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ASSOCIATION OF WASTE
HAZARDOUSMATERIALS
TRANSPORTERS

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DEPT. OF TRANSPORTATION
DOCKET SECTION
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November 2 1998

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Docket Office
U.S. Department of Transportation
Room PL-40 1
400 Seventh St., SW
Washington, DC 20590

RSPA-98-3577-12

RE: RSPA-98-3577 (PDA- 18(R))[1]

Dear Sir or Madam:

I am submitting, on behalf of the Association of Waste Hazardous Materials Transporters (AWHMT), rebuttal comments in the matter of PDA-18(R).

The AWHMT represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in North America. The Association is a not-for-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

As the petitioner in this proceeding, AWHMT has received comments from five entities. All have supported AWHMT's petition except a Tony Tweedale of Missoula, MT. Until today, we had no evidence that comments had been submitted by Mr. John J. Copelan, or any other representative of Broward County. While not commenting of the substance of our petition, we just received a copy of a petition dated October 26, 1998, from the Broward County Attorney's Office asking RSPA to stay its review of AWHMT's petition for 6 to 8 months. While we commend the County for initiating a review of its requirements in view of this proceeding and we urge this effort to go forward, we must at this time oppose this request. As RSPA knows from our petition, we have been trying to obtain a resolution of the issues raised in our petition since 1993. Nowhere in the petition does the County disclose what changes it is prepared to make to resolve these outstanding preemption issues, nor does the County offer to withhold enforcement of the challenged provisions pending the resolution of this matter. The County has had our petition since April 9, 1998. Since this time, as we note in our conclusion to this comment, the County has made one attempt to negotiate the elimination of some of its requirements if AWHMT would withdraw its petition. We stand ready at any time to withdraw our petition when the County produces palpable evidence that our concerns have been addressed.

[1] 63 FR 42098 (August 6, 1998).

Comments in Support

In addition to the comments entered in support of AWHMT's petition, we note that, since we filed, the courts have also lent support to an aspect of our petition. While we acknowledge and support the right of localities to immediate notice in the event of a hazardous materials incident – notice which we argue can be effectively accomplished by "911" or operator-assisted telephone contact to local police/fire/rescue – we object to requirements that carriers provide immediate oral notifications to non-police/fire/rescue agencies at specific g-digit telephone numbers. In addition to notifying local police/fire/rescue[2], the California Public Utilities Commission (PUC) requires two oral notifications of hazardous materials releases by railroads.[3] Recently, a federal court preempted the PUC's oral reporting requirements because they were not substantively the same as federal reporting requirements.[4] Again, our challenge of the Broward County requirement is not a challenge of a requirement to notify police/fire/rescue by calling "91 1", but we dispute the cumulative burden imposed by Broward County and other jurisdictions to make additional notifications to non-police/fire/rescue agencies at locally-specified telephone numbers – a burden that is exacerbated because motor carriers operate over irregular routes.

Moreover, such notifications to specific telephone numbers cannot be accomplished without the carrier having a directory of such numbers. Currently, the only emergency response telephone number the carrier is required to have at hand during the entire course of transportation is the emergency contact number provided by the shipper.' The hazardous materials regulations (HMR) require that the emergency contact number requirement be included on the shipping paper. Acknowledging that shipping papers are protected under the "substantively the same as" preemption test from non-federal requirements, [6] federal courts have preempted non-federal requirements to carry specific emergency telephone numbers that differ from the federal requirement.'

Comments in Opposition

Mr. Tweedale does not identify how he is affected by the Broward County Ordinance. In his comment, Mr. Tweedale does not directly refute any of the specific provisions which have been challenged. He appears to be affected by RSPA's statement that the Ordinance "is designed to protect the Biscayne Aquifer from possible harm due to the infiltration of hazardous materials

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2 A number of federal rules require notice to local police/fire/rescue in the event of an emergency. See, for example, 40 CFR 263.30(a) and 355.40 (b)(4)(ii), and 29 CFR 1910.120(q)(2)(i).

3 Cal. Health & Safety Code § 25507, "upon discovery, immediately report any release or threatened release of a hazardous material to the administering agency [selected by the County] and the Office [of Emergency Services."

4 Union Pacific R.R. v. California Publ. Util. Comm'n, No. C-97-3660-TEH (N.D. Cal. June 18, 1998), motion for reconsideration pending. We are aware of Congressional report language stating that"oral notification and reporting of unintentional releases [is] specifically excluded from [DOT's authority to preempt under the "substantively the same as" test]." [House Rept. 101-444, Part 1, page 35.] Nowhere in federal law is DOT precluded from applying an "obstacle" test evaluation of local oral reporting requirements.

5 49 CFR 172.604.

6 49 U.S.C. 5 125(b)(2)(C).

7 Colorado Publ. Utilities Comm'n v. Harmon, 95 1 F.2d 1571 (10th Cir. 1991).

into the aquifer.“[8] While we all share concern and responsibility for safe drinking water, we believe the County’s apparent justification of its Ordinance is without merit.

First, we must keep in mind that the challenged provisions are provisions which are different from or additional to federal requirements. If RSPA agrees that its rules are not adequate to protect water sources from the risks of hazardous materials transportation, then any community could use the aquifer defense to impose “laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials . . . .”[9] Clearly, Congress believed such non-federal regulation creates “ the potential for unreasonable hazards in other jurisdictions and confound[s] shippers and carriers which attempt to comply . . . .”[10]

Second, with the exception of the definition of hazardous materials and spill reporting requirements, all of the challenged requirements pertain to waste (“discarded”) hazardous materials. As RSPA knows, the federal tests to classify waste and non-waste materials do not distinguish between the materials based on their end use. A non-waste poison in the same packing group will likely do the same environmental harm as the waste form of the poison if classed in the same packing group. If protection of an aquifer were truly the motivation for this Ordinance, all hazardous materials would be subject to its provisions.

Third, it would not be possible to distinguish by mode of transportation the contamination caused to the aquifer if the same type and quantity of hazardous material was released. However, the majority of the challenged requirements appear to apply only to the motor carrier mode, and then only motor carriers with destinations in the county. If protection of an aquifer were truly the motivation for this Ordinance, hazardous materials shippers and carriers of all modes, including those engaged in “through” transportation would be subject to its provisions

In our petition we defend this view by providing data from RSPA about the incident history of the County that clearly illustrates the discriminatory impact of the County’s requirements on certain motor carriers of hazardous waste irrespective of the potential environmental consequences that may result from the transportation of hazardous materials generally.”

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[8] 63 FR 42099 (August 6, 1998). We are curious as to where RSPA learned that the alleged protection of the Biscayne Aquifer was the motive for the Ordinance. As noted earlier, we have received no communication from the County and we were unaware of this defense.

[9] P.L. 101-615, Section 2(3).

[10] Ibid. This is not to say that no local conditions are deserving of unique local regulation over the transportation of hazardous materials. The HMTA provides that DOT may issue waivers of preemption to non-federal entities whose requirements “provides the public at least as much protection as do [federal] requirement<’ and are “not an unreasonable burden on commerce.” [49 U.S.C. 5 125(e).]

[11] RSPA should not believe for a moment that we would countenance the Ordinance if it applied broadly to all modes and all hazardous materials. Congress has demanded that DOT, not localities, issue rules that“provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce . . . .” (49 U.S.C. 5101.)

PD-13(R)[12]

While not part of the docket in this proceeding, we are concerned about the direction taken by RSPA in its PD-13(R) decision on issues similar to some in this proceeding. In particular, we take exception to and wish to distinguish the vehicle inspection and marking, and fee requirements of this proceeding from those of Nassau County, NY and PD-13(R).

- Vehicle Inspection: The matter in Nassau County can be distinguished from that of Broward County in that RSPA believes "that most propane gas dealers serve customers within 50 miles of their principle places of business [and therefore] should have adequate time to plan for and undergo inspections without disrupting actual deliveries."[13] We can assure RSPA, as the affidavits to our application for a determination of preemption attest, that the companies and vehicles affected by the Broward County inspection requirement are not engaged solely in local transportation.

  To the extent Broward County requires vehicles to be inspected before engaging in the transportation of discarded hazardous materials, we take exception to RSPA's treatment of this matter in PD- 13(R). [14] In PD- 13(R), RSPA so narrowly applies its Congressionally-delegated obstacle preemption authority on the matter of non-federal vehicle inspection as to render the authority moot. Because vehicle inspections in Nassau County are performed on empty vehicles, RSPA states that "there is no 'unnecessary delay' in the transportation of hazardous materials."" While RSPA does concede that "it is uncertain whether the county is able to conduct inspections, collect fees, and issue permits . . . without causing [out-of-jurisdiction] trucks to wait unnecessarily", it gives Nassau County, and any other jurisdiction a shield to conduct vehicle inspections on interstate or intrastate vehicles as long at the vehicle is empty and used in local commerce.[16]

  When RSPA noted, in its landmark decision on the legality of non-federal vehicle inspections', that "it has encouraged States and local government to adopt and enforce the requirements in the HMR, 'though both <u>periodic</u> and roadside spot inspections"'", we assumed that RSPA was referencing federal periodic vehicle inspection requirements[19] which require states to recognize one annual inspection when performed to federal standards as adequate for the period-of the inspection because there are no per se "vehicle inspection"

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[12] PD-13(R) - Nassau County, New York, ordinance on Transportation of Liquefied Petroleum Gases. 63<u>FR</u> 45283 (August 25, 1998). Petitions for reconsideration have been filed.

[13] 63 <u>FR</u> 45286 (August 25, 1998).

[14] Although the County requires inspection prior to transporting discarded hazardous material, vehicles have been inspected when loaded. These inspections have taken place when transporters attempt to comply with inspection requirements despite that fact that the uninspected vehicle is already in the County in a loaded condition and is otherwise in full compliance with the HMRs.

[15] 63 <u>FR</u> 45285 (August 25, 1998).

[16] 63 <u>FR</u> 45286 (August 25, 1998).

[17] PD-4(R), 58 <u>FR</u> 48933 (September 20, 1993), petition for reconsideration denied 60<u>FR</u> 8800 (February 15, 1995).

[18] 58 <u>FR</u> 48940 (September 20, 1993). (Emphasis added.)

[19] 49 U.S.C. 3 1142(d). As "state" is used in this section it is defined to include "political subdivision[s]." [49 U.S.C. 3 1132(7).]

requirements in the HMRs. (Emphasis added.) Congress recognized the unacceptable burden that would result if states, let alone localities, should require motor vehicles to be produced periodically to be inspected. Again, motor vehicle operate over irregular routes and the potential of inflicting "multiple and conflicting" requirements on carriers is self-evident.

We also believed this interpretation was reasonable inasmuch as RSPA found preemption of the challenged vehicle inspection requirements under the "obstacle" test as opposed to the "substantively the same as" test. However, since RSPA has clarified in PD-13(R) that the HMRs should be the focus of periodic vehicle inspections, we note that the purpose of the Broward County, as well as the Nassau County, vehicle inspection, like the packaging standards in the HMR, is to qualify the vehicle to Contain hazardous materials e s s provided that the federal government should virtually occupy the field of what constitutes a qualified hazardous materials packaging. Under the HMTA's "substantively the same as" preemption authority, non-federal entities are precluded from enforcing rules for the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous materials."[20] Consequently, we suggest that RSPA also review the Broward County vehicle inspection requirements under its "substantively the same as" preemption authority, particularly as its vehicle inspection requirements apply to any authorized packaging into which discarded hazardous materials may be placed.

In PD- 13, RSPA attempts to draw a line between "delay experienced by a . . . company in being able to compete or do business within Nassau County [and] delay in the transportation of trucks loaded with propane."*' RSPA seems to believe if the non-federal requirement demands the production of the vehicle for inspection without hazardous materials that the HMTA is not implicated. However, we would like to suggest otherwise:

(1) Vehicle inspection is a condition for approval to transnort hazardous materials, not other cargo or for the purpose of qualifying the vehicle irrespective of whether any cargo is carried in the vehicle, on the streets of Nassau County or, as is the case in this proceeding, Broward County streets.
(2) RSPA states that Nassau County's use of fees to perform vehicle inspections is a use approved under the HMTA.[22] RSPA cannot hold, on the one hand, that non-federal requirements to produce empty vehicles for inspection prior to transporting hazardous materials do not affect the transportation of hazardous materials and, on the other hand, find that the use of hazardous materials fees to perform inspections of the empty vehicles is a legitimate use of these fees under the Act.
(3) Nassau County, and other non-federal entities, have tried to minimize the consequences of their vehicle inspection requirements by exempting vehicles traveling through these jurisdictions. However, what is a "through" vehicle one day can be a vehicle used in local delivery the next. The requirement to produce a vehicle for inspection applies whether or not any given vehicle engages in local delivery or pick up one day or 365

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20 49 U.S.C. 5 125(b)(l)(E).
21 63 FR 45285 (August 25, 1998).
22 63 FR 45286 (August 25, 1998).

days of the permit year. RSPA has to consider the consequences **if every** locality demanded the production of vehicles for inspection prior to transporting hazardous materials. [23] Hazardous materials transportation, at least by motor vehicle, would indeed become "local", as companies would be unable to produce vehicles, without limitation, for inspection by local authorities prior to transporting such materials. We believe the extra handling that would result from passing hazardous materials between carriers at these service area boundaries would increase risk for more than the risk presented by forgoing locally-required periodic vehicle inspections.

(4) Nowhere is it established that "unnecessary delay" is the only standard by which obstacle preemption may be triggered. A non-federal requirement is an obstacle if it frustrates the accomplishing and carrying out of the HMTA.[24] RSPA advocates this interpretation of the HMTA arguing in federal court that to hold otherwise "runs contrary to almost 20 years of agency practice and is squarely at odds with the decisions of three appellate courts, all of which have construed the Act to preempt state rules that create an 'obstacle' to HMTA despite the absence of a direct conflict with a specific federal regulations."[25] The law provides that a purpose of the HMTA is to facilitate "the movement of hazardous materials in commerce [in order] to maintain economic vitality and meet consumer demands [and that this commerce] shall be conducted **in** a safe and efficient manner."[26] (Emphasis added.) Congress charged DOT to "prescribe regulations for the safe transportation of hazardous materials in . . . commerce."*' (Emphasis added.) Congress underscored the importance of this mission finding that "a high degree of uniformity of Federal, State, and local laws is required in order to promote safety and to encourage the free flow of commerce."*" (Emphasis added.) RSPA must look to impacts on commerce produced by proliferating non-federal hazardous materials requirements.

- Vehicle Marking: In PD- 13(R), RSPA reaches the unbelievable conclusion that if a marking that qualifies a vehicle to transport hazardous materials is placed on the vehicle rather than the packaging that it is not preempted at least under the "substantivelythe same as" test.[29] However, if the same marking, required for the same purpose, is applied to the packaging, the marking would presumably be preempted under the "substantively the same as" test.[30] While we concede that not all vehicles are DOT authorized packagingsper se, they all serve a containment function. It is inconceivable to us that Congress, having stated that the regulatory areas covered by the "substantively the same as" test are areas "the Federal government would regulate exclusively . . . State [not local] entry into these areas could occur only where the Federal government does not address a specific aspect of the covered areas and the Federal government permits it," would condone an interpretation that allows a non-federal entity to avoid the consequences of preemption under the "substantively the same as"

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23 RSPA now has evidence of at least four localities requiring separate, non-reciprocal inspections: Nassau County, NY, Broward County, FL, Houston, TX and Cleveland, OH.

24 49 U.S.C. 5 115(a)(2).

25 Commonwealth of Massachusetts v. U.S. Dept. of Transportation, No. 95-5 175 (D.C. Cir. Aug. 27, 1996), petition for rehearing, October 1996, page 1.

26 P.L. 101-615, Section 2(8).

27 49 U.S.C. 5 103(b).

28 House Rept. 101-444, Partpalge 22.

29 63 FR 45287 (August 25'1998).

30 49 U.S.C. 5 125(b)(l)(E).

test simply by providing that the non-federal markings be placed on a part of the vehicle that is not the DOT-authorized packaging. [31]

If, despite these observations, RSPA holds to this contrary view, we request that the Broward County marking requirements be evaluated under the "obstacle" test. It should be clear from the several pending preemption dockets before RSPA now that non-federal marking requirements to signify that a vehicle is authorized to transport hazardous materials are a growing phenomenon. RSPA has to anticipate that without restraint more and more non-federal entities will require such markings turning vehicles into bulletin boards and drawing attention away from the most important marking – namely that which is required by DOT.

- Permit Fees: In PD- 13(R), RSPA allowed a $150 initial/$75 annual per-vehicle inspection fee. RSPA held that the amount of the fee was related "to the work involved in conducting the required inspection." Likening the inspection fee to a per-use charge, RSPA noted that no other information had been presented to show that the fees were unfair.[32]

  In contrast, the Broward County $175 annual per-vehicle license fee is not a per-use inspection charge, but rather a flat, annual charge purportedly imposed to reimburse the County for a variety of administrative and other unidentified costs related to its general regulation of hazardous materials transporters. Clearly, the fee is not a per-use charge directly related to vehicle inspection costs or any other regulatory or administrative costs that are directly attributable to that vehicle.[33] The fees are simply unapportioned, flat charges that are not "fairly related" (or in any way related) to a feepayer's level of presence or activities in Broward County and thus violate the Commerce Clause.[34]

Conclusion

The Broward County permit and attendant requirements do not enhance safety or enforce the HMRs. In a conversation with the County, staff offered to eliminate all requirements but the permit application filing, fees, and the vehicle marking if AWHMT would withdraw its

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[31] House Rept. 101-444, Part 2, page24.

[32] We believe that RSPA erred in not considering the impact on interstate commerce of multiple jurisdictions requiring fee supported annual vehicle inspections. Under the Supreme Court's"internal consistency,' test, a law's impact on interstate commerce is examined in the context of its impact if every other jurisdiction imposed an identical requirement. Oklahoma Tax'n v. Jefferson, 115 S. Ct. 133 1, 1338. There can be little dispute that interstate hazardous waste transporting commerce would come to a halt if every jurisdiction in which a truck operated required that truck to undergo a separate, duplicative fee-supported inspection. If RSPA is concerned about the theoretical nature of the internal consistency analysis and believes it needs actual proof of multiple burdens, the requirements of Nassau and Broward Counties as well as the Cities of Houston [PDA-15(R)] and Cleveland [PDA-20(RF)], viewed together, provide that proof- the multiple fees and duplicative inspections imposed on a vehicle would surely affect its ability to operate fully in interstate commerce.

[33] Indeed, although Broward County has a vehicle inspection requirement, it is intermittently enforced. [See affidavit of Diana Hughes, ETS, January 27, 1998.1 Consequently, Broward cannot argue that its fee is in any way related to work it performs in conducting vehicle inspections. To the contrary, County staff offered to eliminate the inspection (and all other requirements except the permit application filing, fees, and vehicle marking) if AWHMT would withdraw it preemption application. Affidavit of Cynthia Hilton, page 7-8, at footnote 34.

[34] American Trucking Associations. Inc. v. Scheiner, U.S. 266, 284-86 (1987).

preemption application.[35] AWHMT declined this course of action believing that the County's offer shows its requirements for the sham that they are.[36]

Uniformity has been described by the courts as the "linchpin" of the HMTA[37] – not uniformity for uniformity's sake, but "uniformity to promote the public health, welfare, and safety."[38] Safety is not enhanced by fostering even abetting a non-federal regulatory scheme that will balkanize hazardous materials transportation by motor carrier as these requirements are replicated by other jurisdictions in America. Broward County's requirements simply do not further the federal purpose of promoting safety though uniformity.

Certification

I certify that a copy of this comment has been sent to Mr. Copelan at the address specified in the Federal Register.

Sincerely,

Michael Camey
Chairman

Enclosures

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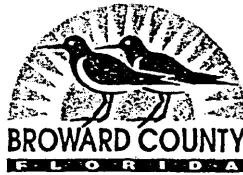
35 Telephone conversation between Cynthia Hilton, AWHMT, and Lisa Zima Bosch, Office of the County Attorney, Sermin Unsal and Didier Dupuy, Department of Natural Resource Protection, May 7, 1998.
36 See attached letters from Ms. Zima Bosch to Michael Camey, AWHMT, and from Mr. Camey to John Copelan, County Attorney, dated respectively May 19, 1998, and June 4, 1998.
37 Op. Cit. Harmon.
38 P.L. 101-615, Section 2(5).

John J. Copelan, Jr.'
County Attorney
*Board Certified in City, County
and Local Government Law



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May 19, 1998

Our File: 98-313

Michael Carney
Chairman
Association of Waste Hazardous
Materials Transporters
2200 Mill Road
Alexandria, VA 22314

RE: Broward County Hazardous Materials Ordinance

Dear Mr. Carney:

We have recently been in contact with Cynthia Hilton, Executive Director of the Association of Waste Hazardous Materials Transporters (AWHMT) in response to the application filed with the Department of Transportation (DOT) by AWHMT, requesting preemption of Broward County's environmental ordinance as referenced above. As we discussed with Ms. Hilton, the Department of Natural Resources Protection (DNRP) has been examining the above referenced ordinance during the past two years, in an effort to update its applicability to regulated industry. We explained to Ms. Hilton that applicable sections in the ordinance have not been revised since 1993. Additionally, it is our impression that for the most part, the waste transporter industry has become more environmentally aware during the last several years.

Since the agency is seriously considering changes to the existing regulations anyway, we welcome the constructive input of AWHMT to the process.

Although Broward County contemplates retaining a licensing and compliance program for waste haulers, DNRP would be willing to explore alternative requirements and consider policy changes. I would encourage you to seek input from your members in an effort to avoid the protracted disputes that will likely arise within the application/preemption process. Although I am not authorized to make any formal offers to AWHMT, it appears that your members may benefit from a cooperative effort to explore alternatives.

BROWARD COUNTY BOARD OF COUNTY COMMISSIONERS — An Equal Opportunity Employer and Provider of Services
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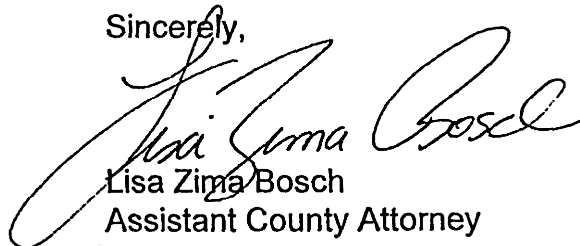
World Wide Web: http://www.co.broward.fl.us/legal

Unfortunately, our recent discussion with Ms. Hilton indicates that this suggestion would not be acceptable to your members. Please accept this correspondence as our second attempt to address the concerns of the industry.

In the event that your association wishes to contribute to the ordinance update, please contact me within the next two weeks. We would be willing to arrange a telephone conference to discuss the issues. It appears wise for both parties to expend effort on environmental protection, rather than in a preemption challenge.

Sincerely,



Lisa Zima Bosch
Assistant County Attorney

LZB/jkw

wastehaz.l01