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BEFORE THE

**Materials and Transportation Bureau
Research and Special Programs Administration
Department of Transportation**

-- WASHINGTON, D.C. 20590

Commonwealth of Massachusetts,)
Executive Office of Transportation)
and Construction; Application for)
Non-Preemption Determination)
)

Docket No. IRA-31

COMMENTS

OF

**THE VINYL INSTITUTE OF
THE SOCIETY OF THE PLASTICS
INDUSTRY, INC.**

The Vinyl Institute, a division of The Society of the Plastics Industry, Inc. (SPI), by its attorneys, respectfully submits these Comments in response to the Public Notice and Invitation to Comment issued by the Materials Transportation Bureau (MTB) of the Department of Transportation in connection with the Commonwealth of Massachusetts' Application for Non-Preemption Determination.^{1/}

^{1/} 49 Fed. Reg. 3166 (1984).

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I.

ISSUES PRESENTED

1. The specific issues presented by this proceeding are as follows: _

(i) Whether compliance with both the Massachusetts bylaw and the Hazardous Materials Transportation Act (HMTA) or the Hazardous Materials Regulations (HMR) is feasible?

(ii) Even if compliance with state and Federal requirements is feasible, whether the Massachusetts bylaw "is an obstacle to the accomplishment and execution" of the HMTA and the HMR?

II.

INTRODUCTION AND SUMMARY

2. The Vinyl Institute of SPI^{2/} represents the major producers and users of vinyl chloride.^{3/} In this capacity, the

^{2/} SPI, the major national trade association of the plastics industry, is a Corporation organized under the Not-for-Profit Corporation Law of the State of New York. Its 1,200 member companies and individuals and 49 operating units include those who supply raw materials; process or manufacture plastics or plastics products; engineer or construct molds or similar accessory equipment for the plastics industry; and engage in the manufacture of machinery used to make plastics products or materials of all types. The majority of SPI members are the proces-

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Vinyl Institute's goal is to ensure that markets remain open for the safe use of its members' products. The Institute is participating in this proceeding on behalf of its members because of its twin concerns that the Framingham bylaw may diminish, rather than improve, safety in the handling of vinyl chloride and is likely to impede its movement in interstate commerce. In particular, the Vinyl Institute is concerned that the implementation of the bylaw may lead to an embargo on the movement of vinyl chloride that will cause the closing of plants.

3. The bylaw, viewed in its entirety is inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR). It is likely that the bylaw's requirement that a yard be set aside solely for the storage of vinyl chloride would require carriers to obtain additional land in an area where vacant land is scarce, if non-existent, and to comply with burdensome and unnecessary security, water, and reporting requirements. These requirements are so onerous that they are tantamount to a localized ban that would

[Footnote 2/ continued.]

sors and converters of plastic resins into end products which represent 75% of the dollar volume sale of plastics in this country.

3/ Vinyl chloride monomer is used to make polyvinyl chlorid , which accounts for n arly 22% of the dry resin market. [Cite.]

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necessitate rerouting, if possible. As a result, carriers would be forced to use less direct routes. This would increase transit time, movement, and switching of rail cars containing vinyl chloride. The bylaw's segregation requirements would also increase switching and handling. Because the risks of hazardous materials transportation arise out of the handling of cars, rather than the mere presence of a stationary transportation unit, the additional movement that would be required by the bylaw would increase risks. In cases where alternate routes are unavailable or economically non-competitive, plants such as the Borden Chemical Company's facility in Leominster, which employs _____ persons, would be forced to close.

4. Individual provisions of the bylaw also are inconsistent with Federal law. Framingham concedes that certain provisions are inconsistent. As explained below, inconsistent provisions include: (1) physical separation of vinyl chloride cars; (2) limitation on number of cars stored; (3) inspection requirements; (4) arrival and departure notification; and (5) license revocation. Moreover, the bylaw is inconsistent with the focus of Federal safety efforts. Therefore, whether viewed as a whole or by its individual provisions, the bylaw is inconsistent.

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III.

FACTUAL BACKGROUND

5. Since approximately 1979, the Town of Framingham, Massachusetts has been seeking to restrict the storage within town limits of rail cars containing vinyl chloride. Framingham, which is located 19 miles west of Boston, is the site of a Conrail switching yard (North Yard) through which cars containing vinyl chloride monomer must pass on their way to a Borden Chemical Company plant in Leominster, Massachusetts, 30.5 miles to the north. Conrail train WNFR 10, the local freight service that passes through Framingham, operates daily, except Saturdays and Sundays. The Borden plant, which has an annual operating capacity of 200 million pounds of polyvinyl chloride (PVC)^{4/} utilizes vinyl chloride . The only output of the facility is PVC. Therefore, it would be forced to shut down if it could not receive its vinyl chloride shipments.^{5/} At one time, the switching yard was also used for rail cars bound for the Great American Chemical Plant in Fitchburg, Massachusetts, located

^{4/} The Society of the Plastics Industry, Inc., 1983 Directory of Chemical Producers, 830 (1983).

^{5/} If Conrail trains are unable to pass through Framingham, they would be forced to take a circuitous route through Rotterdam Junction, New York which would substantially add to the transit time and costs. Telephone Conversation with Hermon Wells, Associate General Counsel, Conrail, March 8, 1984.

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35.2 miles to the north of the Conrail yard. That plant was closed in 1981. In 1981, the Great American plant had an annual operating capacity of 60 million pounds of polyvinyl chloride.^{6/}

6. The Town of Framingham has approximately 70,000 residents. 46 Fed. Reg. 56,297 (1981). The Conrail Yard is " 'located in the most densely populated part of Framingham.' " Id. at 56,300 (quoting EOTC Application for a Non-Preemption Determination). As is the case in many locations around the country, the town has literally grown around the railroad tracks.

7. In 19__, Framingham enacted a bylaw that would have required Conrail to remove cars containing vinyl chloride from temporary storage on tracks within the town. 49 Fed. Reg. 3166 (1984). The United States District Court for the District of Massachusetts enjoined the bylaw on May 24, 1979 on the grounds that the ordinance was preempted by the HMTA. Consolidated Rail Corp. v. John Hancock, C.A. No. 79-0983 (D. Mass. May 24, 1979).

8. On June 30, 1980, EOTC requested that the MTB waive preemption of the bylaw. It sought to avoid the presence of vinyl chloride at the North Yard and indicated that " 'licensing may encourage shippers to route away from the densely populated

6/ The Society of the Plastics Industry, Inc., 1982 Edition, Facts and Figures of the U.S. Plastic Industry 68 (1982).

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areas.' " 46 Fed. Reg. 56,299, 56,300 (1981) (quoting EOTC Application for a Non-Preemption Determination).

9. A hearing was held on December 15, 1981, at which time, Framingham indicated that the town was considering the adoption of a new bylaw and the MTB proceedings were halted until the bylaw was passed. On January 3, 1983, EOTC amended its application to reflect the enactment of that bylaw on April 28, 1982. That bylaw is the subject of this Comment.

10. Between the time of the December 1981 hearing and the present, the facts have changed dramatically. The Framingham Fire Chief, John Hancock, whose concerns led to the enactment of the bylaws, has indicated that the basis for the concern has abated. He was quoted as stating that four years ago "there were 32-34 cars a day scattered all over the yards less than a quarter mile from the center of town." At the present time, however, " 'Conrail has agreed to keep the cars in one part of the yards, and the number of cars has dropped.' " He stated that "there was an average of 3.3 cars daily in January, [1984], with the longest stay 9 days, compared with earlier layovers in the railyard of up to 30 days." Chemical Week, Feb. 22, 1984, at 14.

11. Despite the significant improvement in the number of rail cars stored and the storage period, Framingham is pro-

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ceeding with its attempt to enforce its latest bylaw. Framingham's bylaw presents a comprehensive regulatory scheme governing any vinyl chloride rail car that "remains within the town for more than 24 hours."^{7/} Notwithstanding the fact that rail cars containing vinyl chloride are in the stream of commerce, and are present in the Conrail yard at Framingham only because the yard serves as a commercial hub for the Northeast, EOTC seeks to treat such rail cars as being "in storage." Thus, the bylaw requires that no vinyl chloride be held in the Town of Framingham for more than 24 hours without first obtaining a license for storage from the Framingham Board of Selectmen. To obtain this license, a carrier must set aside a special storage area that is restricted to rail cars containing vinyl chloride. The designated area must comply with elaborate safety and security requirements. These detailed requirements would mandate an eight-foot high chain link fence topped by barbed wire, a paved road around the area, complete illumination, both ground and elevated water supply points, and an alarm system. To retain the license, the carrier must store no more than 10 cars, keep

^{7/} The by-law addresses "rail cars containing liquefied vinyl chloride." Vinyl chloride is a gas at ambient temperatures and pressure. However, it is handled commercially in a pressurized, liquefied form. As a practical matter the by-law would cover all rail shipments. Most vinyl chloride is used to manufacture polyvinyl chloride, an inert polymer.

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the fence locked, provide 24-hour security, conduct two inspections daily, maintain records, notify the Fire Department of car movements, and comply with other provisions. Violations may result in a fine or the suspension or revocation of the carrier's license.

12. In its amended non-preemption determination application, EOTC expresses its continued concern for the safe storage of vinyl chloride within the Town of Framingham for long periods of time. EOTC ignores the closing of the Great American plant, which accounted for the longest vinyl chloride detention periods, [cite?] and continues to refer to the plant as if it were operating. See, e.g., Amended Application for a Non-Preemption Determination Framingham, Massachusetts Town By-Law at 11 (Jan. 3, 1983) [hereinafter cited as Application]. EOTC states that its citizens' concern for the "potential for catastrophe" was heightened by reports of a recent derailment of tank cars containing vinyl chloride at Livingston, La. Application at 3. The bylaw purports to regulate storage; derailments do not occur during storage.

13. The MTB is seeking comments on whether "any or all provisions of the Framingham bylaw are inconsistent with the HMTA or the HMR." 49 Fed. Reg. at 3167. EOTC has conceded in its application that three sections are inconsistent with Federal

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law: (1) Section 2, which authorizes Framingham to revoke carrier licenses, (2) Section 2(B), which sets a 10-car maximum on the number of cars that may be stored, and (3) Section 2(J), which requires a licensee to furnish certain information to the Framingham Fire Department. Application at 5.

IV.

REGULATORY FRAMEWORK

14. Hazardous materials transportation is comprehensively regulated under the HMTA and the HMR. The HMTA gives the Secretary of Transportation broad authority to promulgate regulations governing "any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing . . . of hazardous materials" In enacting the legislation, Congress intended to "improve the regulatory and enforcement authority of the Secretary of Transportation to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. § 1801 (19__). Specifically, Congress sought to "preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting re-

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gulations in the area of hazardous materials transportation." S. Rep. No. 1192, 93d Cong., 2d Sess. 37 (1974.) Consistent with this legislative purpose, Section 112(a) of the HMTA, 49 U.S.C. § 1811(a) (19__), expressly preempts all requirements of a state or political subdivision which are inconsistent with any HMTA requirement or the HMR. An inconsistent state or local requirement may be allowed if the Secretary of Transportation determines that the state requirement (1) provides an equal or greater level of protection to the public than the HMTA or its implementing regulations and (2) "does not unreasonably burden commerce." Section 112(b) of the HMTA, 49 U.S.C. § 1811(b) (19__).

15. The general principles applicable to questions of preemption are well-established. Federal law preempts state and local law when compliance with both is a "physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). More often, the conflict does not involve impossibility, but raises questions concerning general feasibility, need, burden and consistency with Federal regulation. In such instances, Federal law preempts state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

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16. These principles apply to transportation matters. City of New York v. Ritter Transportation, Inc., 515 F. Supp. 663, 670 (S.D.N.Y. 1981), aff'd sub nom. National Truck Carriers, Inc. v. New York, 677 F.2d 270 (2d Cir. 1982). MTB regulations implementing Section 112 of the HMTA, 49 C.F.R. §§ 107.201-107.225, closely follow these judicial principles. The Department of Transportation (DOT) will consider the following two factors in determining whether a state or local requirement is inconsistent with a Federal requirement:

- 1) Whether compliance with both the state or political subdivision requirement and the Act or the regulations issued under the Act is possible; and
- 2) The extent to which the state or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.^{8/}

49 C.F.R. § 107.209(c).

Based on these criteria, SPI respectfully submits that the regulations developed by the Commonwealth of Massachusetts are inconsistent with the Federal requirements.

^{8/} EOTC's contention that these tests are only to be applied if there is no "particular local safety hazard" is without merit. Application at 17. Its reliance on Inconsistency Ruling 1 is misplaced. In that case, MTB considered New York's high population density as part of the two-fold analysis for whether the local regulation conflicted with the Federal law. Contrary to EOTC's reading, the presence of a local hazard does not replace the two-fold analysis. 43 F.d. Reg. 16,953, 16,957 (1978). The language in Section 434 of the Federal Railroad Safety Act of 1970, an analogous Act, supports this view:

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V.

The Framingham By-Law in its Entirety
Constitutes a Ban That is Beyond
Massachusetts' Regulatory Authority

17. In its January 3, 1983 Amended Application for Determination of Non-Preemption, EOTC admits that the Town of Framingham "understands that it cannot ban the through transportation of vinyl chloride." Application at 3. Therefore, the Town has embarked on a cleverly contrived plan to enact a bylaw which, on its face, purports to embody safety requirements in the public interest, but in actuality, is so burdensome that it

[Footnote 8/ continued.]

A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

State of Rhode Island Rules Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended to be Used by a Public Utility; Inconsistency Ruling (IR-2), 44 Fed. Reg. 75,556, 75,573 n.31 (1979).

Moreover, no local hazard is set forth here. Both the HMTA and the HMR are designed to promote safety under "normal" population conditions. Id. at 75,569. The population around the North Yard obviously is much lower than the population density problem in New York that MTB deemed to be extreme. Id. There are no other problems cited that would qualify Framingham for unique treatment.

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is little more than a unilateral ban which exports hazards to other locales. Indeed, Framingham admitted that its original intent in enacting a bylaw was to discourage shippers from routing via Framingham. Apparently, Framingham has not revised its intent. See supra ¶ 7. It is well-established that an agency cannot do indirectly what it is prohibited from doing directly. Natural Resources Defense Council v. EPA, 682 F.2d 752, 763 n.23 (3d Cir. 1982); Amalgamated Association of Street, Electric Railway and Motors Coach Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc., 202 F. Supp. 726, 737 n.8 (D. Nev. 1962), aff'd, 319 F.2d 783 (9th Cir. 1963).

18. There is no evidence that Framingham or the EOTC considered the effect the bylaw would have on other jurisdictions both in and outside the state of Massachusetts as is required by the MTB. See City of Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City; Inconsistency Ruling (IR-3) Decision on Appeal, 47 Fed. Reg. 18,457, 18,458, 18,460 (1982). As MTB has previously stated:

The power to ban, as contrasted with the power to channel and guide the flow of hazardous materials highway traffic, in our view, is exclusively Federal. The nature of the subject matter and the structure and purpose of the HMR and HMTA support this view A unilateral local ban is a negation, rather than an exercise of local responsibility, since it isolates the

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local jurisdiction from the risks associated with the commercial life of the nation.

Id. at 18,458.

19. The clever drafting of the Framingham bylaw is evidenced by the fact that the regulations, on their face, only apply to the "temporary storage" of vinyl chloride within the Town of Framingham rather than "transportation." Storage, unlike transportation, has traditionally been considered to be a local concern since it does not involve movement between states. See 49 U.S.C. §§ 1801 and 1802.^{9/} Under the bylaw, "a rail car will be deemed stored or in storage if it "remains within the town for more than 24 hours prior to being shipped or sent to its next destination." However, the vinyl chloride at issue in this bylaw is not in storage, but rather is still in the stream of commerce. Under the HMTA and the HMR, storage does not begin until after a rail car reaches the point of delivery. Temporary stoppages at intermediate points between the point of origin and the point of delivery are considered to be part of transportation. Indeed, the HMR specifically permits stopovers of up to 48 hours or, where only biweekly or weekly service is performed, shipments can be held until the first available train.

^{9/} The HMTA governs transportation of hazardous materials in "commerce." "Commerce" includes transportation between states or that which affects transportation between states.

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49 U.S.C. § 174.146 (19__).^{10/} Thus, the EOTC is regulating the movement of rail cars, and, as such, its bylaw, when viewed in its entirety, is in direct conflict with the purpose of the HMTA because it interferes with the safe and expeditious transportation of hazardous materials.

20. The burdensomeness of the EOTC bylaw is best demonstrated by the requirement that carriers set aside a special storage yard dedicated to cars containing vinyl chloride. As Framingham itself admitted in its initial application for a non-preemption determination, the North Yard is in the most densely populated area of town. To comply with the bylaw, Conrail may well have to exercise the power of eminent domain in order to convert adjacent land now occupied by businesses or other facilities to storage yards.

21. If approved for vinyl chloride, similar requirements could be adopted for the transportation of other hazardous materials. The requirement for a separate "storage" yard for each material presents an obvious dilemma: the shipment of such

^{10/} The HMTA defines "transportation" to include storage incidental to transportation. 49 U.S.C. § 1801 (19__). Although "incidental storage" is not defined in the HMTA or the HMR, by such language Congress recognized that temporary stoppages were to be considered and regulated as transportation under the HMTA.

SPI interprets 49 U.S.C. § 174.146 to be subject to carrier convenience. If a carrier determines that it is more convenient to move out a car that has just arrived at a yard in lieu of a car that has arrived previously, it may do so.

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materials could come to a halt, since, if separate storage yards must be set aside for each hazardous material, it would soon become impossible for a carrier to find storage space, given the limited supply of available land. Thus, carried to its logical conclusion, the Massachusetts plan could result in a ban on all hazardous materials rail transportation through Framingham.

22. Nor is there any reason to distinguish Framingham from any other town with similar rail traffic. Imposition of such requirements in other jurisdictions would not only create localized bans, it would likely prohibit any transport of hazardous materials.

23. The other requirements for establishing a fortress to guard rail cars containing vinyl chloride--e.g., fence specifications, emergency signals, ground and elevated water supplies--

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are also extremely burdensome. But even assuming arguendo that the MTB concludes that the burdensomeness of the requirements does not amount to a ban, the fact that a carrier's license can be revoked for failure to comply with them still constitutes a ban.^{11/} If a carrier loses his license, it cannot transport vinyl chloride through Framingham if it must stop there for more than 24 hours. Given the fact that Conrail trains that pass through Framingham do not operate on weekends, stopovers of more than 24 hours are unavoidable. Thus, alternate routes would have to be found. As the MTB has stated in previous proceedings, the power to ban is exclusively Federal. 47 Fed. Reg. 18,458 (1982). Therefore, the fact that a license can be revoked for failure to comply with state requirements is inconsistent with the HMTA.

VI.

The Individual Requirements for Obtaining
and Retaining a License Are Inconsistent
With Federal Law

A. Physical Separation of Cars Containing Vinyl
Chloride From Other Cars

24. Section 2(D) of the bylaw requires that no rail cars other than those containing liquefied vinyl chloride may

^{11/} See discussion of lack of standards for revocation, infra ¶ 31.

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be stored in the area set aside for vinyl chloride. This provision is contrary to Section 174.80 of the HMR which provides that "hazardous materials may not be loaded, transported, or stored together except as provided" in the accompanying table. Thus, the Department of Transportation has expressly determined which hazardous materials may be loaded, transported or stored together. Framingham may not, therefore, impose its segregation requirement since the implementation of such a bylaw would result in the multiplicity of conflicting regulations that Congress sought to avoid by enacting a uniform state law.

25. Moreover, the requirement to segregate cars will result in delays as trains must be held up so that the cars may be switched, coupled, and uncoupled so that they may be stored according to their contents. Such delays are contrary to the purpose of the HMTA and conflict with Section 174.146. As MTB has previously stated "[d]elay is significant in hazardous materials transportation because it threatens public safety by increasing the total amount of time the public is exposed to risk between loading and delivery." IR-3, 47 Fed. Reg. at 18,457. Thus, delay is "incongruous with safe transportation," which is the manifest purpose of the HMTA and the HMR. IR-2, 44 Fed. Reg. at 75,571. Therefore, the Massachusetts bylaw conflicts with the "manifest purpose" of the HMTA--safety.

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B. Limitation on Number of Cars Stored

26. Section 2(B) of the bylaw requires that fewer than 11 cars be kept in the storage area. EOTC concedes that this is inconsistent with the carrier's obligations under 49 C.F.R. §§ 174.14(a) and 174.14(b) (1982). Both of these provisions require that movements must be expedited. Framingham is correct that the car limitation conflicts with the expedited movement provision. Shortening the length of trains or requiring the detachment of cars before entering into Framingham or in Framingham itself will result in delay and will, therefore, directly conflict with Section 174.14(a) and (b) and obstruct the accomplishment of the HMTA.

C. Inspection Requirements

27. Bylaw paragraph 2(H) requires that all rail cars in the storage area be inspected at least twice daily. This requirement conflicts with the inspection provisions of 49 C.F.R. §§ 174.9 (1982) which requires that inspections be made only "before acceptance at the originating points and when received in interchange." In addition, such a requirement will unreasonably delay shipment. Holding a car in Framingham for additional inspection when the train is ready to leave is unduly

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burdensome and could cause the train to be held more than 48 hours in defiance of Section 174.14.

28. Bylaw paragraph 2(P) permits the Fire Chief or his designee to inspect the storage area and the rail cars at any time. This conflicts with Part 212 of the HMR which provides a procedure under which the state agencies--not municipal agencies--can participate in investigative and surveillance activities under the Federal railroad safety laws and regulations when they meet certain requirements. Thus, the Framingham bylaw runs counter to the Federal rules in two respects. First, it authorizes local rather than state officials to inspect cars. Second, even if Framingham officials could qualify as inspectors, the Town has ignored the established Federal procedures for obtaining authorization to conduct inspections. Such authorization ensures that state officials are qualified to conduct inspections and that carriers will only be subject to inspection by the Federal government or a state if the Federal government has delegated inspection authority to it. By ignoring Part 212, the bylaw evidences the multiplicity of conflicting or duplicative requirements the HMTA was designed to eliminate.

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D. Notice to Fire Department of Arrivals and Departures

29. EOTC has conceded the inconsistency of Section 2(J) of the bylaw which requires a carrier to notify the fire department in writing by noon of each day of any arrivals or departures from the storage area occurring on the previous day. In its Application, the EOTC indicates that although not specified in the bylaw, it is implied that a carrier "identify the rail cars which arrived at or departed the storage area on the previous day, not just the number of arrivals and departures" and that the quantity of product in the cars also be identified. Because this information is already provided on shipping papers accompanying the rail cars, EOTC has correctly conceded that Section 2(J) is inconsistent with the HMR. Sections 172.200 and 172.202 of the HMR require the shipper to identify the hazardous material and the total quantity of the material. The placarding requirements contained in 49 C.F.R. § 172.330 (1982) advise all persons--including Framingham officials--that cars contain hazardous material and the nature of the material.

30. In a similar situation, where a state sought to impose information requirements to obtain a permit that duplicated information provided in the shipping papers, the MTB found the state requirements to be inconsistent.

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To the extent that Rhode Island would require the same information as appears on the DOT required shipping paper but in a different form, the Rhode Island rule is redundant. Redundancy does not further transportation safety and represents the type of multiplicity that the HMTA intended to make unnecessary No matter what the form, any state or local requirement that asks for an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper would be inconsistent with the requirements contained in the Hazardous Materials Regulations.

IR-2, 44 Fed. Reg. at 75,571.

E. License Revocation Leads to Delay

31. As Framingham has conceded, Section 2 of the bylaw, which authorizes the Board of Selectmen to suspend or revoke a license for failure to comply with the various requirements, is inconsistent with Federal law. Suspension of a license can lead to shipments being backed up in other locations contrary to the requirement that movements be expedited as set forth in 49 C.F.R. §§ 174.14(a) and 174.16(b)(2) (1982). The failure of the bylaw to specify standards for invoking the revocation power will also add to delay, as officials must decide on a case-by-case basis whether a single minor infraction, a repeated minor infraction or only major violations should result in license revocations.

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VII.

Approval of the By-Law Would Result in Additional
Car Movement and Switching Which Would be
Inconsistent With Federal Law

32. If the bylaw is approved, it would require additional car movement and switching to segregate cars containing vinyl chloride from other cars and to maintain the number of cars stored at less than 10. It would also encourage carriers to move cars on a first-in, first-out basis, although a last-in first-out system might be more efficient. This in turn, would generate further switching and coupling. Such additional switching increases the risks of derailment that Framingham is trying to prevent. In addition, it will lead to increased coupling and uncoupling which will add to the risk of puncturing cars containing vinyl chloride. The avoidance of such risks is central to hazardous materials regulation as is evidenced by requirements that tank cars carry head shields and not be moved unless there is a order giving a specific destination. See, e.g., 49 C.F.R. §§ 179.105-5, 179.100-23, 49 Fed. Reg. 3468 (1984), 174.14(b).^{12/}

^{12/} Although this section of our comments demonstrates the inconsistency of particular portions of the Framingham bylaw, we believe that if any provision is inconsistent the entire bylaw should be found inconsistent. The bylaw constitutes a broad regulatory storage plan. If individual sections are invalidated based on inconsistency and burden, the resulting bylaw may not be coherent or rational.

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VIII.

**THE BYLAW IS INCONSISTENT WITH THE
FOCUS OF DOT SAFETY EFFORTS**

33. The purposes which Framingham seeks to accomplish--the safe storage of vinyl chloride in rail cars--is already being accomplished at the Federal level. On January 27, 1984 DOT published new rules requiring that large capacity tank cars for flammable gases be retrofitted to improve fire and puncture resistance. 49 Fed. Reg. 3468 (1984). The regulations, which were developed by the Federal Railroad Administration, require puncture-resistant head shields and high-temperature thermal insulation. In announcing these additional requirements, Secretary Dole credited previous rail car improvement regulations with "a measureable decline in the number and severity of such releases involving flammable gases." The new rules should provide further protection.

34. Unlike the Framingham bylaw which attempts to create a limited secure area, the DOT rules increase rail car safety no matter where the car is located. It is inconsistent for Framingham to require duplicative safety expenditures when no evidence of increased benefits has been demonstrated. Fundamentally, Framingham seeks redundant safety requirements. As noted in another inconsistency ruling, "[r]edundant require-

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m nts present the clearest example of the kind of multiplicity that the HMTA was enacted to prevent." IR-2, 45 Fed. Reg. 71,883 (1980).

IX.

CONCLUSION

35. The rationale for enacting the bylaw governing the "storage" of vinyl chloride in the Town of Framingham no longer exists. The once protracted storage of numerous cars in the town has abated since the close of the Great American Plant in 1982. Even if there were a justification for the bylaw, it cannot stand because, in its entirety, it is inconsistent with the HMTA and the HMR. The requirements of the bylaw are so burdensome that total compliance would not likely be impossible absent eminent domain proceedings or the destruction of public facilities. Therefore, the requirements amount to a unilateral ban that local governments lack authority to impose. Even if the bylaw as a whole is not construed as a ban, the individual requirements are inconsistent with Federal law because they conflict with provisions of the HMR and are an obstacle to the accomplishment of the HMTA; compliance with the bylaw would result in increased safety risks because of delays and increased movement.

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WHEREFORE, THE PREMISES CONSIDERED, the Vinyl Institut
of The Society of the Plastics Industry, Inc. respectfully urges
the Materials Transportation Bureau to find the requirements of
the Massachusetts bylaw to be inconsistent with the Hazardous
Materials Transportation Act and the Hazardous Materials Regula-
tions.

Respectfully submitted,

THE SOCIETY OF THE PLASTICS
INDUSTRY, INC.

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