement pertaining to the transportation of hazardous materials is preempted if: (1) it is not possible to comply with both the state requirement and the HMTA or the implementing regulations; or (2) the state requirement is an obstacle to accomplishing and carrying out the HMTA or the implementing regulations.

These criteria have previously been applied by RSPA in Inconsistency Ruling No. IR-31 55 Federal Regulation 25572, 25582 (June 21, 1990) wherein the exact same provisions of LA R.S. 32:1510 were determined to be consistent with the HMTA and the implementing regulations. In that opinion, RSPA stated as follows:

> **"Requirements for immediate telephonic hazardous materials transportation accident/incident reports for emergency response purposes generally are consistent with the HMTA and HMR. IR-2, IR-3, IR-28, all supra; National Tank Truck Carriers, Inc. v. Burke 535 F. Supp. 509 (D.R.I. 1982)...**

Further, the National Tank Truck Carriers, Inc. decision cited by RSPA applied the two-prong test of 49 U.S.C. 5125 (a)(1) and (2) to the Rhode Island requirement of emergency notice to the State Police. The Court therein found that the state notice requirement was "...neither inconsistent nor in conflict with nor contrary to the purpose of Congressional policy." National Tank Truck Carriers, Inc. supra.

III. Conclusion

In light of the previous inconsistency rulings on this exact issue by RSPA and the cited jurisprudence, and especially in view of the recent brief filed on behalf of DOT, all of which unequivocally conclude that the state notice requirements at issue are not preempted by federal law, the request by ATOFINA (that a determination be made that LA R.S. 32:1510 is preempted by 49 CFR 171.15 and 171.16) should be denied.

Respectfully Submitted by:

State of Louisiana, Department of Public Safety & Corrections

CERTIFICATE OF SERVICE

I certify that copies of this comment have been sent to Ms. Flynn at the address specified in the Federal Register.

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Paul Schexnayder