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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