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**Phil Olekszyk,**

*Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.*

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## Research and Special Programs Administration

[Preemption Determination No. PD-7(R); Docket No. PDA-12(R)]

### Determination That Maryland Certification Requirements for Transporters of Oil or Controlled Hazardous Substances Are Preempted by Federal Hazardous Material Transportation Law; Decision on Petition for Reconsideration

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Decision on petition for reconsideration of RSPA's administrative determination that Maryland certification requirements for transporters of oil or controlled hazardous substances are preempted by the Federal Hazardous Material Transportation Law.

*Petitioners:* Maryland Department of the Environment (MDE).

*State Laws Affected:* Code of Maryland Regulations (COMAR) 26.10.01.16.D and 26.13.04.01.F.

*Applicable Federal Requirements:* 49 U.S.C. 5101 et seq. (previously the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 et seq.), and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

*Mode Affected:* Highway.

**SUMMARY:** The Maryland Department of the Environment petition requests reconsideration of a RSPA determination that Federal hazardous material transportation law preempts Maryland regulations requiring certification of non-domiciled operators of motor vehicles loading or unloading certain hazardous materials in Maryland. The petition is denied.

**FOR FURTHER INFORMATION CONTACT:** Charles B. Holtman, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW, Washington, DC 20590-0001, telephone number (202) 366-4400.

#### I. Background

On June 3, 1994, RSPA published in the **Federal Register** the determination that Maryland certification requirements, applicable to operators of

motor vehicles loading or unloading oil or "controlled hazardous substances" (CHS) in Maryland, are preempted by the Federal hazardous material transportation law (Federal hazmat law), to the extent that they apply to the loading or unloading of oil or CHS that is a hazardous material. 59 FR 28913. RSPA found that these requirements are training requirements, and that the requirements, as enforced and applied, are stricter than HMR training requirements at 49 CFR 172.700-.704.

Specifically, COMAR 26.10.01.16.D, which applies to operators of oil cargo tanks, requires the operator to take and pass a test administered by MDE at five in-state locations and at out-of-state business locations approved by MDE. COMAR 26.13.04.01.F, which applies to operators of vehicles transporting CHS, requires "[t]raining in the requirements necessary to transport hazardous waste," which include requirements promulgated by, and specific to, Maryland. In addition, the instructor must meet an experience criterion, and MDE may require the operator to pass an approved written examination. These elements of the certification requirements, RSPA found, are more strict than the HMR. 59 FR 28919.

To the extent that the requirements are more strict than the HMR, they violate 49 CFR 172.701, which permits States to apply training requirements to non-domiciled vehicle operators only if the requirements are no more strict than those of the HMR. Accordingly, RSPA reasoned, each of the two requirements is "an obstacle to accomplishing and carrying out" Federal hazmat law. 49 U.S.C. 5125(a)(2); see 59 FR 28919.

Within the 20-day time period provided in 49 CFR 107.211(a), MDE filed a petition for reconsideration of the determination. It certified that, in accordance with 49 CFR 107.211(c), it had mailed copies of the petition to CWTI/NTTC and to all others who had submitted comments, with a statement that each person, within 20 days, could submit comments on the petition. RSPA has received no comments on the MDE petition.

#### II. Petition for Reconsideration

In its June 20, 1994 petition, MDE first states that the three elements that RSPA found to be more strict than the HMR do not apply to both the oil and CHS vehicle operator certification requirements. It notes that only COMAR 26.10.01.16.D (oil) requires that the operator pass a State-administered examination; under COMAR 26.13.04.01.F (CHS), the examination requirement is at the discretion of MDE. Similarly, only COMAR 26.13.04.01.F

specifies required areas of training and instructor experience requirements.

MDE concedes that its CHS vehicle operator certification provisions specifying required areas of training and instructor experience criteria are "training requirements" within the meaning of 49 CFR 172.701. On the other hand, it contests the RSPA finding that the examination requirement, and the general requirement to obtain a certificate, are training requirements. It suggests, instead, that they "are intended to demonstrate that the training received by the drivers is adequate to insure the safe transportation and transfer of hazardous materials in Maryland." Because they are not training requirements, MDE then argues, RSPA cannot find them to be obstacles simply because they violate 49 CFR 172.701. Rather, MDE contends, RSPA must factually analyze whether they are obstacles as enforced and applied. MDE contends that CWTI/NTTC has not submitted specific evidence sufficient to allow RSPA to find the requirements to be obstacles. As an example, it notes, it does not in fact require a CHS vehicle operator to take an examination, but merely to submit a statement from the operator's employer that approved training has been completed.

MDE does not dispute that its rules specifying areas of training for CHS vehicle operators are training requirements, but argues that they are not more strict than the HMR. It submits that the rules generally are consistent with HMR requirements, differing only in requiring knowledge of Maryland requirements for transporting and handling hazardous wastes. In this latter respect, it contends that operator familiarity with the laws of States of operation should be deemed to be part of required HMR training, and therefore that the Maryland rules should not be found to be more strict.

MDE concedes that the instructor experience criterion is more strict than the HMR. It argues that preemption of this provision nevertheless should not invalidate the entire CHS vehicle operator certification program.

Finally, in their application CWTI/NTTC represented that Maryland applies the CHS vehicle operator certification requirement only to those loading or unloading RCRA hazardous waste, and not to other materials meeting the definition of CHS. Although MDE did not take issue with that representation in its comments, it now indicates that it applies the certification requirement to other CHS, including PCB-contaminated wastes, certain wastes associated with the production

of military chemical warfare agents, certain wastes generated in the production of phthalate esters, and certain other organic chemical industry wastes not regulated under RCRA. It notes that this fact may simply correct the record, and may not affect the preemption determination.

MDE asks that RSPA reverse its preemption determination or at least reconsider the decision with respect to the examination and certification requirements by examining whether those requirements, as applied and enforced, in fact are obstacles to achieving the goals of the HMR.

### III. Discussion

The examination requirements, specification of training subjects, and instructor experience criterion under COMAR 26.01.10.16.D and 26.13.04.01.F, as well as the certification requirements themselves, are training requirements within the meaning of 49 CFR 172.700(b). Under that section, "training" is defined as:

[A] systematic program that ensures a hazmat employee has familiarity with the general provisions of [the HMR], is able to recognize and identify hazardous materials, has knowledge of specific requirements of [the HMR] applicable to functions performed by the employee, and has knowledge of emergency response information, self-protection measures and accident prevention methods and procedures.

The term "training," then, particularly as it extends to "ensuring" hazmat employee knowledge in the specified areas, encompasses more than the subject matter that hazmat employees are required to learn. It also includes the means by which hazmat employees are instructed and by which the enforcing governmental body may determine that instruction has been successful. Accordingly, "training requirements" include not only provisions that specify the subject matter of training, but also those that, for instance, prescribe how instruction is to be conducted and documented.

That the term should be read broadly is evidenced by 49 CFR 172.701, which states: "This subpart \* \* \* prescribe[s] minimum *training requirements* for the transportation of hazardous materials" (emphasis added). Thus, under section 172.701, the requirements of the subpart, 49 CFR 172.700-.704, including examination requirements, 49 CFR 172.702(d), and training documentation requirements, 49 CFR 172.704(d), all are "training requirements." As to the Maryland certification requirements, the sole criterion for issuance of the operator certificate under COMAR 26.01.10.17

and 26.13.04.01.F is satisfactory completion of prescribed training (an applicant under COMAR 26.13.04.01.F also must submit a \$20 fee, presumably for processing). The certificate, therefore, is no more and no less than a documentation of training, and the certification requirement is a training requirement.

This reading is consistent with the basis of 49 CFR 172.701. As discussed in the determination, this section, which permits a State to apply motor vehicle operator training requirements more strict than the HMR only to those domiciled in the State, balances competing interests. On the one hand, it "recognizes the traditional regulation by States of their own resident drivers." 59 FR 28919 (quoting 57 FR 20944, 20947 (May 15, 1992)). On the other, it recognizes that:

Were States permitted to impose stricter requirements on non-resident operators, operators potentially would be subject to numerous sets of training requirements, with resulting confusion, cost and paperwork burdens.

59 FR 28919.

Confusion, cost and paperwork burdens would result not only from States specifying different subject matters in which non-domiciled vehicle operators must be instructed, but just as much from disparate examination, documentation and certification requirements. In Inconsistency Ruling (IR-) 26, 54 FR 16314 (Apr. 21, 1989), California required non-resident motor vehicle operators to have a Non-Resident Special Certificate or an employer's certification on a State-approved form before entering the State. RSPA found this to be a training requirement preempted by the HMR. 54 FR at 16323-24. We found that "documentary prerequisites for the transportation of hazardous materials" imposed on non-domiciled operators would cause unnecessary delays in the transportation of hazardous materials in commerce. 54 FR 16323. Section 172.701 closely adopts the rationale of IR-26. See 57 FR 20947.

Furthermore, MDE states in its petition, again, that its examination and certification requirements are "to demonstrate that the training received by the drivers is adequate to insure the safe transportation and transfer of hazardous materials in Maryland." As thus characterized, these are training requirements within the § 172.700(b) definition. More directly, MDE asserted in its June 23, 1993 comments on the CWTI/NTTC application:

Subpart H (49 CFR 172.700(b)) defines training to mean "a systematic program that

ensures a hazmat employee \* \* \* is able to recognize and identify hazardous materials \* \* \* and has knowledge of emergency response information, self protection measures and accident prevention methods and procedures." These are exactly the issues addressed by the State's training requirements.

MDE's characterization at that time is diametrically opposed to the position it now takes. For the reasons discussed, RSPA agreed with MDE's earlier characterization, and is not now persuaded to the contrary.

Whether the specific requirement to obtain a certificate of training from the State fails the obstacle test was not explicitly addressed in the determination. As MDE directly raises the issue in its petition, this decision will address it. Because the certification requirements are training requirements, to determine whether they are an "obstacle to accomplishing and carrying out" Federal hazmat law, 49 U.S.C. 5125(a)(2), it is necessary only to determine whether they violate 49 CFR 172.701. A training requirement that violates 49 CFR 172.701 is an obstacle as a matter of law. See 59 FR 28919. The HMR do not require an operator to obtain a certificate of training from a governmental body; therefore, the MDE requirement to do so is more strict than the HMR, and is preempted as an obstacle. See IR-26, 54 FR at 16323 (discussed above).

MDE is correct that if the requirements in issue were not training requirements, then 49 CFR 172.701 would not apply. If 49 CFR 172.701 did not apply, RSPA could not find that merely because the requirements as applied to non-domiciled operators are stricter than the HMR, they violate the obstacle test. Rather, RSPA would need to analyze whether these particular requirements *in fact* create an obstacle.

MDE supposes wrongly, however, that if the certification requirements are training requirements, it is not necessary to examine them "as applied or enforced." 49 U.S.C. 5125(a)(2). Section 172.701 simply establishes, as a matter of law, when non-Federal motor vehicle operator training requirements are an obstacle to accomplishing the goals of the HMR. Under the obstacle test, however, the non-Federal requirements to be considered are those that are applied or enforced. For one, this ensures that RSPA does not expend resources considering hypothetical preemption issues.

Absent contrary evidence in the record, RSPA presumes that a State rule is applied and enforced by its clear terms. In this case, MDE does not dispute that the operator of an oil cargo

tank subject to COMAR 26.10.01.16.D must appear at a place designated by MDE and demonstrate, by passing an examination, that he or she has knowledge of procedures for handling oil. MDE does not dispute that the training received by an operator of a CHS transport vehicle subject to COMAR 26.13.04.01.F must include instruction in certain Maryland requirements and must be administered by an instructor meeting certain experience requirements. Finally, MDE does not dispute that a cargo tank motor vehicle carrying oil or a vehicle carrying CHS may not be operated in Maryland for the purpose of loading or unloading within the State, unless the operator has applied to the MDE and received the required certificate.

As to how the provisions in question are enforced or applied, MDE disputes only RSPA's characterization of the CHS operator's examination requirement. It states that an examination is not required, but that a statement from the operator's employer that approved training has been completed may suffice. See also 58 FR 29322-23 & n. 5 (CWTI/NTTC agreement with this characterization). COMAR 26.13.04.01.F(6) provides that MDE may require an applicant for a certificate to pass an administered written examination; MDE does not say unambiguously that it never so requires. Regardless, if, as MDE applies and enforces its rules, there is no examination requirement under COMAR 26.13.04.01.F, then no preemption of an examination requirement is found. It remains, however, that the requirement that CHS vehicle operators apply for and obtain a certificate is preempted as more strict than the HMR.

MDE requires operator training in Maryland hazardous waste regulations, and concedes that the HMR do not require this. It claims that its requirement nevertheless is not more strict than the HMR because the HMR should be deemed to require operator training in the laws of States of operation. That the MDE believes the HMR should require operator training in the laws of States of operation, however, does not mean that the HMR actually do require that type of training.

The HMR do not prohibit an employer from training its employees in the requirements of the various States. Indeed, because an employer likely would be liable for an operator's violation of State law, the employer would be wise to instruct its employees on the laws of the States in which they operate. Nonetheless, the HMR do not require it. Operator training that did not

include instruction in Maryland hazardous waste law would not for that reason violate the HMR; it would, however, violate COMAR 26.13.04.01.F(4). This suffices to show that the Maryland requirement, in this respect, is more strict than the HMR.

MDE correctly surmises that its enforcement of the certificate requirement against operators of vehicles loading or unloading CHS other than RCRA hazardous waste does not affect the preemption determination. If the CHS that is not RCRA hazardous waste otherwise qualifies as a hazardous material under the HMR, then the determination applies to operators of vehicles loading or unloading that material to the same extent as it applies to operators loading or unloading RCRA hazardous waste. If that CHS is not a hazardous material, the preemption determination does not apply. Training requirements for operators of vehicles not transporting hazardous materials are not preempted by the HMR.

Finally, the MDE petition suggests some confusion about the effect of a RSPA preemption determination that rules unfavorably on some, but not all, elements of a State rule. The Maryland rules are preempted only to the extent that they are an obstacle to accomplishing the purposes of Federal hazmat law. *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). Accordingly, to the extent the rules are applied and enforced against non-domiciled operators without the offending elements, namely the requirement to pass an MDE-administered examination, the requirement for training in Maryland laws, the instructor experience criterion and the certification requirement, they are not preempted.

#### IV. Ruling

For the reasons stated above, the MDE petition for reconsideration is denied. This decision incorporates and reaffirms the determination, set forth at 59 FR 28920, that 49 U.S.C. 5125:

Preempts Maryland regulations COMAR 26.10.01.16.D and COMAR 26.13.04.01.F, requiring certification of operators of motor vehicles loading or unloading hazardous materials in Maryland, as they apply to vehicle operators not domiciled in Maryland. Specifically, these requirements are stricter than Federal operator training requirements and therefore are obstacles to accomplishing the full purposes and objectives of [Federal hazmat law]. As applied to vehicle operators domiciled in Maryland, the requirements are not preempted.

#### V. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes

RSPA's final agency action on the April 19, 1993 CWTI/NTTC application for a determination of preemption as to the above-specified Maryland requirements. Any party to this proceeding may seek review of this determination "by the appropriate district court of the United States \* \* \* within 60 days after such decision becomes final." 49 U.S.C. 5125.

Issued in Washington, DC on February 17, 1995.

**Alan I. Roberts.**

*Associate Administrator for Hazardous Materials Safety.*

[FR Doc. 95-4625 Filed 2-23-95; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### Public Information Collection Requirements Submitted to OMB for Review

February 17, 1995.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

#### U.S. Customs Service (CUS)

*OMB Number:* 1515-0065

*Form Number:* CF 7501 and CF 7501A

*Type of Review:* Extension

*Title:* Entry Summary (7501) and Entry Continuation Sheet (7501A)

*Description:* Customs Form 7501 is used by Customs as a record of the impact transaction, to collect the proper duty, taxes, exactions, certifications and enforcement endorsements, and to provide copies to Census for statistical purposes.

*Respondents:* Businesses or other for-profit

*Estimated Number of Respondents:* 2,675

*Estimated Burden Hours Per*

*Respondent:* 20 minutes

*Frequency of Response:* On occasion

*Estimated Total Reporting Burden:* 3,454,852 hours

*Clearance Officer:* Laverne Williams, (202) 927-0229, U.S. Customs Service, Printing and Records Management Branch, Room 6216, 1301 Constitution Avenue NW., Washington, DC 20229