DEFINING THE PROBLEM

Incidents that have occurred over the course of the last decade have increasingly made known to the general public the dangers presented by the motor vehicles, trains, and vessels that carry hazardous materials through our nation's communities. In light of these incidents and of the increased public concern they have generated, officials on the federal, state, and local levels have for the past few years been actively seeking to expand and strengthen their regulatory control over such activities.

As DOT is improving its regulations under the mandates of the Hazardous Materials Transportation Act (HMTA) (1), an ever-increasing number of state and local jurisdictions are imposing more or less restrictive operating controls, routing requirements, and equipment standards on carriers transporting hazardous materials through their areas. DOT and the transportation industry view this proliferation of differing state and local requirements with concern, fearing that the regulatory pattern in the hazardous materials field is in danger of falling into chaos. Because state and local officials, on the other hand, believe that the specific concerns of their communities are not being adequately addressed by the federal authorities, they feel that they have an obligation to act themselves.

Thus, the stage is set for a classic interjurisdictional conflict, with the state and local authorities on one side, exercising their police power to protect their constituent public from what they perceive to be an imminent danger, and with the federal authority on the other, feeling an obligation to bring consistency to the field.

Clearly, a prime objective of Congress in passing the HMTA was to avoid a multiplicity of differing and conflicting regulations (2). It, therefore, consolidated federal authority over hazardous materials transport into DOT (3), and set some very specific criteria for permissible state and local action (4).

Congress did not, however, absolutely preempt non-federal activity in the HMTA (5), apparently recognizing that state and local authorities must continue to play some role in the effort to "protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce" (6).

JUDICIAL DECISIONS HAVE ESTABLISHED GENERAL RULES ON PREEMPTION

As in all cases that present issues of interjurisdictional conflict involving state and local regulation of interstate commerce, the courts will measure the validity of a non-federal action to regulate hazardous materials transport against the Commerce Clause (2) and the Supremacy Clause (8) of the U.S. Constitution.

A host of decisions dealing with similar issues have led to the development of some relatively clear principles that are considered in the application of the doctrine of federal preemption. The courts begin with an assumption that a requirement promulgated by a state and local jurisdiction in the proper exercise of its police power is valid, and this is especially true when the regulation involves relations to highway safety (9).
If Congress has not passed any legislation, so that federal supremacy is not at issue, the courts will uphold state or local requirements relating to public safety or welfare so long as the statute regulatory framework unilaterally to effectuate a legitimate local public interest, and so long as the burden imposed on interstate commerce is not excessive in relation to the local benefits accruing from it (10). Thus, the question addressed by the courts under the Commerce Clause is one of degree, with the interest to be protected by the local measure balanced against the extent of the burden on interstate commerce (11).

Where, however, Congress has acted, the courts undertake an additional analysis to test the state action against the Supremacy Clause. Again, however, they start with an assumption that the state or local law is valid (12). They then proceed to determine whether Congress demonstrated an intent to foreclose non-federal action, either explicitly or implicitly (13).

In the event the courts conclude that Congress did not intend a total preemption, they go on to inquire into whether there is an actual conflict or inconsistency between the statute and the local provision and the federal statute. Where they find such inconsistency, either because (a) compliance with the federal requirement on the one hand and the state or local requirement on the other is impossible, so that adherence to one set of requirements could lead to enforcement of the other (14); or (b) the state or local law stands as an obstacle to accomplishment and execution of the full purpose of the act of Congress (15), they will declare the state or local requirement to be preempted.

Congress has made clear by the terms of the HMTA that it did not intend to totally preempt state or local activity in the field of hazardous materials transport regulation (16). Section 112 of the Act declares an inconsistent state or local provision to be preempted, unless, on the application of an appropriate state agency, DOT determines that such inconsistent requirement affords an equal or greater protection to the public and does not unreasonably burden commerce. Thus, Congress imposed on the Secretary of Transportation the burden of determining, by means of some sort of administrative proceeding, whether an inconsistent provision of state or local law, which would otherwise be preempted, should be given effect. In the course of making this determination, Congress directed DOT to measure the state or local requirement against the restrictions of the Commerce Clause.

It should be noted, however, that Congress did not, by the language of S.112 give DOT the duty to make the threshold determination as to whether a non-federal provision is "inconsistent" within the meaning of the act. Nevertheless, DOT has assumed this responsibility by its regulations.

DOT, IN THE COURSE OF ITS ADMINISTRATIVE PROCEEDINGS, HAS APPLIED JUDICIAL RULES OF PREEMPTION TO ISSUES ARISING UNDER THE HMTA

Inconsistency

On September 9, 1976, DOT promulgated regulations establishing procedures and standards for rendering "inconsistency rulings" and "non-preemption determinations" pursuant to S.112 of the HMTA (17).

In the prologue to these regulations, DOT--apparently in response to comments objecting to its assumption of the task of dealing with the question of inconsistency--acknowledged that this question is one that has been traditionally judicial in nature, but declared that it did not view the courts as the "exclusive arbitrators" of the issue (18). It therefore established procedures allowing it to apply to two general arbitrations developed by the courts to resolve conflicts under the Supremacy Clause--i.e., to questions of what is inconsistency within the meaning of S.112 of the HMTA.

Under DOT's regulatory procedure, the associate director of the Office of Enforcement issues inconsistency rulings, on the application of "any affected party", and after appropriate notice to other interested persons. These rulings, which can be appealed to the director, are based on two considerations: (a) whether compliance with both the state and the local requirement and the Act or the regulations issued under the Act is possible ("the dual compliance test"); and (b) the extent to which the state or local requirement and execution of the Act and the regulations issued under the Act meet "the obstacle test".

Several applications for inconsistency rulings are now pending before DOT. Two significant decisions have been published. The first ruling, IR-1 (19), concerned regulations promulgated by the New York City Health Department, which imposed restrictions amounting to a ban on the transportation of certain radioactive materials through the city. DOT, interpreting the restrictions as severe routing requirements for such materials, set out to apply its two tests. Since DOT had not promulgated any of its own rules in regard to routing, it found that the New York City regulation neither made it impossible to comply with any federal requirement nor stood as an obstacle to achievement of any federal regulatory objective. It therefore found the New York requirement to be consistent.

The next inconsistency ruling, IR-2, illustrates more clearly the analysis DOT will undertake to decide the issue of inconsistency. This proceeding dealt with several operating restrictions and equipment requirements imposed by the State of Rhode Island on carriers transporting hazardous materials across its borders.

DOT applied the two tests to each of the substantive Rhode Island requirements at issue and thereby determined some to be consistent, but most to be inconsistent, with the federal requirements. It found, for example, that compliance with certain Rhode Island requirements, such as those requiring the illumination of a rear bumper warning sign, would lead to violation of a federal requirement regulating the types of lights allowable in the rear of such a vehicle. It found others, such as those requiring placarding, to cause confusion with the federal Hazard Identification System and to thereby stand as an obstacle to accomplishment of a federal regulatory objective. Still others, like those imposing curfews or requiring the filing of reports, are found to stand as obstacles to the federal objective of promoting safety, since they generated unnecessary delay, and delay is incongruous to safe transport.

However, DOT made clear in this ruling that there are areas within the field of regulations in which a state or local jurisdiction might act consistently with federal authorities. It stated, for example, that a non-federal authority may regulate to eliminate or reduce a peculiarly local safety hazard not adequately addressed by federal regulations.

While DOT rejected Rhode Island's argument that it was acting to protect against such local safety hazards, it found several of the state regulations, such as requiring non-operating vehicles carrying hazardous materials with headlights on, or the
equipment of such vehicles with two-way radios, to be consistent. It also indicated that some types of permitting activities may not be inconsistent, but found the particular ones at issue to be so in that they required the applicant to submit redundant information.

Thus, in the Rhode Island ruling DOT has demonstrated its intent to allow some fairly extensive non-federal activity to continue.

However, a provision appearing in HM-164 (20), the regulations proposed for the routing of radioactive materials, indicates a contrary purpose. This provision simply declares several types of state or local controls on radioactive materials transport, such as curfews, pre-notification, and escorting, to be "inconsistent" with the federal requirements. Curiously, no substantial attempt was made by DOT to set forth the legal basis for this declaration and no indication appears that DOT applied its two tests for inconsistency prior to formulating this conclusion.

No judicial challenge has been filed to test any of these DOT actions. Thus, neither the procedures established by DOT to decide inconsistency nor the standards it applies have been subject to the scrutiny of a court.

Non-Preemption Determinations

DOT regulations for issuing non-preemption determinations are virtually identical to those established for inconsistency rulings. The standards applied, which relate to the considerations mandated by S.112(b), are (a) whether the state requirement affords at least an equal level of safety to the public; and (b) whether the state requirement does not unreasonably burden interstate commerce.

DOT considers several factors in making this determination (such as the impairment of efficiency resulting from the regulation)—all of which were developed by the courts in testing a state or local requirement against the Commerce Clause.

While at least one application has been submitted for a non-preemption determination, no substantive decisions have yet been issued.

SEVERAL OUTSTANDING LEGAL ISSUES HAVE YET TO BE SETTLED BY THE COURTS

Although the courts have long established many of the general principles to be used in resolution of preemption issues, they have as yet been given little opportunity to apply such principles to conflicts arising under the HMTA. Therefore, there are several outstanding issues to be judicially resolved. The most significant of these are described briefly here.

What Is the Legal Effect of an Inconsistency Ruling?

There is some question as to DOT's authority to enter the issues of inconsistency, since the HMTA does not explicitly provide DOT with any such authority, and since this issue is one that has traditionally been determined by the courts. Presuming, as DOT has, that this authority has been granted implicitly by the language of S.112, it seems at the very least that a court is not bound by a DOT decision, and that a district court can consider the issue de novo (21).

What Standards Should Be Applied by DOT to Determine Inconsistency?

It is not clear whether DOT should properly apply both the "dual compliance" test and the obstacle test in performing its analysis in the course of an inconsistency proceeding. An argument can be made that Congress might not have intended S.112(b), which authorizes a waiver of preemption for inconsistent provisions of state or local law, to apply to provisions that are inconsistent by reason of their standing as obstacles to the federal purpose. Congress may, in fact, have intended only to allow this waiver to apply to measures that are inconsistent in the dual-compliance sense, since it might otherwise have authorized the survival of measures obstructing its own purpose—a scheme that is somewhat improbable.

Thus, Congress may have intended to leave the obstacle test to the courts, indicating in S.112(b) that a state or local provision that is consistent (under the dual-compliance test), but that provides adequate protection and does not unreasonably burden commerce, does not indeed stand as an obstacle to the objectives of the congressional act.

An argument can, of course, be made on the other side that the waiver of preemption provision contained in S.112(b) was intended to be applied only in emergency situations to protect against particularly imminent local dangers (22), and that Congress had, only under such compelling circumstances, intended to allow inconsistent provisions under either test to stand.

What "Local Safety Hazards" Justify State or Local Action?

In the Rhode Island inconsistency ruling, DOT indicated that state or local authorities might act to protect against local safety hazards not addressed by federal regulations (23). Since this concept, if interpreted broadly by either DOT or the courts, might authorize extensive non-federal action, its clear definition is critical to the issue of preemption under the HMTA.

While no judicial decisions have as yet applied this concept under the HMTA, similar issues have been addressed in cases arising under 434 of the Federal Railroad Safety Act (24), which indicate that the local safety hazard presented must be unique. Thus, the courts have required a demonstration that the hazard being regulated is not state-wide in character and is not a subject capable of being regulated through national standards (25).

DOT CAN DEVELOP ITS SUBSTANTIVE RULES SO AS TO MINIMIZE LITIGATION ARISING FROM INTERJURISDICTIONAL CONFLICT

DOT can deal with the problem of interjurisdictional conflict of regulations in any of several ways. It can (a) leave regulation to the states and localities; (b) adopt uniform national federal regulations as it sees fit, without regard for the specific concerns of states or localities; (c) enact federal regulations that impose different requirements on different areas; or (d) establish federal criteria for acceptable state or local regulations.

DOT Can Leave Regulation to the States and Localities

Although S.105 of the HMTA gives the Secretary of DOT very broad authority to develop regulations regarding hazardous materials transport, it does not mandate the Secretary to do so. Therefore, all regulatory activity, or a major part of it, can be left to the state or localities.

In fact, DOT has to some extent, either by inaction or by conscious decision, followed this course since the HMTA was enacted. It has exercised its authority over certain categories of regulatory...
authority but left broad areas of the field to state and local action. Thus, DOT has not yet promulgated routing requirements for hazardous materials transport and has, as was noted in the New York City inconsistency ruling, consequently left the states and localities with the uncontested ability to impose their own routing on carriers.

Indeed, in some areas of regulation DOT has affirmatively endorsed local requirements and directed carriers to comply with them. 49 CFR 397.2 provides that "every motor vehicle containing hazardous materials must be driven and parked in compliance with the laws, ordinances and regulations of the jurisdiction in which it is being operated, unless they are in conflict with the regulations of the Department of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint". Hence, at least in the fields of routing, traffic, and parking regulations, DOT has allowed local regulation to remain dominant.

Perhaps DOT should continue this arrangement, since state and local officials are most informed as to the detailed social, economic, political, and topographical characteristics of their areas. They are, in addition, more reactive to the concerns of their constituent public, and, therefore, more reflective of public sentiment at the grass roots level.

However, Congress did not have this in mind when it enacted the HMTA. Recognizing that state and local officials simply did not have the sophisticated expertise on which decisions in this area must be based and recognizing also that uniformity and consistency of regulation are essential factors in bringing the transportation of hazardous materials under rational control, Congress made very clear that the primary role in these matters was to be played by the federal authority.

**DOT Can Preempt the Entire Field of Regulation**

DOT might promulgate federal regulations across the board, without giving specific regard to the differing concerns of the various states and localities. In effect, it can carry on its business under the HMTA as it has thus far.

There is no doubt that this is an attractive path to follow. By utilizing its vast expertise and database and drawing on the expertise of the transportation and chemical industry, DOT can develop regulations that are uniformly applicable across the nation. It can impose a comprehensive federal routing scheme and uniform requirements for the construction, equipment, and operation of all vehicles carrying hazardous materials without regard to where such vehicles travel.

It might promulgate such regulations under its present rulemaking procedures, giving the Federal Register notice required by 49 CFR 106.15 and convening hearings and conferences as it sees fit. While this option might eventually provide great benefits in terms of consistency and uniformity, it might also generate enough opposition to shake the regulation of hazardous materials in the courts for years and might produce more litigation-induced confusion than it avoids.

State and local officials, environmental organizations, and local citizen groups are deeply and personally concerned with the dangers posed by the movement of hazardous materials through their communities. As a result, they are disinclined to leave the regulation of such activities to the federal authorities. In fact, if they are not convinced that their concerns are being specifically addressed and that their interests are being protected by the federal government, they will vigorously oppose the federal action and will continue to act to protect themselves.

Thus, any rulemaking activity that does not take region-specific concerns into careful account and any regulations that do not provide a significant role to non-federal authorities will be hotly contested in court. Moreover, even if DOT succeeds in the promulgation and defense of such regulations, litigation would continue.

The simple existence of federal regulations does not, by itself, automatically invalidate state or local regulations on the same subject. DOT must first find such regulations to be inconsistent with the federal requirements pursuant to S.112 of the HMTA, must deny any petition for non-preemption submitted pursuant to S.112(b), and must then defend any consequent litigation.

Presumably, non-federal authorities would continue to enforce their requirements until finally mandated by the courts to cease. Even then, they could make legislative adjustments that could revive the entire administrative and judicial preemption process. Taking into account that there are 50 states and countless local jurisdictions, all of which view the transportation of hazardous materials with profound concern, the potential is great for litigation to bring chaos to any attempt by DOT to follow this option.

Moreover, the concerns that would engender such opposition may be quite legitimate. State and local authorities who identify an extraordinary danger within their jurisdictions have the responsibility to exercise their authority to protect their constituents, unless the federal government has, itself, adequately done so. While there is undoubtedly a need for consistency in the area of hazardous materials transport regulation, there is not necessarily a need for absolute uniformity. In fact, local conditions may exist that should be reflected in the regulatory scheme and should be considered in the rulemaking process. It would, therefore, be appropriate for DOT to develop a mechanism for the federal regulatory scheme to take local considerations into account.

**DOT Might Promulgate Regulations That Vary As a Result of Local Conditions**

DOT might promulgate regulations that establish a regulatory norm—imposing basic equipment requirements, operating procedures, and general routing constraints on hazardous materials transporters operating anywhere in the nation. It might then establish certain "zones" in which more restrictive requirements would be imposed.

It could attempt to do so broadly by establishing wide geographic regions with varying requirements imposed within their boundaries. Thus, it could apply more restrictive controls on the movement of hazardous materials in congested urban regions, while allowing freer movement in sparsely populated rural areas.

It might also, however, develop a more complex regulatory structure, with zones developed on a state or local level. More than one category of zone might be developed, of course, with more or less restrictive requirements applicable to each category. However, DOT could develop the requirements applicable within such zones so as to make them uniform within the category of zone to which they relate.

The particular restrictive zones could be established either on the initiative of DOT, by DOT on the petition of a state or local jurisdiction, or by
the state or local authorities subject to the approval of DOT. In any event, DOT should develop the criteria (relating to population density, industrial characteristics, road conditions, or the like) on which the restrictive zones would be designated. Under this scheme, a carrier planning a route could determine the most restrictive zone through which the carrier would travel, and thereby learn precisely what level of restriction would be imposed on that carrier's activities.

DOT Might Establish Criteria for Non-Federal Jurisdictions Seeking to Impose Specific Requirements

DOT might allow non-federal jurisdictions to impose requirements that are different from those promulgated by DOT if they fall within certain specific, federally developed guidelines. Under this scheme DOT would first initiate rulemaking proceedings to establish the criteria against which non-federal requirements would be measured and to develop a process whereby such requirements would be submitted to DOT for its approval. The criteria might allow for the establishment of region-specific hazardous materials routing plans by non-federal authorities, developed according to guidelines that would require consideration of the concerns of neighboring jurisdictions and of the affected industry. DOT, in fact, might require such plans to be developed by the state and localities on a regional, rather than a purely local, basis.

DOT could also develop criteria allowing state and local jurisdictions to impose more or less restrictive controls along the course of such regional routes. However, such controls would have to be developed in coordination with the other jurisdictions in the region and could not unreasonably interfere with interstate commerce. In this manner, controls that might otherwise interfere with the smooth flow of commerce (such as absolute bans in limited areas, time restrictions, permit requirements, and operating controls) by subjecting a carrier to a multiplicity of conflicting regulations could be developed and imposed without confusion.

DOT CAN ENACT GUIDELINES TO MINIMIZE CONFUSION IN THE FIELD OF PREEMPTION

Regardless of how DOT goes forth to promulgate its substantive regulations, it can act to minimize administrative and judicial litigation by providing some clear guidance to state and local authorities as to what types of activities it views as permissible under the HMTA. DOT might undertake a detailed analysis of its regulations and decide for itself what sort of state or local activities are circumscribed. It might then publish informational guidance documents, or might even commence formal rulemaking proceedings to establish criteria against which non-federal activities would be measured. Interested parties may, of course, now be guided by the views expressed in DOT's inconsistency rulings. Yet this piecemeal approach to the problem is not very efficient, and since we can expect non-federal actions to multiply in this climate of public concern, DOT may soon find itself flooded with inconsistency petitions.

DOT would therefore be well advised to face the difficult questions in a general, threshold proceeding, and thereby clear the air at the outset.

CONCLUSION

DOT is faced with the very delicate task of balancing the need for uniformity in the area of hazardous materials regulation against the need to address local safety concerns adequately. If it succeeds in striking the correct balance and in establishing a viable mechanism for including local considerations in its federal regulations, the issues surrounding preemption will be of little importance to the field. However, if DOT fails to meet its challenge, interjurisdictional conflict will proliferate, and the legal issues involved with preemption will be considered by the courts for years.

REFERENCES

4. HMTA, §112(b).
6. HMTA, §102.
7. U.S. Const. Art. 158.
18. 41 FR 38167; 49 CFR 107.
19. Ibid.
24. 45 USC 434.

Hazardous Materials Transportation Risk Assessment

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A glossary of terms useful to the reader precedes part 1 of this paper, which describes various risk estimation methodologies along with their strengths and weaknesses. Approaches to risk evaluation and acceptance are also discussed. Part 2 considers some of the ethical and philosophical aspects of risk assessment. The meaning of "safety" and the concept of the justifiability of harm are tested. A plea is made for the use of systemic risk analysis in contrast to the current piecemeal application of risk analysis. Part 3 raises questions for consideration by conference participants. It is intended that recommendations for improvements in methodologies and implementation approaches will result.