



CHEMICAL MANUFACTURERS ASSOCIATION

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September 13, 1996

Dockets Unit
U. S. Department of Transportation
Research and Special Programs Administration
Nassif Building, Room 8421
400 Seventh Street, SW
Washington, DC 20590-0001

RE: Docket HM-223; Notice 96-15
Applicability of the Hazardous Materials Regulations to Loading,
Unloading, and Storage

Dear Sir or Madam:

Please find enclosed five copies of the written statement of the American Petroleum Institute, Chemical Manufacturers Association, The Chlorine Institute, Inc., The Fertilizer Institute, National Tank Truck Carriers, Inc., and Railway Progress Institute regarding the Research and Special Programs Administration (RSPA) docket referenced above. This statement will be presented at the RSPA public meeting in Atlanta, GA, on September 13, 1996.

CMA requests that the submittal made by CMA and six other chemical manufacturing trade associations to RSPA on October 2, 1995, also be included in the HM-223 docket files.

Thank you for the opportunity to present this statement in Atlanta regarding the issues in Docket HM-223. If you need additional information or clarification, please contact Meredith S. Grider, CMA, at (703) 741-5256.

Sincerely,

CMA 111313

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

DOCKET HM-223; Notice No. 96-15

APPLICABILITY OF THE HAZARDOUS MATERIALS REGULATIONS TO
LOADING, UNLOADING, AND STORAGE

STATEMENT OF:

AMERICAN PETROLEUM INSTITUTE
CHEMICAL MANUFACTURERS ASSOCIATION
THE CHLORINE INSTITUTE, INC.
THE FERTILIZER INSTITUTE
NATIONAL TANK TRUCK CARRIERS, INC.
RAILWAY PROGRESS INSTITUTE

PRESENTED AT A PUBLIC MEETING
OMNI HOTEL
ATLANTA, GEORGIA
FRIDAY, SEPTEMBER 13, 1996

INTRODUCTION:

This is a position on DOT jurisdiction of the American Petroleum Institute, Chemical Manufacturers Association, The Chlorine Institute, Inc., The Fertilizer Institute, National Tank Truck Carriers, Inc., and, Railway Progress Institute (hereafter referred to as "the alliance"). The memberships of these associations represent a large portion of the hazardous materials transportation industry. These affected industries have a significant interest in the US Department of Transportation (DOT) Research and Special Programs Administration's (RSPA) efforts to address the complex issues involved in determining the extent of its jurisdiction.

In an attempt to address the difficult task of establishing the reasonable boundaries of DOT's jurisdiction, especially as it applies to on-site transportation activities, the alliance has developed a position by drawing on the knowledge of experts within its member companies in the areas of DOT, Occupational Safety and Health Administration (OSHA) and US Environmental Protection Agency (EPA) jurisdictional applications. There always has been overlap among the agencies' jurisdictions on the plant site; today it is necessary to draw some distinctions among the three agencies in order to avoid regulatory conflicts and nonproductive overlap. The alliance is eager to assist DOT in addressing the extent of its jurisdiction in order to better delineate the preeminent authorities of each agency.

The alliance believes the agencies and industry can use the fundamental principles set forth in this proposal to determine which agency should regulate various activities on-site. In order to avoid overlapping or conflicting regulations, the alliance believes it is imperative that the agencies consider these fundamental principles.

PREEMINENT AUTHORITY:

To apply the fundamental principles that the alliance suggests, it is first necessary to identify the preeminent authority, in industry's view, of DOT, OSHA, and EPA. The alliance believes that two of DOT's preeminent authorities support safety and commerce through transportation safety regulations and uniform Federal transportation standards; the preeminent authority of OSHA is worker safety and health; and, the preeminent authority of EPA is environmental protection.

For the purposes of this debate, the alliance is focusing on DOT's preeminent authority. The alliance believes that examples of critical areas integral to DOT's preeminent authority are:

- transportation equipment/containers;
- rail tracks;
- roads;
- pipelines; and,
- marine docks.

Primary regulatory responsibility impacting transportation safety (and uniform Federal transportation standards) in these areas should, and, we believe, does lie within DOT.

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION:

DOT has primary regulatory responsibility for the above-noted critical areas. The administration of most significance to shippers of hazardous materials, for transportation purposes, is the Research and Special Programs Administration. By authority granted in the Hazardous Materials Transportation Act (HMTA), DOT, through RSPA, administers a national hazardous materials transportation safety program that protects the general public, the environment, and the employees involved in the handling and transport of hazardous materials. In Docket HM-223, RSPA is questioning the extent of its jurisdiction on the plant site; therefore, the alliance will

focus on the reasonable boundaries of RSPA's jurisdiction in this proposal, and we feel the principles are applicable to all parts of DOT.

Before discussing our proposed principles for resolving jurisdictional overlap, the alliance's comments will first address two issues of absolute importance to the alliance that have a great bearing on the applicability of RSPA's jurisdiction:

- national uniformity, and,
- federal preemption rule.

The alliance believes that a primary function of RSPA is to maintain the national uniformity of hazardous materials regulations to further safety and commerce. Prior to the HMTA, hazardous materials regulation was conducted by various modal organizations with no central authority. Until these functions were centralized, regulation was poorly coordinated. Without a central federal authority, industry could be faced with a multitude of conflicting state and local regulations that would impede commerce and diminish transportation safety. RSPA provides this national uniformity through regulation development, enforcement, its exemption and approval authority, hazardous materials training, and preemption rule.

NATIONAL UNIFORMITY/PREEMPTION RULE:

National uniformity is essential for industry, such as the chemical industry, for example, which ships more than \$341 billion worth of products annually to its domestic and international customers. A major concern for the alliance as RSPA struggles to determine the reasonable boundaries of its jurisdiction is the potential loss of federal preemption rule. The need for federal preemption rule is recognized by Congress in the HMTA and is extremely important. For example, industry increasingly prefers to limit the amount of hazardous materials stored on site. This leads our members to develop and encourage more efficient transportation systems that support "just-in-time" shipments. These "just-in-time" shipments depend on predictability that a uniform national system provides. Often, however, individual states attempt to establish their own criteria. These state initiatives may be driven by local political considerations that do not consider the impact beyond their borders. These initiatives, however well intended, can serve as obstacles to commerce, and may result in shipment delays that expose the public to additional risk. RSPA's preemption rule avoids this situation.

RSPA has already recognized areas of shared jurisdiction with its sister DOT modal administrations, but it has also deferred to the standards of other Federal agencies – such as OSHA for emergency response – as a substitute for rules under the Hazardous Materials Regulations (HMR). The alliance is concerned that if RSPA does not reference these other Federal standards in the HMR, this might be deemed an abdication of the preeminent authority of DOT over activities related to the transportation of hazardous materials. It is not clear whether RSPA's reference to those other agency standards, without formally incorporating them by reference in the HMR, will preserve RSPA's preemption authority over these issues. Because the HMTA is scheduled for reauthorization during calendar year 1997, we believe it is essential that the reauthorizing legislation statutorily affirm that, under these circumstances, 49 USC 5125

would give non-DOT standards that are referred to in the HMR preemptive effect over other standards.

Standards set by other Federal agencies often establish minimum standards, and encourage individual state and local jurisdictions to develop more stringent regulations in addition to the basic Federal standards. If this occurs in the area of transportation, it would create the potential for a myriad of inconsistent regulations and serious impediments to commerce, as well as potentially create unsafe conditions. For these reasons, the preemptive authority exercised by RSPA over hazardous materials transportation activities must be preserved and exercised in any regulatory arena where safe and efficient transportation may be jeopardized.

MEMORANDA OF UNDERSTANDING:

Where RSPA chooses to incorporate by reference the regulations of other agencies, the alliance suggests that RSPA work with those other agencies to develop memoranda of understanding to address responsibility for enforcement actions.

To help alleviate confusion when other agencies propose regulations addressing transportation issues where RSPA has been silent, the alliance also suggests that any agency (DOT or non-DOT) proposing a new regulatory activity affecting the transportation of hazardous materials be required to work with RSPA. Any initiative that affects hazardous materials transportation should be pursued under RSPA's authority to ensure the applicability of Federal preemption. This would alleviate confusion among the agencies and the regulated industry, and help to eliminate regulatory gaps in transportation activities.

FUNDAMENTAL PRINCIPLES:

Given jurisdictional overlap on the plant site between DOT, OSHA and EPA, the alliance suggests that there are four fundamental principles the agencies should consider when resolving jurisdictional overlaps:

- a. With a few exceptions (e.g., the California "Four Pack" preemption determinations), the requirements of the existing transportation, worker, and environmental safety regulations are fundamentally sound. Government and industry should focus our efforts to delineate agency jurisdiction on future regulatory issues.
- b. Coordination is needed at the Federal and State level to avoid duplicative and/or conflicting regulatory coverage.
- c. There is no rational geographic line between the DOT, OSHA, and EPA regulatory arenas on the plant site. However, DOT should maintain regulatory authority for the critical areas integral to DOT's preeminent authority, such as transportation vehicles from loading, up to and including unloading at an end user's facility.
- d. One agency can not issue regulations that conflict with another agency's preeminent authority.

ALLIANCE POSITION:

To preserve the uniformity required for transportation across the United States, requirements associated with DOT's preeminent authority over transportation may be addressed by EPA and/or OSHA regulations only to the extent that they do not conflict with or are not covered otherwise by DOT.

The alliance suggests that the agencies, and industry, use the principles previously mentioned to resolve jurisdictional overlap. The alliance strongly believes that limits on areas of jurisdiction can not be segregated by location or place but must be segregated by the preeminent authorities of each agency. Again, those preeminent authorities are as follows:

OSHA:	Worker Safety and Health
EPA:	Environmental Protection
DOT:	Transportation safety and uniform Federal transportation standards

These preeminent authorities of DOT are necessary to ensure transportation safety and provide for commerce.

DOCKET HM-223 ADVANCED NOTICE OF PROPOSED RULEMAKING QUESTIONS:

The alliance has chosen a few of the questions posed in the advanced notice of proposed rulemaking (ANPRM), Docket HM-223, to illustrate the concerns industry has with these issues; the impact the resulting decisions may have on industry; and how these principles may be used to resolve jurisdictional concerns, and will provide the maximum level of safety and protection and benefit to all parties. We caution that these answers are for illustrative purposes only and that it may be necessary for the alliance to later elaborate upon the answers as we prepare to submit written responses to all of the questions posed in Docket HM-223.

QUESTION: LOADING (5) Are there other factors for determining whether loading of hazardous materials is "incidental" to transportation in commerce?

ANSWER: Using the principles previously discussed, RSPA's role in regulating loading would be to ensure uniform transportation safety standards. There is no appropriate geographic "bright line" that defines where one agency ends and another one starts. RSPA's role in this arena is to ensure that containers intended for transportation in commerce are loaded in such a way that they can be transported safely. As an example, two ways to ensure transportation safety (in the loading process) are to ensure that transportation containers are not overfilled and that closures are securely fastened - and RSPA has regulations to do that. A loaded container is addressed later under the question of "storage incidental to transportation." OSHA and EPA have distinct responsibilities to regulate separately worker safety and health and environmental protection in the loading process to the extent they do not regulate

something that affects RSPA's regulations regarding overfilling containers and securing closures. To the question (3) as to whether RSPA should regulate the loading of cargo tanks but not other bulk packagings, this would make no sense. RSPA should regulate all bulk and non-bulk packagings equally when it comes to issues like filling limits, securing closures, and blocking and bracing. If we consider part of the loading process to be selecting the correct container, this remains solely the jurisdiction of RSPA and can not be regulated directly by the other two agencies because it would conflict with the preeminent authority of DOT.

QUESTION: UNLOADING (5) Are there factors for determining whether unloading of hazardous materials is "incidental" to transportation in commerce?

ANSWER: Until such time as the product is removed from the transportation container/vehicle (rail car, cargo tank, intermodal transportation in the case of bulk shipments; trailer or van in the case of non-bulk shipments), the container/vehicle should be considered to be "in-transportation" or in a phase "incidental to transportation."

QUESTION: STORAGE (4) Are there other factors for determining whether storage of hazardous materials is "incidental" to transportation in commerce?

ANSWER: The primary factor in "storage incidental to transportation" under HMTA would seem to be what the material is stored in. If it is a transportation container/vehicle meeting all RSPA requirements and the intention for that container/vehicle is that it will be, or has been, placed in transportation in commerce, then it is storage incidental to transportation (refer also to the answer to Question Unloading (5) above).

QUESTION: HANDLING (3) Are there other factors for determining when a hazardous materials transportation activity is "handling" within the meaning of Federal hazmat law and, therefore, regulated under the HMR?

ANSWER: The same factors should be applied to handling as were applied to loading and unloading - any "handling" that has an impact on transportation safety or uniform Federal transportation safety standards should be regulated by DOT.

CLOSING COMMENTS:

The alliance and their member companies have spent a significant amount of time discussing these jurisdictional issues and are anxious to work with DOT, OSHA, and EPA to come to an effective resolution that provides maximum safety to the public, employees, and the environment, but also allows for a smooth flow of goods in interstate and intrastate commerce. The alliance has discovered, in wrestling with these complex issues, that it would be a mistake to attempt to resolve, at one moment in time, jurisdictional overlaps with every single hazardous material loading, unloading, storage, handling, etc., activity that occurs on the plant site. That is why our position is based on the four fundamental principles that can be used, in every unique situation, to determine which agency's jurisdiction is appropriate. The alliance recommends that

RSPA not attempt to draw geographic boundaries around its jurisdiction as it applies on the plant site. To do so may place in jeopardy a legitimate transportation activity that DOT will not be able to address because it will have, as a result of this docket, relinquished its jurisdictional authority over that activity. Therefore, the alliance suggests that DOT exercise extreme caution as it wrestles with these jurisdictional concerns.