
Friday,
April 21, 1989

Public Hearing

Part IV

**Department of
Transportation**

**Research and Special Programs
Administration**

**Transporting Hazardous Wastes; City of
Maryland Heights (Missouri) Ordinance
Requiring Bond for Vehicles; Notice**

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration[Inconsistency Ruling No. IR-25; Docket
IRA-43]Transporting Hazardous Wastes; City
of Maryland Heights (Missouri)
Ordinance Requiring Bond for
Vehicles*Applicant:* City of Maryland Heights,
Missouri.*City Ordinance Affected:* City of
Maryland Heights (Missouri) Ordinance
88-378, Section 1.*Applicable Federal Requirements:*
Hazardous Materials Transportation
Act (HMTA) (Pub. L. 93-633, 49 App.
U.S.C. 1801 *et seq.*) and the Hazardous
Materials Regulations (HMR) (49 CFR
Parts 171-179) issued thereunder.*Mode Affected:* Highway.*Issue Date:* April 17, 1989.*Ruling:* Section I of Ordinance 88-378
of the City of Maryland Heights,
Missouri, requiring a \$1,000 bond for
highway transportation of certain
hazardous wastes, is inconsistent with
the HMR to the extent it applies to
hazardous materials regulated under the
HMTA and, therefore, is preempted to
that extent under section 112(a) of the
HMTA (49 App. U.S.C. 1811(a)).*Summary:* This inconsistency ruling is
the opinion of the Office of Hazardous
Materials Transportation (OHMT) of the
Department of Transportation (DOT)
concerning whether Section I of
Ordinance 88-378 of the City of
Maryland Heights, Missouri, is
inconsistent with the HMTA and the
HMR and thus preempted by section
112(a) of the HMTA. This ruling was
applied for and is issued under the
procedures set forth at 49 CFR 107.201-
107.209.*For Further Information Contact:*
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Attorney, Office of the Chief Counsel,
Research and Special Programs
Administration, Department of
Transportation, Washington, DC 20590
(Tel. (202) 366-4362).**I. Background**

On May 13, 1988, Michael K. Moran, Building Commissioner of the City of Maryland Heights, Missouri, filed an inconsistency ruling application. That application requested a ruling concerning the inconsistency with the HMTA of the following prohibition in Section I of the City's Ordinance 88-378:

No person shall haul sewage, sludge, human excrement, special, hazardous or infectious wastes without providing a bond in the amount of One Thousand Dollars (\$1,000)

per vehicle for each vehicle, hauling or to haul sewage, sludge, human excrement, special, hazardous or infectious waste.

The City requested that this section be reviewed for consistency with the insurance and indemnification requirements of the HMTA.

On the issue of consistency, the City stated:

We believe this bonding requirement is not in conflict with the Hazardous Materials Transportation Act inasmuch as it imposes an additional requirement upon haulers; it does not exempt, or attempt to exempt them from the requirements of the Hazardous Materials Transportation Act.

On June 6, 1988 (53 FR 20736), OHMT published a Public Notice and Invitation To Comment soliciting public comments on the City's application. Comments supporting a finding of inconsistency were filed by E & H Hauling Company, Infectious Waste Management, Inc. (IWM), the Chemical Waste Transportation Council (CWTC), the National Tank Truck Carriers, Inc. (NTTC), the American Trucking Associations (ATA), and jointly by the National Private Trucking Association (NPTA) and the Private Truck Council of America (PTCA). No comments were filed by the City of Maryland Heights or any other party in support of a finding of consistency.

II. General Authority and Preemption Under the HMTA

The HMTA at section 112(a) (49 App. U.S.C. 1811(a)) preempts " * * * any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state or local action. The HMTA preempts only those state and local requirements that are "inconsistent."

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" (S. Rep. 1192, 93rd Cong., 2d Sess., 37-38 (1974)). Through its enactment of the HMTA, Congress gave the Department

the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress apparently intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR, issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity.

Although advisory in nature, inconsistency rulings issued by OHMT under 49 CFR Part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision. If a state or political subdivision requirement is found to be inconsistent, the state or local government may apply to OHMT for a waiver of preemption. 49 App. U.S.C. 1811(b); 49 CFR 107.215-107.225.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption under the HMTA will be considered. A court might find a non-Federal requirement preempted for other reasons, such as statutory preemption under another Federal statute, preemption under state law, or preemption by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, OHMT does not make such determinations in its inconsistency ruling process.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following criteria for determining whether a state or local requirement is consistent with, and thus not preempted by, the HMTA:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

These criteria are based upon, and supported by, U.S. Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

The first criterion, the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, involves determining whether a state or local requirement is an obstacle to executing and accomplishing the purposes of the HMTA and the HMR; a requirement which is such an obstacle is inconsistent. Application of this second criterion requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through OHMT's regulatory program.

III. Public Comments

As indicated above, the City of Maryland Heights stated in its application its belief that this bonding requirement is "not in conflict" with the HMTA. As discussed in more detail below, all six commenters who responded to OHMT's Federal Register Notice opposed a finding of consistency.

E & H Hauling Company, Maryland Heights, states that there is no need for a local bond because of existing liability requirements for hazardous waste transporters. It argues that the ordinance was passed to hinder the solid waste transporting business, and it claims the ordinance is discriminatory because it does not apply to transporters of other hazardous materials (e.g., propane or gasoline). Finally, it contends that the ordinance would be difficult to enforce without permanent roadblocks or inspections of all trucks entering the City.

IWM states that the scarcity of licensed disposal facilities results in long transportation distances for sludge, special, hazardous or infectious wastes. IWM continues:

Therein lies the problem. As an example, Maryland Heights is one of over 100 communities in the St. Louis Metropolitan Area and is located on two Interstate

Highways. If each City in the Metro area adopted an Ordinance of this type and only thirty DOT regulated trucks traveled through this area, it is conceivable that consumer prices on certain products and services could rise in excess of three (3) million dollars annually for the St. Louis consumers alone. On a nationwide basis this figure could reach into the billions. It should also be pointed out that layered bonding causes additional administrative expense at the local level with no return to the citizens.

IWM concludes that trucking bonds can be enforced and administered more efficiently at the state or Federal level than at the local level and urges that bonding of regulated trucking be limited to the state and Federal levels.

CWTC, on behalf of hazardous waste transporters, contends that the City's bonding requirement is inconsistent for several reasons. First, it contends that it is inconsistent with § 177.853(a) of the HMR because it will cause rerouting of hazardous materials around the City.

Second, CWTC argues that this "artificial routing" will be done without adequate safety justification and appropriate coordination with adjoining affected jurisdictions—allegedly in violation of the tenets set forth in Inconsistency Ruling No. IR-1 (IR-1), 43 FR 16954 (Apr. 20, 1978); IR-2, 43 FR 75566 (Dec. 20, 1979), *appeal* 45 FR 71881 (Oct. 30, 1980), *correction*, 45 FR 76838 (Nov. 20, 1980); IR-3, 46 FR 18918 (Mar. 26, 1981), *appeal*, 47 FR 16457 (Apr. 29, 1982); IR-20, 52 FR 24396 (June 30, 1987), *correction*, 52 FR 29468 (Aug. 7, 1987).

Third, CWTC asserts that the City's bonding requirement will divert traffic off the I-270 beltway and onto non-interstate routes or interstates (e.g., I-170) through more densely populated areas. This effect allegedly would contravene a 1977 RSPA interpretation of 49 CFR 387.9.

Fourth, CWTC states that the City has failed to make the purportedly required showing that \$1,000 is a reasonable and appropriate amount for the required bond.

Fifth, CWTC contends that the City's requirement is inconsistent with the financial requirements of 49 CFR 387.15. It argues that, despite statements to the contrary in the Public Notice on this matter, RSPA must consider consistency with those requirements—as it allegedly previously did in IR-10, 49 FR 46645 (Nov. 27, 1984), *correction*, 50 FR 1939 (Mar. 12, 1985); IR-11, 49 FR 46647 (Nov. 27, 1984); IR-15, 49 FR 46660 (Nov. 27, 1984); IR-15 (Appeal), 52 FR 13062 (Apr. 20, 1987); IR-18, 52 FR 200 (Jan. 2, 1987), *appeal*, 53 FR 28850 (July 29, 1988).

Sixth, CWTC claims that the City's bonding requirement is inequitable because it is not levied on the

transportation of all hazardous materials. It points to the irony that a bond is required for hazardous wastes but not for undiluted non-waste hazardous materials which are more toxic and hazardous than the waste materials.

Finally, CWTC argues that the cumulative effect of multiple state and local bonding requirements would be to ban the transportation of hazardous waste.

NTTC argues that the City's bonding requirement is inconsistent for several reasons. It contends that it is a form of tax or fee applicable because of the nature of the commodity transported and that it will prompt transportation delays in violation of the HMR.

NTTC contends that the City's bonding requirement fails the "dual compliance" test for consistency. It contends that, unlike the Illinois fee involved in IR-17, 51 FR 20925 (June 9, 1986), and IR-17 (Appeal), 52 FR 36200 (Sept. 25, 1987), *correction*, 52 FR 37399 (Oct. 6, 1987), the City's requirement does not support an otherwise consistent safety regulatory program. It also points to unnecessary delays which would be caused by roadside checks to enforce the City's requirements, by carriers' routing their trucks around the City, and by the administrative delays necessarily involved in obtaining the required bond. It argues that the potential for replication by other jurisdictions is relevant because the result will be massive disruptions in traffic flows, a factor which it says must be considered under the "DOT enabling act," which directs the Secretary to "promote" transportation.

In addition, NTTC contends that the City's requirement fails the "obstacle test" for consistency. It argues that, because the City's ordinance provides no compliance methodology or details concerning guarantors or beneficiaries, the Ordinance is a transparent attempt to export risks to other jurisdictions by discouraging the hauling of hazardous wastes through the City. NTTC also urges that consideration be given to "burden of commerce" arguments—despite rejection of such arguments in IR-17 (Appeal), *supra*—because the potential threat of widespread fees and similar financial requirements has become a reality; it contends that the "burden on commerce" argument must be considered by OHMT in deciding inconsistency applications because astute state or local governments will not request waivers of preemption (which would open the door for consideration of "burden on commerce" issues).

The NPTA and the PTCA, in their joint comments, contend that the City's bonding requirement is inconsistent for three reasons. First, they assert that the requirement of a bond as a precondition to hazardous materials transportation would result in rerouting by carriers and an exportation of risk to other communities and thus constitutes a *de facto* ban on hazardous materials transportation. They cite IR-10, *supra*, in support of this contention. In addition, they argue that the rerouting effects of the City's bonding requirement will be aggravated by the existing Federal motor carrier insurance requirements in 49 CFR 387.15.

Second, they contend that the City's requirement will result in unnecessary delays in transit for many shipments because of the rerouting that requirement will cause. Such delays, they argue, result in a direct conflict with § 177.853 of the HMR, which directs that highway shipments proceed without unnecessary delay.

Third, they assert that the City's requirement is inconsistent because of potential multiplicity. In support of this argument, they quote from IR-10, *supra*:

[I]f any one State may use insurance requirements to deflect interstate carriers of hazardous materials into other jurisdictions, then all States may do so. The logical result would be, if not a total cessation of a Congressionally recognized form of interstate transportation then the very patchwork of varying and conflicting state and local regulations which Congress sought to preclude.

49 FR 46647. NPRA and PTCA also cite IR-6 as declaring City of Covington, Kentucky, prenotification requirements inconsistent for the same reasons.

ATA challenges the consistency of the City's requirements on several grounds. It points out that the City's Ordinance states that the "bond shall assure that the provisions of the Ordinance are satisfied" and "shall inure to the benefit of the City of Maryland Heights and persons residing therein." ATA claims that the bond is used to enforce compliance with other provisions of the Ordinance, including requirements to have an annual waste transportation license, to be inspected, to display a sticker, to have specified levels of insurance, and to have vehicles and containers which meet City construction requirements.

ATA also states that the City contains segments of four major interstate highways near the Missouri-Illinois border and that City Manager Moran stated that the City believes it has authority under this Ordinance to regulate trucks passing through the City

on Interstate highways and state highways.

Having set forth these premises, ATA advances three separate arguments against the consistency of the City's requirement. Its first argument is that the City's requirement is inconsistent with the national uniformity intended by Congress in enacting the HMTA, as reflected in 49 CFR 177.800. They perceive the City's Ordinance as a precedent leading to adoption of different regulations by many jurisdictions which would interfere with compliance with the HMR and reduce safety.

This lack of uniformity, ATA asserts, is demonstrated by the City's prohibiting the use of drivers and vehicles meeting all HMR requirements from transporting hazardous wastes in the City unless the vehicle is bonded, licensed, inspected, insured and constructed in compliance with the City's Ordinance. In particular, ATA points to "ambiguous" requirements that "vehicles and containers used shall be constructed—so as to prevent wastes from spilling" and shall "have spillproof bodies."

ATA's second argument is that the City's Ordinance would create unnecessary delays in transportation in conflict with § 177.853 of the HMR. It expresses concern that delays would result from City inspections to enforce the bonding requirement and from carriers having to await the availability of those specific vehicles in their fleets for which they have obtained a required bond. ATA argues that these delays would not only violate § 177.853 but also would constitute an obstacle to compliance with the HMR under IR-22, 52 FR 46574 (Dec. 8, 1987), *correction*, 52 FR 49107 (Dec. 29, 1987).

ATA's third argument is that the City's bonding requirement is an inconsistent routing restriction or ban. It contends that the minimal bond level cannot measurably increase safety, particularly in light of the 49 CFR 387.15 [actually §§ 387.7 and 387.9] requirement for \$1,000,000 liability insurance for carriers of hazardous waste in interstate commerce. Nevertheless, ATA contends these bonds will be difficult, costly or impossible to obtain. Therefore, it argues, the bonding requirement will force some carriers to avoid the City and that, therefore, the Ordinance really is a routing restriction or *de facto* ban.

ATA contends that the Ordinance is inconsistent as either a hazardous materials routing restriction or ban. It points out that IR-23, 53 FR 16840 (May 11, 1988), requires routing restrictions to be preceded by a determination of effect on overall public safety and consultation with other affected

jurisdictions—neither of which is reflected in the record here. ATA further states that IR-23 indicates that the power to ban is exclusively Federal and that local bans generally are inconsistent.

IV. Ruling

While many of the issues raised in the comments (e.g., delays, routing restrictions, bans, equipment requirements, etc.) may have merit, it is unnecessary to discuss them in order to determine the consistency of the City of Maryland Heights' bonding requirement for the transportation of hazardous wastes.

A local government may not impose any insurance, bonding or indemnification requirement as a precondition to the transportation of hazardous materials. It is necessary to discuss the imposition of such requirements to both radioactive materials and other hazardous materials because the City's bonding requirement appears to apply to both radioactive and non-radioactive hazardous wastes. This issue previously has been resolved with respect to radioactive materials, and this ruling addresses this issue with respect to other hazardous materials, specifically hazardous wastes.

Several prior inconsistency rulings have made it clear that indemnification, bonding or insurance requirements for radioactive materials transportation differing from Federal requirements are inconsistent. IR-10, IR-11, IR-15, IR-15 (Appeal), IR-18, all *supra*; IR-18 (Appeal), 53 FR 28850 (July 29, 1988). This conclusion was stated succinctly by the RSPA Administrator in IR-15 (Appeal):

The indemnification level established through the HMR, coupled with the indemnification provisions of the Price-Anderson Act (42 U.S.C. 2210), provides the exclusive standard for radioactive materials transportation indemnification. They have totally occupied that field, and any state or local bond, insurance or indemnification requirement not identical to the HMR requirement is an obstacle to the accomplishment of the objectives of the HMTA and the HMR.

52 FR 13062.

However, no prior inconsistency ruling or court decision has considered the consistency under the HMTA or the HMR of a local bonding, insurance or indemnification requirement for the transportation of non-radioactive hazardous materials. There is no such requirement in the HMR. OHMT is determining herein, in accordance with *Ray v. Atlantic Richfield Co.*, 435 U.S.

151 (1978), that no such requirement is necessary—particularly because 49 CFR 387.7 and 387.9 already require insurance or surety bonds of between \$1,000,000 and \$5,000,000 for motor carriers transporting hazardous wastes, hazardous substances and other hazardous materials.

If OHMT later determines that a bonding, insurance, or indemnity requirement is necessary under the HMTA for the transportation of non-radioactive hazardous materials, it will amend the HMR accordingly. Until such time, the absence of such a requirement in the HMR is a reflection of OHMT's determination that no such requirement is necessary and that any such requirement imposed at the state or local level is inconsistent with the HMR.

The subject of bonding, insurance and indemnity requirements for hazardous materials transportation is exclusively Federal. The existence in the U.S. of more than 30,000 local jurisdictions,

each having the potential to impose such requirements, demonstrates the havoc which could be created if even a small percentage of them were to impose such requirements (with their inevitable differences). It would be extremely difficult for carriers to learn about, let alone comply with, such local requirements.

As indicated in IR-10, *supra*, at 46647, this regulatory subject is the type of subject (insurance) about which Congress was concerned when it included preemption language in the HMTA "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation." S. Rep. 1192, 93rd Cong., 2d Sess., 37-38 (1974). Thus, non-Federal bonding, insurance and indemnity requirements for hazardous materials transportation regulated under the

HMTA fail the "obstacle" test and are inconsistent with the HMR.

V. Ruling

For the foregoing reasons and on the basis of this record, I find that Section I of Ordinance 88-378 of the City of Maryland Heights, Missouri, is inconsistent with the HMR to the extent it applies to hazardous materials regulated under the HMTA, and, therefore, is preempted to that extent under section 112(a) of the HMTA (49 App. U.S.C. 1811(a)).

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Alan I. Roberts,
Director, Office of Hazardous Materials and Transportation.

Issued in Washington, DC, on April 17, 1989.

[FR Doc. 89-9554 Filed 4-20-89; 8:45 am]

BILLING CODE 4910-60-M

Corrections

Federal Register

Vol. 54, No. 89

Wednesday, May 10, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

International Trade Administration

[Order No. 431]

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review

Correction

In notice document 89-10563 beginning on page 18918 in the issue of Wednesday, May 3, 1989, make the following correction:

On page 18918, in the table, entries 15 through 19 should be under the heading "Countervailing Duty Proceeding".

LUNG CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 514 and 556

Animal Drugs, Feeds, and Related Products; Editorial Amendments

Correction

In rule document 89-10207 beginning on page 18278 in the issue of Friday, April 28, 1989, make the following corrections:

§ 514.1 [Corrected]

1. On page 18280, in the second column, in amendatory instruction 24, in the eighth line, no space should appear between the "o" and the "u" in the word "Resources".

2. On the same page, in the same column, in the same paragraph, in the 13th line, no space should appear between "(2)" and "(i)".

§ 514.11 [Corrected]

3. On the same page, in the third column, in the first full paragraph, in the second line, "is" should read "in".

4. On page 18281, in the second column, in the authority citation, in the first line, "Sta." should read "Stat.".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 166 and 167

(CGD 83-032)

RIN 2115-AB29

Traffic Separation Schemes and Shipping Safety Fairways Off the Coast of California

Correction

In proposed rule document 89-10109 beginning on page 18258 in the issue of Thursday, April 27, 1989, make the following corrections:

1. On page 18258, in the third column, in the ninth line, "of voluntary" should read "is voluntary".

2. On the same page, in the same column, in the 13th line, "and inhibit" should read "may inhibit".

3. On page 18261, in the first column, in the 12th line from the bottom, "copies" should read "copied".

4. On page 18262, in the second column, in the first complete paragraph, in the 21st line, "form" should read "from".

5. On the same page, in the same column, in the same paragraph, in the 23rd line, "including" was misspelled.

§ 166.300 [Amended]

6. On page 18263, in the first column, in § 166.300(b)(1), the third geographical position under "Latitude" should read "33°43'24" N."

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Inconsistency Ruling No. IR-25; Docket IRA-43]

Transporting Hazardous Wastes; City of Maryland Heights (Missouri) Ordinance Requiring Bond for Vehicles

Correction

In notice document 89-9554 beginning on page 16308 in the issue of Friday, April 21, 1989, make the following corrections:

On page 16308, in the first column, under I. Background, in the first paragraph, in the sixth line, "inconsistency" should read "consistency".

On the same page, in the third column, in the first paragraph, in the sixth line, "unnecessary" was misspelled.

On page 16310, in the second column, in the first complete paragraph, in the fourth line, "It" should read "Its".

BILLING CODE 1506-01-D