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Hazardous Materials Transportation: A Local Approach

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Cover Page Footnote

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HAZARDOUS MATERIALS TRANSPORTATION

A Local Approach

by Gregory T. Phillips

Both American society and industry are becoming increasingly dependent upon hazardous materials (explosives, gases, corrosives, flammables, poisons, and radioactive materials) to facilitate our high standard of living and the requirements of modern technologically advanced industries. As these materials become more widely used, the dangers inherent in their production, transport, and use spread. However, until recently, Americans have been much more interested in enjoying the benefits of the use of hazardous materials than in properly attending to the dangers they pose.

Recent events have sharpened public understanding of the hazards posed by these substances. The near disaster at the Three Mile Island nuclear power plant focused attention on the inherent dangers in the production of nuclear energy. The chemical contamination discovered at Love Canal in Niagara Falls, New York, and at Times Beach, Missouri, have drawn attention to the hazards of the use and improper disposal of the toxic chemicals so widely used in industry. And while attention has focused on these environmental problems, there is a growing awareness that the transportation of hazardous materials poses health and environmental dangers which may be equally great.[1]

While there has not been the sort of massive catastrophe which would focus national attention on the safety aspects of hazardous materials transportation, there have been many serious accidents which have brought home these dangers on a local scale. As these accidents continue to increase, pressure increases at all levels of government to take steps to make hazardous materials transportation safer. Despite a massive federal entry into the field of hazardous materials transportation (which will be detailed below), many states and localities have enacted laws and ordinances regulating transportation of these materials within their boundaries. Because uncoordinated regulatory activity could adversely affect both public safety and economic growth, the proper regulatory role of each level of government—federal, state, and local—needs to be determined.

This article focuses on the role of localities—cities, towns, and counties—in regulating the transportation of hazardous materials within their boundaries. Because the powers of localities are restrained by federal activity in this area, an overview of the federal regulatory framework, including criticisms of it, many of which have encouraged regulatory activity on the local level, is useful. Local, and to a lesser degree state, regulations are considered in the light of the federal scheme. Here the focus will be on the historic basis of local safety regulation—namely, the police power—and an evaluation of specific local safety measures that have been enacted. Finally, this author suggests a framework for the proper role to be played by each level of government.

One final note as to the scope of this article: the focus will be on highway transportation of hazardous materials by truck. Shipment of hazardous cargo by rail, air, or sea will not be considered. These modes of transport involve many of the same dangers as highway transport but are separately regulated by federal authorities and often are beyond the regulatory impact of local legislation. Also, the transportation of nuclear fuels and wastes and radioactive materials will be discussed as if they were a typical sub-group of hazardous materials. This is not always necessarily the case, as these materials are also separately regulated and often involve hazards of a different nature than nonnuclear materials. However, radioactive materials have been incorporated herein for two reasons. First, there is great public concern over the transportation dangers of nuclear materials, particularly through populous areas. Second, some local regulations single out radioactive shipments for special safety treatment, and these regulations have been actively challenged in the courts, providing a body of legal doctrine and research work which may be applicable to nonradioactive safety regulation.

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THE FEDERAL REGULATORY FRAMEWORK

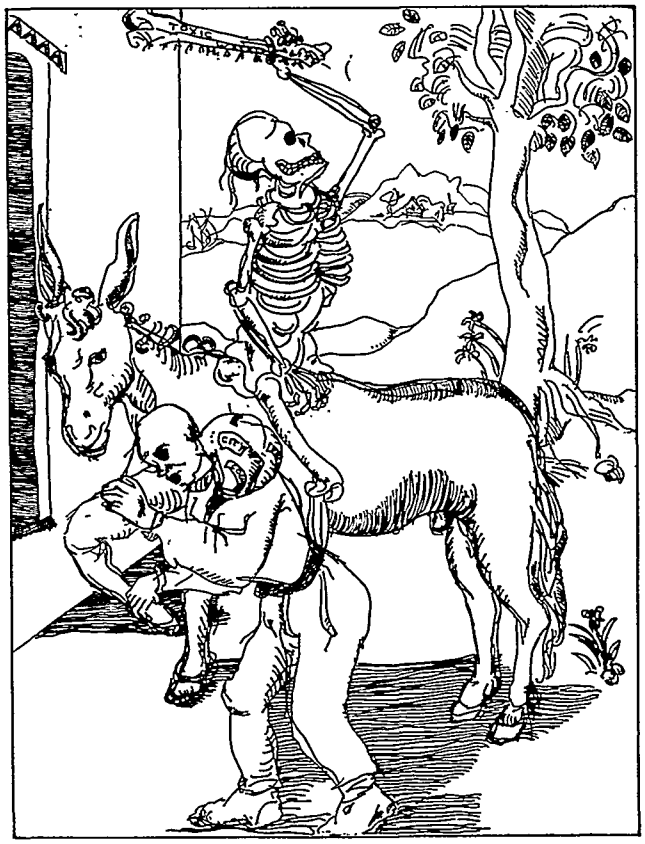
The basic federal statute in this area is the Hazardous Materials Transportation Act (HMTA), enacted on January 3, 1975, and found at 49 U.S.C. 1801 *et seq.* The HMTA concentrated the regulatory and enforcement authority that had previously been delegated to the various modal agencies (for example, the Federal Aviation Administration, the Federal Railroad Administration) in the hands of the Secretary of Transportation. The HMTA authorized the secretary to establish uniform regulations governing the movement of hazardous materials in interstate commerce and in intrastate commerce affecting interstate commerce. The secretary's authority under the HMTA reaches carriers and shippers of hazardous materials as well as manufacturers of containers used to transport hazardous materials.

Hazardous materials are defined in the HMTA (sections 1802 and 1803) as "a particular quantity and form" of material which the secretary, "in his discretion," has determined "may pose an unreasonable risk to health and safety or property when transported in commerce." The Department of Transportation (DOT) has identified over eighteen hundred such materials—from common household items such as paint, matches, and charcoal briquets to extremely hazardous materials such as plutonium, chlorine, and liquified petroleum gas.[2]

The HMTA (section 1804) empowers the secretary to issue regulations governing "any safety aspect of the transportation of hazardous materials," including packaging, handling, labeling, and routing. Under this mandate, the DOT has issued a very elaborate system of regulations that occupy more than eleven hundred pages in the Code of Federal Regulations.[3] Finally, the secretary is given broad enforcement powers, including authorization to conduct investigations, hold hearings, inspect documents and property, and impose civil and criminal penalties.

Despite the resources and energy that have been expended to create the extensive federal regulatory system described above, the system has generated much criticism from such varied sources as spokesmen for the transportation industry, officials from local governments, and from federal agencies and congressional panels charged with evaluating the regulations. The alleged failure of the federal regulatory system to adequately ensure the safe transportation of hazardous materials is often cited by local governments when they enact local safety ordinances.

According to a report by the General Accounting Office (GAO), the DOT's planning and operation of the federal hazardous materials transportation safety program is



severely hindered by a lack of adequate information. The DOT does not know the identity of all the firms it is supposed to regulate, the kinds of materials transported by these carriers, nor the volume of materials being shipped. As Albert B. Rosenbaum, III, assistant managing director of the National Tank Truck Carriers, Inc. (NTTC), put it, "[P]resently, the enforcers are referees in a game where they do not know who the players are." Futher, the DOT relies on voluntary reports of accidents involving hazardous materials transportation supplied by industry and generally does not question the accounts it receives. This procedure results in figures which seriously understate the number and the impact of these accidents. In a report concerning the improvement of hazardous materials transportation, the GAO concluded: "DOT can neither determine the extent of the problems involved in transporting hazardous materials, nor assure the Congress—and the American public—that it is using its limited staffing and funding resources efficiently and effectively."

Resource levels, both budgetary and personnel, are a further problem. The GAO reported that in 1979 the DOT

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had only forty-nine full-time hazardous materials inspectors, and the 1979 Senate Commerce Committee concluded the inspection forces of each of the various modal administrations were "so small that they can make no more than a token number of inspections of those parts of the industry that they are responsible for." As a result, enforcement of the federal safety regulations remains a goal to be pursued, rather than a reality which has been attained.

Many spokesmen for the transportation industry complain that the DOT's enforcement activities are less than vigorous. While testifying before the Commerce Committee, one characterized the DOT's enforcement activities as "sporadic and poorly organized and directed," while another referred to the DOT's enforcement program as "a laughing matter." A study of hazardous materials transportation conducted by the National Research Council and released in June 1983 criticized current safety enforcement approaches for the lack of a "consistent" relation between the penalty and the gravity of the offense and characterized such a program as "a disservice to the public."

Companies that do comply with the regulations feel that they are at a competitive disadvantage against those that do not comply. The result is a strong incentive toward noncompliance. A study by the National Transportation Safety Board (NTSB) found another major cause for noncompliance: the complexity of the regulations. The National Research Council study concurred, finding a "pervasive and unnecessary complexity that may in fact discourage the very safety it proposes to assure." The NTSB found that the hazardous materials regulations are so complicated that some firms do not even try to comply with them. An official of the port of Seattle perhaps stated it best when he described the federal regulations as "fine print an inch and a half thick, requiring a Ph.D. chemist and a Philadelphia lawyer to read."

Thus, the federal safety program for hazardous materials is characterized by many as a failure. An under-staffed federal agency, relying on incomplete information, issues regulations that industry cannot or will not comply with, and yet the agency is unwilling to enforce compliance—indeed, unable even to fully monitor noncompliance. It is hardly surprising, then, that states and localities feel compelled to issue their own sets of transportation safety regulations. According to a spokesman for a national trade association of tank truck carriers, a major motivation for local safety regulations has been "frustration borne of the reality of minimal federal enforcement efforts."

LOCAL AND STATE SAFETY REGULATIONS

States and municipalities (as the administrative arms of states) have long enjoyed the power to enact regulations promoting the health, safety, and welfare of their citizens. This power, known as the police power, clearly extends to highway safety regulations. The Supreme Court has held that state or local regulations to promote highway safety enjoy a strong presumption of validity against consitutional attack. In *Raymond Motor Transportation* v. *Rice*, the Supreme Court stated, "[I]n no field has . . . deference to state regulation been greater than that of highway safety regulation." The obvious reason for according deference to local safety regulations is that the local authorities are generally in the best position to consider problems unique to their areas and to tailor their rules accordingly.

Nevertheless, state and local regulations promoting transportation safety may be subject to attack on at least two grounds. If the local requirements regulate an area in which congressional action has been taken, they may be preempted by the federal legislation. Second, local transportation regulations may be struck down if they place a burden on the flow of interstate commerce, under the Commerce Clause of the Constitution. Each of these barriers to local action needs to be explored more fully.

PREEMPTION UNDER THE HMTA

The federal statute covering hazardous materials transportation, the HMTA, contains an express provision (section 1811) which preempts "any requirements, of a state or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA] or regulations issued under [the HMTA]." The provision makes clear that Congress did not intend the HMTA and its regulations to completely occupy the field of hazardous materials transportation so as to preclude *any* state action. According to a

Senate Commerce Committee Report on the preemption provision, Congress sought only "to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." Therefore, absent federal occupation of the field, local or state safety measures will stand, so long as they are deemed not "inconsistent."

The HMTA also contains a procedure whereby a local regulation may be approved by the Secretary of Transportation even though the local law is inconsistent with federal law or regulations. Such an inconsistent law is exempt from preemption if the secretary finds that the law (1) affords an equal or greater level of protection to the public than is afforded by the requirements of the HMTA or the regulations issued by the DOT, and (2) does not unreasonably burden commerce.

One problem that has developed is that, despite the establishment of procedures for considering whether local safety requirements are "inconsistent" with, or exempt from, the federal regulations, there is no *requirement* that a local government seek the approval of the Secretary in advance of putting into effect local regulations dealing with the transportation of hazardous materials. In other words, if a local government deems its regulations to be *not* inconsistent with federal law, it can put them into effect subject to challenge by a party who contends otherwise. Transportation industry spokesmen complain bitterly that the laxity of this requirement allows localities to enact a myriad of inconsistent regulations leaving transportation firms with the double burden of challenging the regulations as inconsistent while at the same time attempting to keep abreast of these local requirements and comply with them. Local officials respond that the failure of the federal safety efforts leaves them no choice but to try to protect their citizens through local ordinances.

A party objecting to a local requirement may either bring an "inconsistency proceeding" before the DOT or may challenge the requirement in court. The federal statute does not indicate who is to make a determination of inconsistency, but it has been held that DOT decisions represent "advisory opinions" that do not bind the courts. Nevertheless, given the experience that the DOT has acquired in these matters, courts may properly resort to the DOT's rulings for guidance.

Inconsistency requires more than a mere difference between state and federal law. The nonfederal requirement must actually conflict with the HMTA to be deemed inconsistent with it. The actual criterion applied is derived from several Supreme Court cases and have been codified in the regulations under HMTA. The question of inconsistency involves consideration of two issues: (1) whether or not compliance with both the federal and nonfederal requirements is physically possible, and (2) the extent to which the nonfederal requirement is an obstacle to the achievement of the full purposes of the HMTA. Therefore, a local or state rule or regulation directly conflicts with the HMTA if it hinders the achievement of the purpose of the HMTA, which is to promote hazardous transportation safety.

COMMERCE CLAUSE LIMITATIONS

As noted above, the Commerce Clause also acts to restrain the powers of localities to enact safety regulations dealing with hazardous materials requlations. The Commerce Clause, which grants Congress the power "[t]o regulate Commerce . . . among the several States . . ." prevents states from enacting laws which unduly burden commerce. States are not prevented from enacting laws which affect interstate commerce provided that the laws serve a legitimate state interest and that they do not discriminate against interstate commerce.

Highway safety has long been recognized as a legitimate state concern, and, consequently, courts have been reluctant to invalidate state safety regulations as violative of the Commerce Clause. However, in *Kassel* v. *Consolidated Freightways*, the Supreme Court decided that mere "incantation of a purpose to promote the public health or safety does not insulate a State law from Commerce Clause attack." A conflict between the legitimate state interests of safety and the national interest in the free flow of interstate commerce is resolved by balancing the nature of the local interest involved and the means used to promote the interest against the degree of interference imposed on interstate commerce. The rule followed by the Supreme Court in *Pike* v. *Bruce Church, Inc.*, provides that "where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." In applying this test in the area of hazardous materials transportation regulations, courts will look to the safety interest sought to be protected, the means chosen to do so, and the impact of those means on interstate commerce, often measured by the compliance costs imposed on highway carriers.

SOME LOCAL REQUIREMENTS CONSIDERED

Perhaps the best way to illustrate the limitations that

statutory preemption and Commerce Clause considerations impose on the ability of localities to regulate hazardous materials transportation is to consider how specific local regulations have fared under challenges before the DOT and the courts. For this purpose, regulations governing the transportation of some types of hazardous materials enacted by the Cities of Boston and New York and by the State of Rhode Island will be considered. Each of these local regulatory approaches have been challenged in inconsistency hearings before the DOT and in the federal courts. Among these three sets of local regulations, most of the typical types of local action can be seen, so that it is possible, after consideration of various rulings as to their validity, to set forth with reasonable certainty precisely what regulatory action a locality may or may not take.

NEW YORK CITY

Radioactive Materials

Two local regulatory actions taken by New York City dealing with the transportation of hazardous materials have been challenged on statutory and constitutional grounds. A section of the city's Health Code[4] bans the transportation of most radioactive materials through the city. Several provisions of the city's fire department regulations restrict the transportation of hazardous gases by tank truck within the city. Each of these actions have been determined to be based upon the legitimate local safety concerns of the densely populated city and have been sustained as valid.

The Health Code provision bans the commercial transport into or through the city of large-quantity or high-level radioactive materials. The directors of the Brookhaven National Laboratories, seeking to ship spent nuclear fuel from Long Island through the city by truck, sought a declaration from the DOT that the city's regulation was inconsistent with HMTA and DOT regulations. On April 20, 1978, the DOT denied the request, ruling that the city regulation was in effect a routing requirement and that, although the DOT had the power to preempt local routing rules, the agency had not yet exercised that power. Since no federal routing requirement existed, the city regulation was not preempted. In making its determination, the DOT noted that the city's action was related to its extreme population density, as a result of which "the consequences of a major accident are too extreme to be tolerable, however remote the probability."

Yet, while refusing to find the rule inconsistent, the DOT suggested that it disapproved of the city's regulation. The DOT questioned whether it was prudent or fair to allow local governments to ban transportation of hazardous materials within their jurisdictions, given the likelihood that neighboring jurisdictions might reciprocate. According to the DOT, "a proliferation of local bans like [New York City's] dealing with hazardous materials carriage will result in a disrupted national transportation network that is at best confusing, at worst chaotic, and neither condition advances transportation safety."

It was apparently these concerns that led the DOT to attempt to overturn New York City's health regulations by promulgating a uniform national rule regarding transportation of radioactive materials. The rule, HM-164, was published on January 19, 1981, and was scheduled to take effect on February 1, 1982. It would have permitted the shipment by road throughout the nation of all types of radioactive materials. One avowed purpose of the rule was to override local prohibitions against the shipment of radioactive materials, particularly New York City's health regulation.

The city brought suit to invalidate the rule or, alternatively, to prevent it from overriding the city's regulation. On May 5, 1982, in *City of New York* v. *U.S. Department of Transportation*, the U.S. District Court for the Southern District of New York invalidated the rule insofar as it overrode nonfederal bans on truck transportation of large-quantity radioactive materials shipments through densely populated areas such as New York City. While holding that the final rule was, in general, reasonably within the DOT's authority, the court found that the DOT had failed to consider alternatives to truck transport (namely, shipment by barge) and had inadequately assessed the risks of highway transport in populous areas and the need, given potential alternatives, to impose those risks on the public. Therefore, the agency had not developed a sufficient administrative record necessary to justify a rule, and thus the DOT's adoption of the challenged rule was "arbitrary and capricious."

However, rather than invalidate the rule in its entirety, the court only enjoined enforcement of it in New York City. Other jurisdictions seeking to restrict the transportation of radioactive materials within their borders were directed to apply to the DOT for a ruling that the local ban was not overridden by the DOT rule. Upon a showing by the locality that application of the rule might result in truck transport through populous areas that present dangers of high-consequence accidents, and presentation of evidence of a safer, feasible alternative to such truck transport, the DOT must then permit the local ban to remain in effect. Thus, local ordinances or regulations governing the

transportation of radioactive materials are held to a test different from those governing other types of nonnuclear hazardous materials. The court in this case sustained a large federal preeminence in one area: in matters of nuclear materials transportation, the presumption is toward federal leadership. Variations from the federal rule will likely come only in very populous areas—major cities—and only where a viable, safer alternative exists to truck transport, perhaps only in cities with marine access. The court did not reach the question of whether restrictions on nuclear transport enacted by rural, nondensely populated areas are preempted, but the suggestion is that such restrictions would be. The DOT and the nuclear industry have appealed the decision to the Second Circuit Court of Appeals.

Hazardous Gases

Regulations promulgated by the New York City Fire Departments govern the transportation of hazardous gases by tank truck.[5] These regulations prohibit such shipments unless transporters obtain a permit from the city fire commissioner certifying that "no practical alternative route to passage through the city exists." When permits are granted, transporters are required to conform with routing requirements (which avoid the most densely populated sections of the city) and curfews (no shipments between the rush hours of 6:00–10:00 AM or 3:00–7:00 PM).

These requirements were challenged by the NTTC, a trucking trade association, as an unconstitutional burden on interstate commerce and as preempted by HMTA and its regulations. In a May 3, 1982, decision, *National Tank Truck Carriers, Inc.* v. *City of New York*, the U.S. Court of Appeals for the Second Circuit sustained the validity of the regulations.

In rejecting the Commerce Clause challenge to the regulations, the court held that the routing and curfew requirements were "based on a legitimate local safety interest and do no impose a disproportionate burden on interstate commerce." Rather, these requirements amounted to mere "inconveniences" which are "not unconstitutionally disproportionate when balanced against the public interest in avoiding a catastrophic accident in a densely populated urban area."

Further, the regulations were "entirely consistent" with the HMTA, its regulations, and their underlying purposes. The curfew requirements did not conflict with a regulation requiring that all "shipments of hazardous materials shall be transported without unnecessary delay," but imposed "only a necessary delay" which could be eliminated by better scheduling by the truckers. Nor did the routing requirements stand as an obstacle to the accomplishment of the objectives of the HMTA, since the DOT "has not issued, and cannot practicably issue, specific routing requirements for localities, whose own agencies are very likely far better equipped to do so." Thus, the New York City hazardous gas routing and curfew requirements were deemed constitutional and not preempted by federal law.

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RHODE ISLAND

Prompted by concern over serious accidents involving the transportation of liquid energy gases (including natural gas and petroleum) in other states, the Rhode Island legislature directed the State Division of Public Utilities and Carriers to promulgate regulations covering such transportation within the state. These rules and regulations, issued in November 1978, cover transport of these gases over the highways, streets, and roads of the state to be used by a public utility, whether in intrastate commerce or in interstate commerce in which the loading and unloading of tank trailers is to be performed within Rhode Island.

The regulations represented a detailed attempt by the state "to regulate the transportation of hazardous materials . . . within the boundaries and/or over the highways and roads of this state" (*NTTC* v. *Burke*), but it should be noted that the rules impacted on only some of the Liquified National Gas (LNG) transports in the state—not all. Nevertheless, the regulations reached many varied aspects of hazardous gas transportation. The central requirement was the obtaining of a state permit before any hazardous gas transportation was conducted within the state. The permit could only be obtained at least four hours prior to each transport and a separate permit was needed for each shipment within the state. The permit application required the carrier to specify, among other things, the date and time

of the shipment, the route to be followed, and the type and amount of gas to be shipped.

The Rhode Island regulations further required carriers to comply with the following operating requirements: no transport of hazardous gases by truck during rush hours (7:00–9:00 AM and 4:00–6:00 PM, Monday through Friday); all vehicles, whether loaded or empty, were required to travel with their headlights on; and drivers were required to inspect vehicles for safety defects and leaks prior to leaving and upon arrival. Additionally, there were three equipment requirements: carriers had to have two-way radios in their trucks, illuminated bumper signs containing a warning, and "frangible-shank-type" locks to prevent tampering with the valves on the truck. Finally, the state regulations required immediate reporting of any accident or safety irregularity to the State Police and the filing of a written report with the Division of Public Utilities and Carriers and the State Transportation Department within twenty-four hours.

NTTC, the transportation industry association which also challenged the validity of the New York City requirements, brought suit in federal court seeking an injunction against enforcement of the Rhode Island rules and regulations on the grounds that they were preempted by the HMTA. At the same time, the state applied to the DOT for a ruling on whether or not the regulations were inconsistent with the HMTA. The district court issued a preliminary injunction against the three vehicle equipment requirements (two-way radios, bumper signs, and frangible locks), finding that the requirements may well be invalid and that, in order to comply with them, carriers would have to incur substantial expenses. The court enjoined enforcement of these three equipment requirements for a reasonable time. As to the other regulations, the district court preferred to await the DOT's determination on the issue of consistency. The district court's issuance of the injunction was affirmed by the U.S. Court of Appeals for the First Circuit prior to any DOT ruling.

The DOT's inconsistency ruling was finally issued on December 13, 1979. The DOT found the requirements concerning the permit and application, curfew hours, subsequent written notice of accidents within twenty-four hours, bumper signs, and frangible locks were inconsistent with federal law and preempted. The state appealed within the DOT, and the ruling was affirmed.

Because the DOT inconsistency rulings are not binding on the courts, when the dispute moved to federal court, the NTTC was able to seek a permanent injunction against all the state requirements.

By this point, the state no longer sought to implement the rules requiring rear bumper signs and frangible locks. The district court, in *National Tank Truck Carriers, Inc.* v. *Burke*, decided on March 17, 1982, that the requirements concerning the permit, applications, curfew hours, and written notice of accidents were inconsistent with federal law and regulations. However, in the absence of any federal requirements pertaining to two-way radios, illumination of headlights, or vehicle inspections, the state's requirements were not preempted. The requirement of immediately reporting accidents to the State Police was held to be consistent with the purposes of the federal rules. These requirements were also deemed to have only a "minimal" impact on interstate commerce.

However, Rhode Island's permit and application requirements and the curfew restrictions were invalidated by the district court as being likely to result in unnecessary delays in conflict with federal regulations and as frustrating one of the purposes of the HMTA—namely, uniformity of regulation. The requirement of written notice of accidents was invalidated as being duplicative of, and thus inconsistent with, federal accident notification requirements. This decision was affirmed by the First Circuit Court of Appeals in January 1983 in a brief memorandum opinion relying substantially upon the reasoning of the district court.

BOSTON

The City of Boston, Massachusetts, enacted on December 19, 1979, an ordinance governing the bulk transportation of several types of hazardous materials within the city. The ordinance and related regulations took effect on March 2, 1981. The regulatory scheme has been challenged by national and state trucking associations, and its validity is still a live legal controversy. Despite the absence of resolution on the issues raised by these local regulations, Boston's requirements are of interest both for the approach they take to safety regulations and for the scrutiny applied to them by the DOT and the courts.

The Boston regulations apply only to the bulk transportation of large quantities of liquified petroleum gas, liquified energy gas, and certain other flammable liquids and solids. Also covered is the transportation in any quantity of certain explosives, poisionous gases, and radioactive materials. The regulations are thus tailored to affect transportation of only large shipments of the most dangerous substances.

The rules were aimed at controlling and reducing the inherent dangers of the movement of these materials in the city's densely populous downtown area. The rules impose a

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ban on the use of streets in the downtown area for the transportation of the described hazardous materials on weekdays between 6:00 AM and 8:00 PM. Further, the rules also preclude the use of any city streets, at any time, for transportation of materials whose point of origin or destination is outside the city. Upon application to the city fire commissioner, exceptions to these regulations may be made by permit, after a showing of "compelling need" consistent with the "public interest." Vehicles operating under such a permitted exception to the rules must carry the permit and display a decal at all times. Additional decals must be displayed on all regulated vehicles, whether or not exempted from the rules, identifying the product carried. Finally, regulated vehicles must comply with existing local and federal traffic regulations, travel three hundred feet apart from each other, drive with their headlights on, and use only designated streets.

Transportation industry officials have singled out Boston's local requirements as being particularly burdensome to carriers. While complaining generally against the proliferation of local laws impacting on hazardous materials transportation before the Senate Commerce Committee, one industry spokesman stated, "the ordinances for the City of Boston are perhaps classic." According to the spokesman, "a 6:00 AM to 8:00 PM ban exists, and violators are subject to civil and criminal penalties, but for purchasing $600 worth of permits from the city, a carrier may conduct business as usual." The spokesman concluued that the net result of these individual safety measures was to "create impossible burdens on shippers and carriers" of hazardous materials.

On the very day the Boston ordinance and regulations took effect, trucking associations challenging their validity won a temporary restraining order preventing implementation of the rules. A short time later, in an inconsistency ruling issued on March 20, 1981, the DOT found major portions of the Boston requirements inconsistent with federal laws and regulations, and therefore preempted.

The DOT had two major criticism of the Boston rules. First, the requirements concerning the daytime curfew and the ban on downtown transport were deemed likely to force hazardous materials shipments to be routed around the city, adding to the travel time of these shipments and thus resulting in "unnecessary delay" in conflict with federal regulations under the HMTA. Second, the DOT took issue with the process used by Boston to make decisions with safety implications reaching beyond its jurisdictional boarders. The DOT stated, "for consistency with the HMTA, Boston must act through a process that adequately weighs the full consequences of its routing choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules." The DOT ruled that the process used by Boston failed to adequately address these concerns. Therefore the ban against use of city streets for transport of hazardous materials, the daytime curfew, and the permit system were inconsistent with the purposes of the HMTA. Thus, they were preempted.

Additionally, the DOT also found the various requirements regarding vehicle identification decals to be inconsistent with the HMTA. Any such identification decals were duplicative of federally required placards and thus stood as an obstacle to the accomplishment of the purpose of the federal regulations. The requirements regarding separation distances between vehicles and the use of headlights were, in the absence of any federal requirements, deemed to be consistent by the DOT.

The Boston regulations were simultaneously challenged in federal court. On April 6, 1981, the U.S. District court for Massachusetts, in *American Trucking Associations* v. *City of Boston*, rejected most of the DOT's analysis and, for the most part, denied a preliminary injunction against enforcement of the Boston regulations. The district court referred to the DOT's inconsistency opinion but noted that, on the issue of the process used by Boston in devising its rules, the proposed regulations were submitted to the State Department of Public Safety for approval and were commented on by the fire marshals of neighboring jurisdictions. This information had not been made available to the DOT. Therefore, the court held that it might find the downtown ban and curfew fully consistent with federal law and refused to issue the injunction. However, the court did find the decal and permit requirements unduly burdensome and enjoined their enforcement.

Since this decision, Boston has sought appeal of the DOT's original finding of inconsistency within the DOT. In

an April 16, 1982, appeal decision, the DOT retreated from many of its previous conclusions and rendered an "indeterminate" ruling, finding it impossible to render a precise decision on the question of preemption, given the factual dispute over the amount of input received by citizens outside Boston affected by the Boston rules. Pending a trial on the merits in district court, scheduled to begin in September 1983, Boston's rules, for the most part, remain in place.

The passage of the Hazardous Materials Transportation Act in 1975 signaled a large federal entry into the field of hazardous materials transportation safety. Nevertheless, as this article demonstrates, the federal role is not an exclusive one; cities, towns, and states can and do play an important part in supplementing and augmenting the federal goal of "protect[ing] the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."

It is possible to outline the scope of permissible local safety regulations over hazardous materials transportation by truck. Local governments have the most latitude in subject areas in which no federal rules exist. On this basis, regulations requiring carriers to inspect their vehicles before and after each shipment or to drive with lights illuminated have been upheld. Any equipment requirements are likely to be preempted by the numerous federal rules on the subject; but, again, where the federal rules are silent, and where compliance costs are low relative to the safety impact, localities may enact valid regulations. An example of this is Rhode Island's two-way radio requirement, which was sustained based upon the utility of the radios for reporting accidents and the fact that most trucks are already equipped with CB radios.

The two most difficult areas are curfew and routing requirements. As for curfews, the safety impact of reducing or preventing the possibilities of accidents during business hours, when more people in downtown areas may be affected, must be balanced against the possibilities of delay likely to be encountered by transporters. Routing regulations affecting nuclear materials must meet the requirements set forth in *City of New York* v. *United States Department of Transportation.* Routing rules over nonnuclear materials are likely to be sustained if they appear reasonably based upon safety considerations and are enacted after consultation with other affected jurisdictions.

The HMTA's preemption clause allows localities to play an important role in hazardous materials transportation safety. The danger, of course, is that a multiplicity of local rules will make it much more difficult and expensive for carriers to legally transport the important products and materials. Nevertheless, some degree of local input and control is desirable given the capabilities of localities to fashion their requirements to the needs and concerns of the local area and the regulatory and enforcement gaps in the federal program.

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Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978)
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49 U.S.C. sections 1802, 1803, 1804, 1808, 1809, 1811.

FOOTNOTES

1. Marten. 1980. *Regulation of the Transportation of Hazardous Materials: A Critique and a Proposal.* 5 Harvard Environmental L. Rev. 345.
2. Marten, *supra*, note 1, at 349.
3. Marten, *supra*, note 1, at 358, n. 97.
4. New York City Health Code, Section 175.111(1).
5. New York City Fire Department Regulations, F.P. Directive 5-63, sections 10.2 and 10.4(b).