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REGULATION OF HAZARDOUS WASTE TRANSPORTATION: FEDERAL, STATE, LOCAL, OR ALL OF THE ABOVE

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Summary

Administrative rulings (inconsistency rulings) and judicial determinations of preemption of state and local government regulations concerning the transportation of hazardous materials by federal regulations have been analyzed. Transportation of both nuclear material and other hazardous materials are considered. The methodology utilized was analysis on an issue-by-issue basis. Background on federal regulations and the criteria used for preemption decisions is presented. Considerations relevant to federal entities, including the DoE, DoD, state and local governmental entities, and transporters of hazardous materials are discussed. It is concluded that Congress has failed to make a sufficient effort to resolve interjurisdictional differences.

1. Introduction

1.1. Background

The federal government has enacted voluminous regulations intended to regulate the transportation of hazardous materials, including radioactive materials. These regulations include the Hazardous Materials Transportation Act (49 U.S.C. § 1801, *et seq.*) ("HMTA") and the Department of Transportation's Hazardous Materials Regulations (49 C.F.R. 170–179) ("HMR").

In addition to the above delineated regulations, three other federal agencies, the Environmental Protection Agency ("EPA"), the Nuclear Regulatory Commission ("NRC"), and the Department of Energy ("DoE") have established transportation-related requirements for hazardous materials.

Further, the Department of Defense ("DoD") is a major shipper and carrier of hazardous materials. The DoD has established additional transportation requirements for its own shipments, which are similar to those developed by the Department of Transportation ("DoT") and the NRC. (For government

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contractors or other commercial parties transporting DoD materials, the DoT and NRC regulations are applicable.)

Notwithstanding the extensive and exhaustive nature of the federally promulgated regulations, certain states and local governments have seen fit to attempt to add further regulations with which compliance is required in their respective jurisdictions. The entry of state governments into the field of hazardous materials transportation safety began in earnest in the early 1970s.

State and local regulations have included, *inter alia*, the following:

a. notice requirements;
b. permit requirements;
c. requirements to pay fees;
d. limitations as to time, date, or place;
e. requirements concerning vehicles and shipping containers;
f. requirements concerning shipping papers;
g. imposition of special penalties;
h. route justification;
i. emergency plans;
j. loss indemnification;
k. inspection requirements; and
l. complete prohibition against importation of nuclear materials.

State and local regulations in the above delineated areas are typically "justified" by the enacting jurisdiction as vital to that particular jurisdiction, notwithstanding the deleterious effect the regulations may have on other jurisdictions. However, it was the express purpose of the federal regulations to supplant state and local regulations and to render most such regulations unnecessary.

If all of the conflicting state and local regulations, or even an appreciable portion thereof, were permitted to co-exist with the federal regulations, the result would be a quagmire that would threaten the safety of residents of certain jurisdictions as well as threaten the viability of interstate transportation of hazardous materials, which transportation is vital to the well-being of the United States.

In order to prevent such an unacceptable result, the federal government has provided two means for resolving conflicts between federal regulations and state or local regulations. The first is the conventional judicial challenge (in the federal court system) to the propriety of the state or local regulations in view of preemption by the federal regulations and in view of the limitations on permitted state or local regulation of interstate commerce imposed by the United States Constitution.

The second means is an administrative procedure (albeit not in accordance with the federal Administrative Procedures Act) where the DoT Materials Transportation Bureau ("MTB") analyzes the state or local conflict to determine by means of inconsistency rulings proceedings whether the state or local

regulation is preempted by the federal regulations. There is, however, no consideration of constitutional limitations in these rulings.

1.2. Scope of paper

This paper addresses the results of the two means of conflict resolution, discussing on a subject-by-subject basis both the relevant cases and the inconsistency rulings. It must be noted that there are many other state and local regulations in existence which have not been challenged and which will not be discussed herein.

Chapters 2 through 6 provide the basic material applicable to all types of inconsistency determinations. Chapter 2 discusses the history of hazardous materials transportation regulation, federal preemption authority, and the determination of inconsistency. Chapter 3 discusses the regulations concerning the transportation of nuclear materials. Chapters 4 and 5 discuss the two primary tests for inconsistency determination. Chapter 6 concerns the necessity for a state or local government regulation. The remaining chapters, save for the Conclusion, consider the decisions and rulings in the various subject areas. Although these latter chapters do, at least to some extent, build upon each other, they may be addressed individually if the reader is so inclined.

The various conflict rulings, both administrative and judicial, may be significant to the various types of jurisdictions for different reasons. For the federal authorities tasked with promulgating regulations, they illustrate those areas in which state or local governments have significant interest and those areas that hazardous materials transporters have such interest.

For the DoE, whose regulations are frequently equivalent to but not identical to the regulations promulgated by the DoT and NRC, the conflict rulings indicate where there may be conflicts with DoE regulations in the future.

For the DoD, the conflict rulings indicate those areas of state concern that may be the subject of objection to the procedures implemented by the DoD. Further, they serve to indicate the areas in which government contractors or other commercial parties transporting materials for the DoD may experience difficulties.

The conflict rulings should serve to assist state and local governments in determining the extent to which they are at liberty to regulate the transportation of hazardous materials.

Lastly, the conflict rulings should assist the transporters of hazardous materials in determining which state and local regulations may be viably challenged and which will be probably upheld.

2. Federal preemption authority and determinations of inconsistency

2.1. History of federal regulation of hazardous materials transportation

Federal regulation of the transportation of hazardous materials was begun approximately one hundred twenty years ago. The first federal law regulating

the transportation of hazardous materials, Stat. 81, was enacted on July 3, 1866 and concerned the shipment of explosives and flammable materials. On February 28, 1871, Stat. 441 was enacted. That statute established criminal sanctions against persons who transported specific hazardous materials on passenger ships in navigable waters.

In 1887, the Interstate Commerce Act, 24 Stat. 529, was enacted and established the Interstate Commerce Commission ("ICC"). The initial regulations promulgated by the ICC concerned rail transportation. However, the ICC extended its regulations to include other modes of transportation. The ICC was the primary regulatory agency with authority over hazardous materials transportation through 1966.

In 1966, the Department of Transportation Act, Public Law 89-670, 49 U.S.C. 1651, was enacted and transferred the authority to regulate the transportation from the ICC (and other federal agencies) to a newly established agency, the Department of Transportation.

2.2 The Hazardous Materials Transportation Act of 1975

The DoT experienced persistent administrative and organizational difficulties in the early 1970s. These difficulties led the DoT to seek legislation that would consolidate hazardous materials regulatory authority. Those efforts were to little avail until, in 1973, a Boeing 707 cargo transport hauling several tons of hazardous materials crashed (see National Transportation Safety Board ("NTSB"), Aircraft Accident Report, NTSB-AAR-74-14 (Washington, D.C., 1974)).

As discussed in the NTSB report concerning the crash, the accident inquiry showed that a general lack of compliance with existing requirements due to (1) the fragmentation of the regulatory authorities, (2) the complexity of the regulations, (3) the lack of industry familiarity at the working level with the federal regulations, and (4) inadequate government regulations.

The HMTA was finally enacted on January 3, 1975, Title I of Public Law 93-633, 49 U.S.C. 1801. The HMTA had the following effects:

1. The DoT's potential jurisdiction was expanded to any traffic affecting interstate commerce;

2. The DoT was authorized to designate hazardous materials, defined as materials or classes of materials in quantities and forms that the Secretary of the DoT ("Secretary") determined might pose an unreasonable risk to health and safety or property;

3. The DoT was authorized to issue regulations related to the packing, handling, labeling, marking, placarding, and routing;

4. Expanded the regulated community to include those who manufacture, test, maintain, and recondition containers used to transport hazardous materials;

5. Authorized the DoT to establish a program for the registration of shippers, carriers, and container manufacturers and reconditioners;

6. Codified the DoT procedures for granting regulatory exemptions;

7. Provided the Secretary with the ability to conduct surveillance activities, establish record-keeping requirements, and conduct inspections;

8. Authorized the DoT to assess civil and criminal penalties for violations of the HMTA; and, most importantly for the purpose of this paper,

9. Defined the relationship between the federal regulations and regulations promulgated by state or local governments such that non-federal rules found to be inconsistent with the federal rules were preempted and established a procedure for the DoT to waive preemption.

Shortly after the HMTA was enacted, the Secretary created the MTB within the Research and Special Programs Administration ("RSPA"). The MTB was designated as the lead DoT agency for hazardous materials regulation.

The DoT proceeded to prepare and issue a comprehensive set of substantive regulations concerning the transportation of hazardous materials, including radioactive materials. These regulations are known as the HMR and are codified at 49 C.F.R. Parts 171–179.

The enactment of the HMTA was a milestone in the federal regulation of hazardous materials transportation. The purpose of Congress in enacting the HMTA was,

"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.

The term hazardous material was then defined by Congress to be,

"a substance or material in a quanitty and form which may pose an unreasonable risk to health and safety or property when transported in commerce." 49 U.S.C. 1802(2)

2.3 Federal preemption authority

The federal authority for preemption under the HMTA is delineated in 49 U.S.C. §1811 as follows:

"Relationship to Other Laws.

(a) General. Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this title, or in a regulation issued under this title, is preempted.

(b) State Laws. Any requirements, of a State or political subdivision thereof, which is not consistent with any requirements set forth in this title, or in a regulation issued under this title, is not preempted if, upon the application of the appropriate state agency, the secretary determines, in accordance with procedures to be prescribed by regulation that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce.

Such requirement shall not be preempted to the extent specified in such determination by the secretary for so long as the State or political subdivision thereof continues to administer and enforce effectively such requirement."

The HMTA and the HMR are equally applicable to intrastate as to interstate transport. As stated in *State of Washington Bill No. 1870 Governing Requirements for Red or Red Bordered Shipping Papers for Hazardous Materials*, DoT Inconsistency Ruling IR-4, 47 Fed. Reg. 1231 (1982), as corrected at 47 Fed. Reg. 33357 and 34074 (1982),

"the State's assertion that the HMR do not apply to intrastate shipments is incorrect. It is well established that the HMR apply to wholly intrastate shipments by interstate carriers."

Pursuant to the HMTA, state or local regulations that are inconsistent with the federal requirements are invalid and are not enforceable, unless the Secretary determines that the regulations that are inconsistent with the federal requirements may nevertheless qualify for an exemption. The Secretary has delegated the authority to make such determinations to the MTB.

Preemption has been validated by the U.S. Supreme Court. In *Pacific Gas & Electric* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 210, 211, 103 S.Ct. 1713 (1983), the Supreme Court held that,

"It is well established that state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

2.4. Conflict determination

There are two procedures established to determine if a state or local regulation is inconsistent with the HMTA. A determination of inconsistency may be made by either the administrative procedure of the MTB or the conventional judicial procedure of the courts. The MTB has published procedures (49 C.F.R. 107.203 to 107.211) that implement the preemption language of the HMTA and provide for the issuance of "Inconsistency Rulings," which may contain a finding that a state or local regulation is either consistent or not consistent with the relevant federal requirements.

An inconsistency ruling is not the same as a decision by a court, nor is it an administrative determination in the sense of a proceeding governed by the Administrative Procedures Act, 5 U.S.C. §§ 501–706. As stated in *State of Rhode Island Rules and Regulations Governing the Transportation of Liquified Natural Gas and Liquified Propane Gas Intended to be Used by a Public Utility*, DoT Inconsistency Ruling IR-2, 44 Fed. Reg. 75566 (1979) aff'd on other grounds 45 Fed. Reg. 71881 (1980) as corrected at 45 Fed. Reg. 76838 (1980), later proceeding *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.C. R.I., 1982), aff'd 698 F. 2d 559 (1st Cir., 1983),

"a ruling is an advisory opinion of the Department of Transportation... it is not the product of formal adjudication under the Administrative Procedures Act, or any type of adversary proceeding. An inconsistency ruling generally turns on legal issues. The process was not designed for the resolution of factual disputes, but rather to indicate to the affected parties, including concerned State and local jurisdictions, the Department's view as to the propriety of specific State or local hazardous materials transportation requirements under the Federal statute and regulatory scheme."

Although courts are not required to defer to MTB determinations, they have frequently looked to MTB inconsistency rulings for guidance. Indeed, the same preemption criteria utilized by the MTB have been applied by the United States Supreme Court in *National Tank Truck Carriers, Inc.* v. *Burke* to determine whether a conflict existed between state and federal statutes in areas where the Congress had not completely foreclosed state legislation.

The common criteria, in their most basic form, may be expressed as follows: a conflict or inconsistency exists (1) where compliance with both the federal and state or local regulations is a physical impossibility or, (2) where the state or local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The courts, however, may also address constitutional issues which are beyond the scope of MTB inconsistency rulings.

In its comprehensive ruling concerning Inconsistency Rulings IR-7 through IR-15 (which were considered together as a group and which will be discussed at length, *infra*), the MTB discussed its general authority and preemption under the HMTA as follows:

"With certain exceptions, the HMTA imposes obligations to act only on the Secretary of Transportation. Obligations are imposed on members of the public only by substantive regulations issued under the HMTA. Known as the Hazardous Materials Regulations (HMR), they are codified at 49 C.F.R. Parts 170–179, and mostly predate the HMTA. The HMR previously was authorized by the explosive and other dangerous articles act (18 U.S.C. 831–835), which was repealed in 1979. The HMTA was enacted on January 3, 1975 and the HMR were reissued under its authority, effective January 3, 1977. Subsequent amendments to the HMR have been issued under the authority of the HMTA and with the preemptive effect granted by that act.

"The HMR applies to persons who offer hazardous materials for transportation and (shippers), those who transport the materials in commerce (carriers), and those who manufacture and retest the packagings and other containers intended for use in the transportation of the materials in commerce....

"The HMTA at Section 112(a) preempts' ... any requirement of a State or political subdivision thereof, which is inconsistent with any requirement set forth in (the HMTA) or regulations issued under (the HMTA).' This express preemptive provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any State or local action. The HMTA preempts only the state and local requirements that are 'inconsistent.'

"Absent federal occupation of the field, a State may take certain measures, in the exercise of its police power, to safeguard the health, safety and welfare of its citizens... The legislative history of this provision indicates that Congress intended it 'to preclude a multiplicity of State and local

regulations and a potential for varying as well as conflicting regulations in the area of hazardous materials transportation.'

"In 49 CFR Part 102, the Materials Transportation Bureau (MTB) has published procedures which complement the preemption language of the HMTA by providing for the issuance of inconsistency rulings... There are two principal reasons for providing an administrative forum for such determination. First, an inconsistency ruling provides an alternative to litigation for determination of the relationship between federal requirements and those of a State or political subdivision thereof. Second, if a State or political subdivision requirement is found to be inconsistent, such a finding provides the basis for application to the secretary of transportation for determination as to whether preemption will be waived.

"Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption will be considered. A federal court may find a non-federal requirement not statutorily preempted, but, nonetheless, preempted by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, the Department of Transportation does not make such determinations." (Citations omitted.)

In its latest reported inconsistency ruling, *Illinois Fee on Transportation of Spent Nuclear Fuel*, DoT Inconsistency Ruling IR-17, 51 Fed. Reg. 20906 (1986), the MTB discussed the purpose of these administrative rulings, their scope and their criteria (tests) as follows:

"Because the instant proceeding is being conducted pursuant to the provisions of the HMTA, this ruling will consider only the question of statutory preemption. A Federal court may find that a state requirement which is not preempted statutorily is, nonetheless, preempted by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. The Department of Transportation, however, does not make such determinations in the context of an inconsistency ruling proceeding.

"Given the judicial character of the inconsistency ruling proceeding, the Department has incorporated case law criteria for analyzing preemption issues into the inconsistency ruling procedures (See e.g. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). At 49 CFR 107.209 (c) the following tests are set forth for determining whether a state or local requirement is 'inconsistent':

"(1) Whether compliance with both the [state or local] requirement and the Act or other regulations issued under the Act is possible; and

"(2) The extent to which the [state or local] requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

"The first criterion, known as the 'dual compliance' test concerns those state or local requirements that are incongruous with Federal requirements; that is, compliance with the state or local requirements causes the Federal requirements to be violated, or vice versa. The second criterion, known as the 'obstacle' test, essentially subsumes the first and concerns those state or local laws that, regardless of conflict with a Federal requirement, stand as 'an obstacle to the accomplishment and execution of the [HMPTA] and the regulations issued under the [HMPTA].' In determining whether a state or local requirement presents such an obstacle, it is necessary to look at the full purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through the Department's regulatory program."

Prior to the initiation of any litigation concerning the enforceability of any state or local regulation, an interested party can apply for a DoT inconsistency ruling pursuant to the procedures delineated in 49 C.F.R. §§ 107.201–107.209 and it may be appealed pursuant to the procedures delineated in 49 C.F.R. § 107.211.

In the event that a state or local requirement is found to be inconsistent with the HMTA, it is also possible to apply for a preemption determination as provided for in 49 U.S.C. § 1811(b), as delineated in 49 C.F.R. § 107.215.

It is important to note that despite the availability of these procedures, the courts have held that there is no requirement that a local government seek federal approval in advance of putting into effect local hazardous materials transportation regulations. If a local government deems its regulations not inconsistent with the HMTA and its associated regulations, that local government may institute its regulations subject, of course, to challenge by any party who desires to challenge the local government's determination.

For state or local regulations that are not limited to the transportation of nuclear materials, there have been a variety of reasons for finding such regulations preempted. First, the federal regulations have been perceived to have virtually preempted the entire field in several areas. These include the "hazard class" definition, hazard warning systems, shipping paper requirements and container requirements.

In addition, state or local requirements limiting the time, date, or place of transportation have generally been held preempted as violative of the goal of national uniformity, but not where there is a clear need for such local regulation. Further, permit requirements have been held preempted where they would cause an "unnecessary" delay, but not where they would only cause a "necessary" delay.

Of course, state or local hazardous material transportation requirements that have essentially adopted, or could not possibly conflict with the federal regulations, have generally been held to not be preempted.

Challenges to state and local government regulations are usually successful where the state or local government contends that because of their unique local conditions, their safety regulations should not be preempted by the HMTA and its associated regulations.

3. Regulation of nuclear material transport

Both of the courts and the MTB frequently take special note as to whether the state or local requirements which may be preempted specifically concern the transportation of nuclear materials. There are specific federal regulations concerning the shipment of radioactive materials.

Some state and local nuclear materials transportation requirements have

been held to be preempted by the Atomic Energy Act (42 U.S.C. §§ 2011, *et seq.*), numerous determinations of preemption have also been made under the HMTA, but preemption in the nuclear materials area typically turns on the interpretation of HM-164 (49 C.F.R. 177.825(b) and Appendix A to 49 C.F.R. Part 177).

HM-164 was promulgated because a large number of states and local entities had proposed or enacted legislation banning or restricting the transport of radioactive materials through their respective jurisdictions. HM-164 requires, *inter alia*, that carriers of all placarded shipments of radioactive materials, including radiopharmaceuticals and low-level wastes, operate on routes that minimize radiological risks, that drivers of vehicles that transport high-level radioactive materials receive written training, and that carriers prepare a written route plan.

An appendix to HM-164 provides policy guidance for state and local governmental entities for establishing requirements that are consistent with the federal regulations.

The validity of HM-164 was considered in *City of New York* v. *United States Department of Transportation*, 715 F.2d 732 (2nd Cir., 1983), discussed at length *infra*. HM-164 generally requires carriers of "highway route controlled quantity radioactive materials" to use "preferred routes". Preferred routes are then defined as Interstate System Highways or highways of equal or greater safety, the latter designated by a state routing agency.

As discussed in *Illinois Fee on Transportation of Spent Nuclear Fuel*, IR-17, Appendix A of HM-164 is not a regulation. Rather, it is a policy statement in which the Department has set forth its interpretation of the general preemptive effect of its regulations on state and local highway routing requirements. As such, it is intended to advise state and local governments contemplating rulemaking action of the likelihood of such actions being deemed inconsistent.

State or local nuclear materials transportation regulations which are considered to be "routing rules," either directly or indirectly, have generally been found to be inconsistent with the federal scheme, and therefore preempted. Permit requirements, route justification requirements, emergency plan requirements, fee requirements, and indemnification requirements have all been so considered.

Even if the state or local nuclear materials transportation requirements are not so directly inconsistent with the federal requirements, many have been held preempted as creating an unnecessary multiplicity of requirements. In essence, for nuclear materials transportation, state or local requirements have generally been held not to be preempted only in the event that they essentially adopted the federal scheme or could not possibly conflict with the federal scheme.

Although the courts and the MTB have determined the preemption of regulations associated with the transportation of nuclear materials under the

HMTA without reference to the Atomic Energy Act, in other cases the courts and the MTB have held and determined that the Atomic Energy Act, when read in conjunction with the HMTA, generally preempted state regulation associated with the transportation of nuclear materials.

For example, in *New York State Energy Research and Development* v. *Nuclear Fuel Service, Inc.*, 102 FRD 18 (W.D. N.Y., 1983), the State of Ohio attempted to intervene seeking to prohibit the transportation of certain nuclear waste materials through Ohio by means of restrictions on such transportation and the upgrading of terms upon which the transportation would be made. The court held that the HMTA, when read in conjuction with the Atomic Energy Act of 1954, expressly and impliedly preempted state regulation associated with the transportation of nuclear materials. The court ordered various utilities in the trespass suit to remove their spent nuclear fuel from a reprocessing center in New York State. Ohio learned that two of the utilities intended to transport fuel through densely populated portions of Ohio to storage facilities located in Wisconsin and Illinois. Ohio then moved to intervene, arguing that it lacked the emergency capability to respond to the consequences of any accident which might befall the shipments through the State. The court denied the State of Ohio's motion, stating that Ohio lacked a direct, substantial, legally protectable interest in the subject matter of the litigation. The Nuclear Regulatory Commission had exclusive jurisdiction over nuclear materials and the Department of Transportation was the federal authority overseeing the transportation of hazardous materials. Thus, the court said that Ohio's interest in safeguarding the health, safety and welfare of its citizens must be addressed to those two agencies. The court further stated that under the HMTA, even state regulations which purports to increase the safety of transportation of hazardous materials was, under the circumstances, precluded.

Similarly, in *Washington State Building & Construction Trades Council* v. *Spellman*, 518 F. Supp. 928 (E.D. Wash., 1981), aff'd. on other grounds (9th Cir., 1982) 684 F.2nd 627, cert. den. 461 U.S. 913, 103 S.Ct. 1891 (1983), the court held that Washington's Radioactive Waste Storage and Transportation Act of 1980, which banned the transportation of all non-medical radioactive waste generated outside of the State to disposal sites within the State, was preempted by the HMTA when read in conjunction with the Atomic Energy Act and other federal statutes. The court reviewed the federal statutory scheme for the regulation of radioactive waste, including the Atomic Energy Act, the Low Level Radioactive Waste Policy Act, (42 U.S.C. § 2021) and the HMTA and concluded that Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except in instances where jurisdiction was expressly ceded to the states. The court found that authority had not been ceded under any federal statute and that the state statute sought to regulate legitimate federal activity.

It thus concluded that the statute was unconstitutional as violative of the Supremacy Clause (U.S. Constitution, Article VI, Clause 2).

In *City of New York*, the Court of Appeals upheld the validity of HM-164. In early 1976, the City of New York amended its health code so that transportation of spent nuclear fuel and other large quantities of radioactive material through New York was prohibited unless the transporter obtained a Certificate of Emergency Transport from the Commissioner of Health. The amendment, in effect, banned motor vehicle transport of spent fuel from the nuclear reactors on Long Island because all of the roads from Long Island passed through New York City. Subsequent to the enactment of that amendment, spent nuclear fuel had to be removed from Long Island by barge across the Long Island Sound to New London, Connecticut.

Brookhaven National Laboratories operated a reactor on Long Island and responded to the amendment by requesting that the MTB declare the amendment preempted by the HMTA. However, the MTB, in *City of New York Ordinance*, DoT Inconsistency Ruling IR-1, 43 Fed. Reg. 6954 (1978), determined that the New York amendment had not been preempted by the HMTA. Although the HMTA authorized the Secretary of the DoT to develop national rules for the routing of nuclear materials, the Secretary had not yet exercised that authority. On that basis, the MTB concluded that local jurisdictions, including municipalities such as New York City, could enact their own routing rules, including extreme routing requirements such as a ban on the shipment on nuclear materials through densely populated urban areas.

Notwithstanding that conclusion, the DoT became concerned about the restrictions being placed on the transportation of nuclear fuel materials by City of New York, as well as numerous other jurisdictions. The DoT decided to investigate whether the federal rules governing of nuclear materials transport were indeed needed. The DoT proceeded with the rule making proceedings and in January 1980 published a notice of proposed rule making which contained the preliminary assessment of routing requirements and driver training programs. Approximately one year later, the DoT published a final rule known as HM-164.

The litigation in *The City of New York* challenged those sections of the final rules which govern the routing of motor vehicles that carry large quantity shipments of radioactive materials. HM-164 established a system of preferred routes comprised of the highways of the interstate highway system supplemented by the local highways selected and approved by state routing agencies. Under HM-164, vehicles which carry large quantity shipments of radioactive materials should, as a general matter, operate over preferred routes selected to minimize time in transit, except that an interstate system route that bypasses around a city is preferred, if available. The DoT designated the entire interstate highway system as a preferred route because of that system's low accident rate and its capacity to reduce transit times. The DoT acknowledged, however, that in many

cases local roads might provide safer and more direct routes for highway carriers and that state authorities were better able to determine whether such alternate routes would be preferable. Thus, state routing authorities were given the authority to supplement the interstate highway system.

In addition to the routing requirements, HM-164 required that for large quantities of radioactive materials, carriers prepare written route plans before shipment, drivers for the shipments complete training programs, and that carriers moving radioactive reactor fuel follow security procedures established by the NRC.

Throughout the rule making process, the City of New York had been a vocal critic of the DoT proposals. It had repeatedly urged the DoT to broaden the scope of its inquiry and to additionally consider barging as a means of transporting large quantity shipments of radioactive materials around urban centers that do not have circumferential highways which permit bypass of the city. The DoT did not incorporate the City of New York's barging suggestion into the proposed rule. The City of New York reiterated its support for barging and requested that the DoT accompany the final rule with a non-preemption ruling for the amendment to the New York City Health Code. The City of New York's application for the non-preemption ruling was denied as premature. However, when the final rules were published in January 1981, the City of New York renewed its application for non-preemption ruling. On January 15, 1982, the DoT informed the City of New York that the city's request for non-preemption ruling would most likely not be approved due to a lack of sufficient supporting documentation. The final rule went into effect on February 1, 1982.

On March 25, 1981, the City of New York filed a complaint in the Southern District of New York to invalidate rule HM-164 on numerous grounds. The District Court granted motions by the State of New York and a group of utilities to join the proceeding. On January 29, 1982, only three days prior to the date that HM-164 was to take effect, the District Court issued a temporary restraining order ("TRO") which restrained the preemptive effect of HM-164 on the amendment to the City of New York health code. On February 10, 1982, the District Court ruled that HM-164 violated the HMTA and the National Environmental Protection Act ("NEPA"), 42 USC § 4332, in its preemption of state local bans on the transportation of large quantities of radioactive materials along highways and densely populated areas. The District Court permanently enjoined, nationwide, enforcement of what the court concluded was the invalid effect of HM-164. The court offered the parties the opportunity to suggest corrections to the court's opinion. Based on those suggestions, the District Court filed an amended opinion and judgment on May 6, 1982, which limited its earlier decision and invalidated HM-164 only to the extent that it preempted the New York City Health Code amendment.

The Court of Appeals reversed the District Court's decision, holding that HMTA regulations are valid so long as they are rationally related to the policy

underlying the HMTA and are promulgated in accordance with the Administrative Procedure Act. The DoT had fully complied with those standards for HM-164.

With respect to NEPA, HM-164 establishes the manner in which highly toxic substances are to be moved around the country and therefore results in impact to the environment. In addition to the potential risk of a possible accident, transportation of radioactive materials would cause some incremental contribution to the amount of low level radiation on the interstate highway system. The Court of Appeal concluded that HM-164 had sufficient impact on the environment that the DoT was required to consider alternatives to the action. The Environmental Assessment prepared for HM-164 covered nine alternatives, including a no-action alternative. All of the alternatives considered highway transportation of radioactive materials. The District Court's criticism of the DoT's environmental assessment was that there was no serious consideration of the barging alternative.

However, the DoT's finding that HM-164 would not significantly affect the environment substantially diminished the viability of the claim of the plaintiffs that the DoT acted arbitrarily in not considering barging as an alternative. Further, even if barging offered a nationwide alternative to highway transportation (which was not the case inasmuch as the Court of Appeals noted that 26% of the nation's nuclear facilities at that time reportedly did not directly access navigable waters), barging was not an alternative to the DoT objective of creating national safety regulations for *highway* transportation. The non-preemption ruling possibility and the lack of justification for requiring the DoT to consider barging only around New York City rendered the plaintiffs' arguments unconvincing. The court concluded that the DoT did not violate NEPA in deciding that a formal Environmental Impact Report ("EIR") was not required.

The Court of Appeals went on to find that the other criticisms of the DoT, particularly those regarding technical judgments, were unjustified. The DoT had considered a rule that might be expected to generate a catastrophic accident approximately once every 300 million years. Based upon advice received during the rule making process, the DoT decided that such a remote possibility of even such a serious consequence did not create a "significant" risk for the human environment. The Court of Appeals concluded that,

> "disquieting as it may be even to contemplate such matters, this discretion cannot be said to be an abuse of discretion." *Id.* at 752.

The Court of Appeals thus upheld HM-164, but did not consider the viability of a non-preemption ruling being granted to the City of New York inasmuch as such a ruling would be premature since the DoT had not yet denied New York City's pending application.

4. The dual compliance test

The courts and the MTB, in many cases and rulings, respectively, have invoked the "dual compliance test" to determine that a state or local requirement is inconsistent with the HMTA and its associated regulations, and therefore preempted. The "dual compliance test" is met if it is not physically possible to comply with both the federal requirements and the state or local requirements. This test was discussed in *State of Rhode Island*, IR-2 (which also contains an excellent discussion of the distinction between an inconsistency ruling and the related nonpreemption determination).

In IR-2, the MTB stated that in analyzing the preemption issues under the HMTA, the MTB would inquire whether compliance with both the state or local requirements and the HMTA and its associated regulations was possible. (The MTB stated that the other criteria was the extent to which the state or local requirement was an obstacle to the accomplish of the HMTA and its associated regulations, discussed in the next section.)

The nature of the dual compliance test in proceedings before the MTB was also explained. The MTB noted that the procedures used by it for issuing inconsistency rulings were not designed for the resolution of factual disputes. The MTB stated that it would not consider an argument that in actual practice the state or local regulation was not inconsistent with federal law and thus was not preempted.

The state appealed the ruling issued by the MTB, contending that the transportation delays cited by the MTB Associate Director were only conjectural in nature. The state contended that the curfew provision in question did not in actual practice result in conflicting and unnecessary delays as the MTB Associate Director had ruled. The MTB Director ruled that his Associate Director had correctly applied the criteria of 49 CFR § 107.209(c). The Director noted that there is a distinction between an inconsistency ruling and a nonpreemption determination. An inconsistency ruling is tied to 49 U.S.C. § 181(a) and involves a decision as to whether a state or local regulation is inconsistent and therefore preempted. However, the non-preemption ruling relates to 49 U.S.C. § 1811(b), and concerns the analysis as to whether an inconsistent state or local regulation which would ordinarily be preempted is determined to be "non-preempted" because it provides an equal or greater level of safety than that afforded by the federal requirements and without unreasonably burdening commerce.

The Director pointed out that level of safety was certainly not conclusive, and probably not even relevant, in the initial preemption decision. An inconsistency ruling is an advisory opinion generally turning on legal issues only; it indicates the DoT's opinion as to the propriety of a specific state or local requirement concerning hazardous materials transportation with respect to the HMTA. The Director further stated that the forum provided by the procedure for the MTB permitted it an opportunity to express its view on the

proper role of state and local versus federal regulatory activity in the area of hazardous material transportation.

5. The obstacle to legislative goals test

Both the courts and the MTB have held or recognized that a state or local requirement is inconsistent and preempted if that state or local requirement stands as an obstacle to the accomplishment and execution of the purposes and objectives enacted by Congress in the HMTA. *State of Rhode Island*, IR-2, concerned this issue as well. The MTB stated that in analyzing the preemption issues under the HMTA, the MTB would inquire into the extent to which the state or local requirement was an obstacle to the accomplishment and execution of the HMTA and its associated regulations. In making this determination, the MTB would look at the full purposes and objectives of Congress in enacting the HMTA as well as at the matter and extent to which those purposes and objectives had been carried out through the HMTA regulatory program.

One purpose that has been addressed repeatedly by the courts and the MTB is that of increased safety. In *State of Washington*, IR-4, the MTB ruled that a state law which might result in an inappropriate emergency response technique and which could concomitantly lead to a substantially increased risk to the public was clearly an obstacle to the accomplishment and execution of the HMTA.

Inconsistency Rulings IR-7 to IR-15, 49 Fed. Reg. 46632 (1984), as corrected 50 Fed. Reg. 9939 (1985), also concern the obstacle to legislative goals test and were, as previously discussed, considered simultaneously by the MTB, inasmuch as they were interrelated. These inconsistency rulings are as follows:

IR-7.	State of New York; Letter of Governor's Designated Representative Advising Suspension of Spent Fuel Shipments.
IR-8.	State of Michigan; Radioactive Materials Transportation Regulations of the State Fire Safety Board and the Department of Public Health.
IR-9.	State of Vermont; Letter from Governor Concerning Highway Shipment of Spent Fuel through Vermont.
IR-10.	State of New York; New York State Thruway Authority Restrictions on the Transportation of Radioactive Materials.
IR-11.	State of New York; Ogdensburg Bridge and Port Authority, Radioactive Materials Transportation Rules.
IR-12.	State of New York; St. Lawrence County of Local Law Regulating the Transportation of Radioactive Materials Through the County.
IR-13.	State of New York; Thousand Islands Bridge Authority Restrictions on the Transportation of Radioactive Materials.
IR-14.	State of New York; Jefferson County local Legislative Stipulation Regarding Radioactive Materials Transportation Through the County.
IR-15.	State of Vermont; Rules for the Transportation of Irradiated Reactive Fuel and Nuclear Waste.

All of these inconsistency rulings arise, in part, from actions taken by the states with reference to the Nuclear Assurance Corporation ("NAC"). The NAC had a contract with Atomic Energy of Canada, Limited ("ACEL"), concerning the transportation of spent nuclear fuel from Chalk River, Ontario, to a DOE facility at Savannah River, South Carolina. The ACEL had a contract with the DOE, with reprocessing of nuclear fuel being part of an overall agreement between the United States and Canada for the assured supply of enriched uranium for Canadian research reactors.

Until 1979, spent fuel was shipped to the DOE reprocessing facility by NAC's truck entering the United States by way of the Ogdensborg Bridge across the St. Lawrence River. However, in 1980, the Ogdensborg Bridge and Port Authority adopted rules and regulations which banned the shipment of radioactive materials across the bridge. At the same time, St. Lawrence County, located at the foot of the bridge, enacted a ban on commercial spent fuel shipments. The Bridge and Port Authority subsequently amended its rules to incorporate the provisions of the St. Lawrence County law.

Subsequently, in 1981 and 1982, the NAC requested and received NRC approval for five routes which entered the United States in Michigan, New York and Vermont. After the Michigan route was approved, the Michigan State Fire Safety Board and Department of Public Health adopted rules covering the transportation of radioactive materials. The NAC alleged that the rules established packaging, planning, information and equipment requirements more stringent than those required by federal agencies for spent fuel shipments. Further, NAC asserted that the net effect of the Michigan requirements was to prevent spent fuel shipments from entering Michigan by way of the approved routes.

In view of the Michigan requirements, a ban by the New York Freeway Authority, and a permit requirement necessitating substantial insurance coverage imposed by the Thousand Islands Bridge Authority (which was also incorporated in a Jefferson County Resolution regulating the transport of radioactive materials), the NAC planned to use a land crossing in Vermont. The Vermont route was used without incident for eight of the eleven shipments. However, confidential information regarding the transport shipments was released. The Governor of Vermont then called upon the NAC to interrupt the series of shipments in order to preclude possible civil action. The NAC was notified shortly thereafter by the Governor that Vermont did not intend to permit further shipments of spent fuel through the state until the Federal government further regulated such shipments.

Given the total prohibition in Vermont, the NAC then established a sixth route through New York. This was intended to accomplish the three remaining shipments in the series of eleven. However, prior to NAC being able to use this

route, the Governor of New York directed his representative to send a notice advising the NAC to suspend spent fuel shipments through New York.

As a result of the actions taken by the multiple states, the NAC was forced to halt shipments of spent fuel from Canada. In October of 1982, NAC filed separate applications for consistency rulings seeking preemption of the following:

1. The Michigan State Fire and Safety Board and Department of Public Health regulations affecting radioactive materials transportation;
2. The radioactive materials transportation ban on the New York State Freeway;
3. The suspension order issued by letter of the Governor of Vermont; and
4. The suspension order issued by letter of the representative of the Governor of New York.

The NAC did not seek inconsistency rulings with respect to the regulations of the Ogdensborg Bridge and Port Authority, St. Lawrence County, the Thousand Islands Bridge Authority, or Jefferson County. However, the MTB concluded that the aggregate effect of all these regulations had been to significantly effect the ability of carriers, including NAC, to transport radioactive materials in accordance with the nationally uniform system of highway routing which the DoT sought to achieve by way of publication of regulations under HM-164. The MTB therefore elected, in accordance with 49 C.F.R. 107.209(p) to consider the issue of inconsistency with regard to those regulations as well, notwithstanding that no applications for such rulings have been filed. Further, under the same authority, the MTB initiated a proceeding concerning the radioactive materials transportation regulations which the Vermont agency of transportation adopted shortly after the initiation of the proceedings.

Each of the resulting inconsistency rulings will be discussed with regard to the specific regulation or regulation in the appropriate sections of this paper. Only the analysis of the MTB is relevant to the instant discussion.

In *State of Michigan Regulations*, IR-8, the MTB stated that it was the primary objective of the HMTA and its associated regulations to protect the nation against the risks inherent in the transportation of hazardous materials. Thus, where a state rule increased the risks, that rule was similarly a preempted obstacle. The MTB also stated that although there is a long-standing federal–state relationship in the field of highway transportation safety which recognizes the legitimacy of certain state action to protect the citizens of the state and the property within the state, and that while the HMTA did not totally preclude state or local action, Congress intended to make state or local action unnecessary to the extent possible. The MTB went on to state that the very comprehensiveness of the HMR severely restricted the scope of state or local activity which had been historically permitted. The nature, necessity and number of hazardous material shipments made uniform regulation critical. Thus, the MTB held that a regulation promulgated which merely contributed to the

type of multiplicity of regulations that the HMTA was intended to eliminate served no safety purpose and therefore constituted a preempted obstacle.

Similarly, in *State of Vermont Rules*, IR-15, the MTB held that in the absence of a clear showing that the transportation of a highway route controlled quantity of radioactive material in a state posed a financial risk exceeding the level of indemnification provided by federal law, the regulation which merely contributed to the multiplicity that the HMTA was intended to eliminate posed an obstacle to the national uniform system of highway routing established under the HMTA.

6. Necessity for state or local "requirement"

Section 49 U.S.C. 1811(a) provides for the preemption of any state or local "requirement" which is inconsistent with requirements with the HMTA or its associated regulations. In the preponderance of decisions which have involved state or local regulations, there is no controversy as to whether a "requirement" is involved. However, it has been held that a formal statute or regulation is not necessary. Even a letter may constitute a "requirement" for the purposes of the HMTA.

In *New York State Letter*, IR-7, a letter from the New York governor's representative advised the Nuclear Assurance Corporation that it should suspend proposed shipments of spent nuclear fuel through New York. The MTB noted (1) that the New York governor's designated representative who promulgated the letter was the same individual authorized to receive the advance notification of nuclear waste shipment through New York, (2) that the letter was in response to advance notification of shipments by the NAC, and (3) that the representative later referred to the letter as a "state order". It was clear to the MTB that the state intended to order the NAC to suspend the proposed shipments and that the failure by NAC to comply with the letter would most likely result in sanctions being imposed upon it by the state.

However, some action must be mandated in order for a "requirement" to exist. In *State of Vermont Letter*, IR-9, the MTB considered the instance where a letter from the Governor of Vermont advised the NAC that the State did not intend to permit it any further shipments of spent nuclear fuel through Vermont.

The letter stated, in pertinent part, that,

"Vermont will not be placed at a disadvantage because of actions in other states which ban or have the effect of banning shipments in violation of applicable federal law for periods then [the Governor] would seek all legal remedies available... to stop the shipments, including an immediate injunction."

This was not held to constitute a state requirement inasmuch as the letter

did not impose presently exercisable restrictions of the transportation of spent fuel by the NAC. Unlike the letter in *New York State Letter,* IR-7, the letter from the Governor of Vermont was not held out to be a "state order." Nothing pointed to any intent that the letter actually assume the weight of law, notwithstanding that the letter did contain rather firm language. The language quoted above indicated to the MTB that the Governor of Vermont understood that the letter was not an enforceable state requirement; nothing prevented the NAC from continuing its planned shipments into Vermont until such time as Vermont successfully obtained an injunction.

7. "Hazard class" definition

The MTB has recognized that the federal goal and definition of hazard classes is exclusive. Thus, state or local hazard class definition differing from federal regulations are preempted by the HMTA.

The MTB in *City of New York Code Governing Definitions of Certain Hazardous Materials,* DoT Inconsistency Ruling IR-5, 47 Fed. Reg. 51991 (1982), as corrected by 47 Fed. Reg. 56766 (1982), cited the potential for regulatory chaos in holding that hazard class definitions contained in a New York City fire prevention code which differed from the hazard class definitions contained in the HMR represented an obstacle to the accomplishment to both the general and specific purposes of the HMTA and were thus preempted by the HMTA. The MTB acknowledged that it did not have any information indicating that compliance with the City's requirements would necessarily result in violation of the HMR or vice versa. However, the agency stated that to the extent definitions differed from those in the HMR, they were inconsistent with the HMTA. The foundation of the federal hazardous materials regulatory system, explained the MTB, is the definition of hazard classes. The MTB then quoted from *State of Rhode Island Rules,* IR-2, to the effect that there are certain areas where the need for national uniformity is so crucial and the scope of federal regulation so pervasive that it is difficult to envision any situation in which a state or local regulation would not present an obstacle to the accomplishment and execution of the HMTA and the HMR. The MTB concluded that,

"The foundation of the federal hazardous materials regulatory system is the definition of hazard classes."

Similarly finding that the federal role in the definition of hazard classes to be exclusive, the MTB in *City of Covington Ordinance Governing Transportation of Hazardous Materials by Rail, Barge, and Highway within the City,* DoT Inconsistency Ruling IR-6, 48 Fed Reg. 760 (1983), cited *City of New York Code,* IR-5, and held that the hazard class definitions of a city ordinance requiring transporters to give advance notification of their intent to transport "haz-

ardous, dangerous substances" (which were extensively defined) within the city were inconsistent with, and hence preempted by, the HMTA and HMR. Finding that the federal role in the definition of hazard classes was exclusive, the MTB acknowledged that it had no information to indicate that compliance with the city's requirements resulted in violation of the HMR or vice versa. The MTB believed that the regulations were further from acceptable than those in *City of New York Code*, IR-5, stating as follows:

"To a much greater degree than the New York definitions which were considered in IR-5, the Covington definitions extend the scope of the Ordinance's impact to a wide range of materials that are not subject to the HMR. Moreover, the Ordinance classifies materials differently, for purposes of application of the City's requirements, from their classification for the purposes of the application of the HMR."

Notwithstanding that the MTB could therefore not conclude that the city's definitions were inconsistent under the "dual compliance" test for preemption, the MTB found that the city's requirements posed an obstacle to the accomplishment and execution of the HMTA.

8. Notification requirements

Requirements of notification have been established by states, numerous local governments, and transportation facilities. Although many have not been challenged, many others have been challenged, the result of the latter being the following rulings.

In *City of Covington Ordinance*, IR-6, the MTB held that a local hazardous materials transportation regulation which required advance notification to the fire department of all hazardous materials shipments in or through the city was preempted. The MTB stated that compliance with the city's requirement would involve unnecessary delay in violation of 49 C.F.R. 177.853 and could result in excessive time being spent in neighboring jurisdictions, to the risk and detriment of those jurisdictions. The MTB stated that, while there appeared to be some merit in alerting jurisdictions to the impending shipment of particularly hazardous materials in order to facilitate emergency response preparedness, the information generated by full compliance would overwhelm the Covington fire department.

Advance notice requirements instituted by state or local governments for nuclear materials transportation have also been held preempted by the HMTA. In *State of Michigan Regulations*, IR-8, the MTB held that a Michigan regulation requiring transporters to notify the state police of any incidents causing delay in a transport of radioactive material in the state, where such delay was more than 6 hours, was preempted. The HMR required transporters of highway route quantity radioactive material to operate in compliance with the Physical Protection Plan as required by the NRC regulations (10 CFR 73.37)

or an MTB-approved equivalent. The MTB noted that any shipment delay of more than 6 hours had to be reported under 10 CFR 73.37(f)(4) and additionally under another Michigan regulation which the MTB had previously found consistent with the HMTA. The MTB also noted that since delays of less than 6 hours might be caused by a variety of factors ranging from an emergency to simple traffic delay, a planned schedule necessarily incorporated estimated times of arrival. Federal regulations ensured that Michigan received information concerning shipment delays which resulted from safeguard emergencies. The MTB concluded that there was no showing that any safety problem unique to Michigan required carriers to report normal transportation delays of less than 6 hours.

In *Tucson City Code Governing Transportation of Radioactive Materials*, DoT Inconsistency Ruling IR-16, 50 Fed. Reg. 20872 (1985), the MTB held that a city code requirement that any person transmitting radioactive materials within or through the city notify the chief of the fire department at least 48 hours prior to the commencement of such transportation and give certain specific shipment information was preempted under the HMTA as an obstacle impeding the HMTA's objectives. The MTB interpreted the requirement as applying only to shipments whose origin or destination was Tucson. Thus, there was clearly no rerouting issue to consider.

The MTB noted that the information that was required by Tucson was not the same information that was required on the HMR shipping paper. Delays could result from the carriers' need to obtain the additional information. The 48-hour period was, to the MTB a fundamental problem, inasmuch as orders for shipments of radiopharmaceuticals were typically received less than 24 hours prior to delivery. With specific regard to highway route controlled quantity radioactive materials, the Tucson code did not provide for any advanced notification not already provided for under federal law and was therefore redundant, except that it required notification of the chief of the Tucson fire department instead of the designated representative under the HMTA and the HMR.

In *State of Vermont Rules*, IR-15, the MTB held that a state nuclear materials transportation regulation which required notice of delay or schedule change was preempted by the HMTA. The regulation required transporters to notify the Vermont Secretary of Transportation of any schedule change which differed by more than one hour from schedule information previously furnished, or of any incident or situation anticipated to cause delay, and to provide the required notification not less than four hours prior to beginning movement in the state. The MTB concluded that these rules were inconsistent with the federal requirements they impeded both the safety and uniformity objectives of the HMTA.

As discussed above, the HMR required transporters of radioactive materials to operate in compliance with the Physical Protection Plan required by NRC

regulations or an MTB-approved equivalent. The NRC regulations required shipment escorts to make calls to a comunications center at least every two hours to advise them of the status of the shipment. The communications center was required to be staffed continuously by at least one individual who monitored the progress of the spent fuel shipment and notified appropriate agencies in the event that a safeguard emergency should arise. The regulations further required that any scheduled change or shipment delay of more than six hours had to be reported. The MTB held that while Vermont did have legitimate interest in knowing of shipment delays which could stem from or result in safeguard emergencies, the federal regulations were designed to ensure that Vermont received adequate notice and that there was not a showing by Vermont that it suffered any safety problems unique to Vermont. In addition, by requiring notification not less than four hours prior to entry into the state, it might be necessary for a transporter to stop short of the Vermont border and simply wait until the four-hour period concluded.

However, in *State of Michigan Regulations*, IR-8, the Michigan nuclear materials transportation regulation requiring notice of delay or schedule change was held not preempted. That regulation required that transporters notify the operations division of the state police of any schedule changes which differed by more than six hours from the schedule information previously furnished. The MTB found that, since one action satisfied both the state and federal rules, the issue of redundancy did not arise. The governor's designee who had to be notified under 10 C.F.R. 73.37(f)(4) was the commanding officer of the operations division of the state police, rendering the state and federal requirements identical.

9. Permit requirements

Permit requirements are promulgated by state an local governments in order to monitor and obtain information from both shippers and transporters operating within their jurisdictions. Fees are generated by permit programs (the issue of fees will be discussed in the next chapter). Transporters are particularly concerned about permits or licenses that must be obtained per vehicle or per trip. The following rulings concern challenges to permit requirements.

In *National Tank Truck Carriers, Inc.* v. *Burke*, the court held that a state regulation which required information on its hazardous materials transportation permit application that was identical to that which had to be furnished on the DoT shipping paper did not in itself cause that state regulation to be preempted under the HMTA. The court noted that while the DoT disfavors redundant regulations and duplicative paperwork, the MTB had found the regulation in question not inconsistent with the HMTA because it required only that the permit be carried aboard a vehicle and not the application, and, presumably, the permit did not contain duplicative information. (However,

since other parts of the regulation were held inconsistent with the HMTA, the entire regulation was held to be preempted.)

In a number of instances, the MTB has ruled that state or local nuclear materials transportation permit requirements were preempted by the HMTA. In other instances, which will be discussed in other sections, the permit requirements were held as being means for enforcing some other requirements and not being an end in themselves.

In *State of Michigan Regulations*, IR-8, the MTB ruled that a requirement by Michigan to obtain written approval to transport highway route controlled quantities of radioactive material was inconsistent with the HMTA and HMR and therefore preempted. The requirement prohibited the transportation of radioactive materials without the written approval of both the Michigan Department of Public Health and the Michigan Fire Marshal.

The MTB held that in the absence of an express waiver of preemption, there was no authority for a state or local government to impose a permit requirement on such shipments of radioactive materials. The MTB stated that with respect to the transport of radioactive materials, all aspects of such transport had been thoroughly addressed and state regulation was very circumscribed. Indeed, the state and local government regulation is, according to the MTB limited to the following:

1. Traffic control which effects all transportation;
2. Emergency restrictions which effect all transportation;
3. Designation of alternate preferred routes;
4. Adoption of federal regulations or consistent state and/or local regulations;
5. Enforcement of consistent regulations or those for which a waiver of preemption had been granted.

The MTB noted that there are still legitimate purposes for permit requirements. For example, a state could require operators to obtain a permit when they intend to transport loads of a size or weight which exceeds the limits established for all traffic. However, in the instant situation, the permit application requirements and approval criteria had the cumulative effect of redirecting shipments to other jurisdictions and was therefore an obstacle to the accomplishment and execution of legislatively mandated purposes.

In *Ogdensburg Bridge and Port Authority Rules*, IR-11, the MTB ruled that a regulation of the Ogdensburg Bridge and Port Authority which required, among other things, that carriers of radioactive materials obtain a permit from the Authority's employee in charge at least 48 hours prior to the crossing the bridge to Canada was preempted to the extent that it effected the transportation of other than highway route controlled quantity radioactive materials. The MTB stated that the DoT, in developing HM-164, had accomplished an orderly and predictable regimen for the transportation of radioactive materials of other than highway route controlled quantities that resulted in a low and equitably distributed level of risk. While a community might legitimately seek

to reduce its exposure to risk inherent in a transportation of such radioactive materials, it was not permitted to promulgate regulations such that reduction in risk was accomplished by means of exporting that risk to its neighbors. The Ogdensburg regulation created the likelihood that shipments which were otherwise intended for the regulated bridge would be diverted to other jurisdictions; it thus constituted a routing rule within the meaning of the HMR. The regulation not only frustrated the equal distribution of risk which the federal rules sought to achieve, but also impeded the accomplishment and execution of the HMTA's objective of regulatory uniformity.

Similarly, in *Lawrence County, New York, Law*, IR-12, the MTB ruled that a county law which required transporters to obtain a "Certificate of Emergency Transport" was preempted to the extent that it affected the transportation of other than highway route controlled quantity radioactive materials. The reasoning applied was the same as discussed above. The same reasoning was again applied in *Thousand Islands Bridge Authority Restrictions*, IR-13.

The MTB, in *State of Michigan Regulations*, IR-8, held that where the information required to be given under a state nuclear materials transportation regulation was identical to the information required under the federal requirements and was to be given to two different individuals, the redundancy was such that the state requirement was preempted. The MTB noted that the NRC Physical Protection Regulations previously discussed delineated the requirements and stated that the federal government had clearly demonstrated its intent to occupy the field of pre-notification to the exclusion of requirements adopted by state and local governments.

The MTB has held that state nuclear materials transportation requirements which require permit applicants to submit copies of NRC approvals and licenses are preempted under various circumstances. For example, in the *State of Michigan Regulations*, IR-8, the Michigan regulation required that permit applicants submit copies to two state agencies of all NRC approvals and licenses related to their shipment. The MTB held that assurance of compliance with NRC requirements could be obtained by the state in a more secure way by contacting the NRC upon receipt of advance notification of a shipment. Shipment specific information of the sort included in route plans and licenses was required to be protected against unauthorized disclosure under 10 C.F.R. 73.21. By requiring hard copies of these documents to be distributed to state agencies, the probability of critical information disclosure significantly increased such that it was a compromise to the physical security of the shipment.

Similarly, in *State of Vermont Rules*, IR-15, the MTB ruled that a Vermont radioactive materials transportation regulation which required written approval applicants to submit copies of any required NRB approvals and licenses relating to their shipments was preempted. The MTB acknowledged that the Vermont rule did not present the same potential for breach of security as the Michigan rule inasmuch as the Vermont rule required that the submissions be

made to the State Secretary of Transportation, who was also the governor's designee for the receipt of advance notification under NRC regulations. The MTB, nevertheless, believed that Vermont's interest in compliance with the NRC regulations did not justify the regulation since the information could be obtained from the NRC directly.

The MTB has held that state nuclear materials transportation regulations which require that permit applications submit certification that their shipments or their shipping containers are in compliance with applicable federal and state law or that their vehicles have been inspected are preempted, under certain cirumstances.

In *State of Michigan Regulations*, IR-8, the MTB considered a state nuclear materials transportation regulation which required that a certificate of compliance for the container to be used for the transportation have been issued by the NRC. The MTB suggested that Michigan's criterion reflected a misunderstanding of federal regulations inasmuch as the Michigan approval criteria required that a certificate of compliance for the container be issued by the NRC and that the container be tested and approved for hypothetical accident conditions pursuant to the provisions of 10 C.F.R. 71.36. Michigan failed to note that the NRC issues certificates of compliance for container designs, not for containers, and that the regulations do not require that each container be tested and proved for hypothetical accident conditions, but rather that they be constructed in accordance with a design previously approved by the NRC. The MTB further noted that the exclusive federal goal in hazardous materials containment systems had long been established.

Using the same reasoning, the MTB, in *State of Vermont Rules*, IR-15, held that a Vermont radioactive materials transportation regulation which required written approval applicants to certify that their shipments were in compliance with all applicable federal and state statutes was preempted. The MTB noted, as it did in State of Michigan Regulations, the HMR requirement concerning to shippers.

The MTB also considered state nuclear materials transportation regulations which require that permit applications certify that their vehicles had been inspected in *State of Michigan Regulations*, IR-8. The MTB pointed out that federal regulations (49 C.F.R. 396) already required the maintenance of inspection reports in vehicles. Thus, a Michigan regulation that required permit applications to attest that their vehicle had been inspected in accordance with federal or state law was an obstacle to the accomplishment and execution of the HMTA and was preempted. Although the MTB agreed that safety inspection of vehicles was a legitimate state activity, here the question was only whether the requirement was a legitimate precondition to transportation approval. The MTB stated that since Michigan apparently considered the federal record-keeping requirements adequate for the transporters of all other hazardous materials and since the basis for additional requirements to be met

by radioactive materials transporters was not clear, the Michigan requirement merely imposed a redundant paperwork burden which served no apparent safety purpose. *State of Vermont Rules*, IR-15, is in accord as to this portion of the decision as well.

In *National Tank Truck Carriers, Inc.* v. *Burke*, the court held that a permit regulation which required that a permit be applied for not less than four hours prior to each transport of liquified natural gas ("LNG") or liquified petroleum gas ("LPG") within the state was inconsistent with the DoT regulation (49 C.F.R. 177.853(a)) which required hazardous materials to be transported without unnecessary delay. The information required on the permit application included the route, the cargo, the quantity to be transported, and a certificate of compliance with federal DoT regulations.

The court noted that the exact quantity to be transported could not be known until the cargo was loaded and therefore delay was inevitable and unavoidable. The requirement that a permit be applied for at least four hours prior to shipment meant that a truck had to remain outside of the state for a minimum of four hours subsequent to loading. Thus, a cargo to be shipped from a location less than four hours away would suffer an unnecessary delay. The court pointed out that there was some evidence that a tank truck could safely contain LNG or LPG for only five hours under certain circumstances, rendering the requirement hazardous.

In *New Hampshire Motor Transport Association* v. *Flynn*, 751 F.2d 43 (1st Cir., 1984), a state statute which required that hazardous materials transporters obtain an annual or single trip licence was held not inconsistent with the HMTA. The court rejected the contention that the license requirement imposed by New Hampshire interfered with a DoT regulation which provided that hazardous material should be transported "without unnecessary delay," even though the license was obtainable only at New Hampshire border stations during regular business hours.

The trucking associations argued that because hazardous transport requests are often on short notice, trucking firms wishing to have materials transported at night or on weekends might not have enough previously licensed trucks immediately available. The court held (1) that the delay arising out of the mere necessity of obtaining a license was inherent in any state licensing scheme, (2) that the opportunity to obtain single trip or annual licenses involved less delay than in most other states, and (3) that the DoT had previously stated its view that a "bare" license is consistent with the HMTA.

10. Requirement to pay fees

Permit requirements are promulgated by state and local governments in order to both (1) monitor and obtain information from both shippers and transporters operating within their jurisdictions (as discussed in the previous chap-

ter), and (2) raise money. The fees from license programs are often used to cover only the administrative costs of processing application forms, but are sometimes also used to generate funds for other purposes.

The proliferation of state and local licensing requirements which require the payment of a fee, usually applicable to trucks, can pose hardships for carriers. Aside from the impact of a requirement within the regulating state, transporters are concerned about the cumulative eoconomic impact of those requirements. State regulations which require hazardous materials transporters to pay fees have held preempted or not preempted by the HMTA and the HMR, depending upon the circumstances.

In *State of Vermont Rules*, IR-15, the MTB ruled that a Vermont regulation requiring payment of a $1,000 fee in the form of a cashier's check for each shipment of highway route controlled radioactive material through Vermont was preempted by the HMTA since the regulation tended to undermine the goals of nationwide regulatory uniformity and safety. The MTB was concerned that the fee would cause carriers to take routes through other states to avoid paying the Vermont fee, which would in turn, lead to other states imposing their own similar fees. This would tend to increase the total transport time of the hazardous materials, to the detriment of safety and would otherwise cause routing decisions to be made on the basis of economic factors rather than safety factors.

Vermont contended that the fee was justified by the costs that it incurred in having a trained team escort each shipment through the state. Vermont further contended that such escort was necessary because its emergency response groups in many communities were composed of volunteers whose reliability was questionable. The MTB rejected Vermont's argument, stating that Vermont's limited capacity for emergency response was the result of its own deliberate decision not to rely on the federal government's extensive network of emergency assistance.

The ruling in *State of Vermont Rules*, IR-15, may be contrasted to the holding in *New Hampshire Motor Transport Association* v. *Flynn*, a case not concerning nuclear materials, where a state statute requiring hazardous materials transporters to pay a $25 annual license fee, or a $15 single trip license fee, was held not inconsistent with the HMTA and HMR and thus not preempted. With respect to a Commerce Clause limitation, the New Hampshire statute would, according to both parties in the action, raise between $700,000 and $800,000 in annual revenue. New Hampshire would use approximately 5 percent of the money raised for transportation response programs, it would give 20 percent to its Department of Safety to help enforce Chapter 393 (the subject state statute), and it would contribute 75 percent to its own Hazardous Waste Cleanup Fund.

The court stated that the critical Commerce Clause question in the case was whether the license fees could be justified as a "user fee" which would bring

the case within the scope of *Evansville-Vanderburg Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349 (1972), the leading Supreme Court case on that subject. New Hampshire argued that the license fee did amount to a "user" tax or fee and that it was, therefore, under *Evansville*, constitutionally permissible. The truckers did not dispute the characterization by New Hampshire of the fee, but rather claimed that it significantly impeded the flow of interstate commerce, and was, therefore, constitutionally forbidden.

The court concluded that *Evansville* required finding for New Hampshire. The appellate court cited *Evansville* as follows:

"The Court noted that the state can impose a 'flat fee' for the use of its roads 'without regard to actual use by particular vehicles, so long as the fee is not excessive' and when compared to the services the state provides those charged. In applying this standard, the Court pointed out, the challenger has the burden of proving that the fee is 'unreasonable in amount for the privilege granted.' The state has the benefit of the fact the Constitution requires not 'precision' but 'rough approximation' in matching fee and benefit." *New Hampshire* v. *Flynn* at 47.

The Court in *New Hampshire Motor Transport* determined that the issue was whether the truckers had satisfied their burden of approving that the fees required by New Hampshire were constitutionally excessive in relation to the costs. The court held that they had not done so. The record, according to the court, showed a significant number of hazardous materials, trucks and spills and thus demonstrated that hazardous material transport does impose significant costs upon New Hampshire when the state seeks to prevent, or must deal with, the consequences of hazardous material spills. The truckers failed to demonstrate to the satisfaction of the court that the fees were excessive, failed to introduce budget analyses, and failed to trace the actual expenditures of the government department's allegedly involved.

That the actual fees were going to be used indirectly was, accordig to the court, irrelevant under *Evansville*. In *Evansville*, the Supreme Court stated that what the fees themselves are actually spent on is not relevant. The question is simply the relationship between the amount of the fees raised and the amount that the state likely spends.

With regard to the trucker's argument that if New Hampshire imposed such fees, other states would do so, thus creating a fee system that would greatly raise transport costs and seriously burden interstate commerce, the court held that the Commerce Clause (which is beyond the scope of consideration during the inconsistency ruling process) does not prevent states from charging for services that they provide, but noted that the conclusion was not totally satisfactory, since the burden of proof rules meant that each state could charge an amount that individually cannot be proved excessive, the sum total of which may well exceed the sum total of the actual costs of the states' services.

Also distinguishable from *State of Vermont Rules*, IR-15, is *Illinois Fee on Transportation of Spent Nuclear Fuel*, IR-17, where the DoT ruled that Section

4(7) of the Illinois Nuclear Safety Prepardness Act ("INSPA"), codified as Section 4304 (7), which required the fee of $1,000 per cask payable by owners of spent fuel being transported through Illinois, was not inconsistent with either the HMTA or the HMR.

In a letter dated March 21, 1985, the Wisconsin Electric Power Company (WEPCO) applied for an administrative ruling as to whether the fee in the Illinois statute was inconsistent with and therefore preempted by the HMTA and its associated regulations. The statute stated the following:

"Sec. 4304. Persons engaged within this State in the business of producing electricity utilizing nuclear energy or operating facilities for storing spent nuclear reactor rule for other shall pay fees to cover the cost of establishing plans and programs to deal with the possibility of nuclear accidents. Except as provided below, the fees shall be used exclusively to fund those Departmental and local government activities defined as necessary by the Director to implement and maintain plans and programs authorized by this Act. Local governments incurring expenses attributable to implementation and maintenance of the plans and programs authorized by this Act may apply to the Department for reimbursement of those expenses, and, upon approval by the Director of claims submitted by local governments, the Department shall reimburse local governments from fees collected pursuant to this Section, except that such reimbursements, in the aggregate, shall not exceed $150,000 in any year. In addition, a portion of the fees collected may be appropriated to the Illinois Emergency Services and Disaster Agency for, i.e., activities associated with preparing and implementing plans to deal with the effects in nuclear accidents. Such appropriation shall not exceed $350,000 in any year. Such fees shall consist of the following:

"(7) ... A fee assessed at the rate of $1,000 per cask for shipments of spent nuclear fuel traversing the State to be paid by the owner of such shipments."*

The INSPA was originally enacted in 1979 and, at that time, imposed fixed fees on the owners of nuclear power stations and away-from-reactor ("AFR") spent fuel storage facilities in Illinois. In addition, a per-cask fee on shipments of spent fuel storage facilities in Illinois. However, no fees were imposed upon shipments which only passed through the state.

In 1984, amendment P.A. 83-1342 amended the INSPA, increasing the fees payable by the operators of nuclear power and storage facilities and for the first time assessing fees of $1,000 per cask on the owners of spent fuel traversing the Illinois (the "transit fee"). The transit fee was imposed on both interstate and intrastate shipments of spent fuel, which fee is payable prior to the movement of the shipment into the state.

The first criterion that the DoT considered was the dual compliance test. The DoT did not find anything in the HMTA or the HMR which prohibited

*Spent fuel is transported in basically three types of heavily shielded containers called shipping casks. The most prevalent of these are the legal weight truck casks that weigh approximately 23 tons and hold the fuel assemblies from either one pressurized water reactor ("PWR") or two boiling water reactors ("BWR"). There are also overweight truck casks that weigh approximately 35 tons and hold 3 PWR fuel assemblies or 7 BWR fuel assemblies as well as railroad casks that weigh between 64 and 90 tons and hold from 7 to 10 PWR fuel assemblies or from 18 to 24 BWR fuel assemblies.

the regulated party from paying such fees. Thus, it was physically possible to comply with both the Illinois statute and federal regulations.

The second criterion applied was the obstacle test. WEPCO argued that the transit fee constituted an impediment to the execution and accomplishment of the congressional objections underlying the enactment of the HMTA. On the other hand, Illinois offered rebuttal arguments and affirmative reasons for finding that the transit fee was consistent with the HMTA.

The first question that the MTB considered was whether the transit fee was a prohibited routing rule within the meaning of the DoT's regulations concerning highway routing of radioactive materials. A routing rule is defined in HM-164, Appendix A, as an action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, *and* which is applicable as a result of the hazardous nature of the cargo. Included, if they have such effects, are permits, fees and similar requirements. In contrast, traffic controls are not included if their applicability is not a function of the nature of the cargo. Examples of these include truck routes based on vehicle weight or size.

The MTB concluded that there was no question that the transit fee applied because of the hazardous nature of the cargo. However, they concluded that there was considerable room for difference on the question of whether the transit fee effectively redirected or otherwise significantly restricted or delayed movement of the spent fuel on public highways. It was asserted by several commenters during the comment period for this ruling that redirection of shipments away from Illinois whenever possible was a foreseeable and direct impact of the transit fee. Reference was made by those commenters to *State of Vermont Rules*, IR-15, which, as previously discussed, concerned a requirement for a fee of $1,000 on each shipment of highway route controlled quantity radioactive waste to be transported in Vermont. The immediate and direct result of the Vermont fee was to cause transporters to redirect their shipments away from Vermont whenever possible. The diversions onto less direct routes reduced Vermont's exposure to the risks of radioactive materials transportation, but only at the expense of neighboring jurisdictions by increasing total transport time and, concomitantly, the overall exposure to risk. WEPCO and others argued that the Illinois' $1,000 transit fee is indistinguishable from the Vermont $1,000 transport approval fee. The MTB did not agree.

The MTB noted that IR-15 was one of the nine inconsistency rulings issued together which involved state and local requirements in Michigan, New York and Vermont whose combined effects had been to divert and ultimately to block the shipment of spent fuel which orginated in Canada. Further, in IR-15, the shipments were not subject to HM-164 while they were in Canada. Thus, the carrier had an option of entry points into the United States. Indeed, shipments had been diverted as the result of Vermont's transport approval fee.

On those bases, the MTB found that the situation in Illinois was distinguish-

able. The highway shipments of spent fuel entering Illinois necessarily arrived already subject to the routing requirements of HM-164. The carriers had no choice but to comply with requirement of HM-164 to operate over preferred routes selected to reduce time in transit. Although more than one route could qualify as an acceptable alternative and it is not incumbent on the transporter to make detailed calculations in selecting the most appropriate route, resulting in some scope for carriers to avoid Illinois and still comply with HM-164, such diversions would also entail costs which could exceed the amount of the fee to be avoided. Thus, the economic incentive may not be so strong as it initially appeared. Further, the MTB noted that there was no evidence offered to suggest that diversions had actually occurred. The MTB therefore found that the transit fee did not have the effect of redirecting highway shipments of spent fuel away from preferred routes in Illinois.

The second question considered by the MTB was whether the transit fee significantly restricted highway transportation of spent fuel in Illinois. The MTB had considered a variety of state and local requirements which did significantly restrict highway transportation of spent fuel, particularly Inconsistency Rulings IR-6, 8, and 10 through 16. The common aspect of all of those inconsistent rulings was that in each, there had been enacted a prohibition of the highway transportation by carriers of radioactive material, notwithstanding that they complied with all of the federal safety standards, unless and until there was also compliance with additional mandatory requirements imposed by the enacting jurisdiction. Those requirements were based, according to the MTB, upon the false assumption that the (non-federal) jurisdiction had the authority to prohibit a form of interstate commerce which is the subject of a pervasive system of federal regulations.

The MTB decided that the Illinois transit fee did not appear to present the kind of significant restriction found in the other inconsistency rulings. Although the Illinois transit fee did require the highway transporters to pay a fee, submit to safety inspection and accept a state provided escort, it did not deny entry to any shipment for failure to pay the required fee in advance. The safety inspections were based on the federal regulations and were not additional or different state requirements. The MTB concluded that the Illinois state action was, in that regard, precisely what the drafters of the HMTA had intended and which the DoT endorsed as solid enforcement policy. The additional escorts provided by the state caused a burden only to the state; the only requirement placed upon the transporters was to accept the escorts. Thus, the MTB concluded that the Illinois regulations did not significantly restrict the highway transportation of spent fuel in Illinois.

The third question considered by the MTB with regard to the Illinois regulations was whether the transit fee significantly delayed the movement of motor vehicles carrying spent fuel along the public highways. The MTB noted that the DoT had adopted a highway routing rule based upon the finding of a direct

correlation between transportation risk and time in transit. Thus, state or local requirements which delayed shipments necessarily increased the transportation risk, and were considered by the DoT to be inconsistent with HM-164.

In previous inconsistency rulings, the MTB had found a number of non-federal requirements to be inconsistent with the HM-164 as a result of their effect of delaying the transportation of radioactive materials. In particular, in *Tucson City Code*, IR-16, the Department considered a Tucson ordinance which required carriers to provide 48-hour advance notification of transporting radioactive materials into the state and concluded that delay was inherent in such a regulation. The MTB distinguished this regulation from the one implemented in Illinois. The Illinois regulation required that the transit fee be paid prior to the movement of shipments into this state. If one applied a strict interpretation, it may reasonably be argued that the requirement established payment of the fee as a condition precedent to the transportation of spent fuel into Illinois. Assuming that, the question still remained as to whether there was a resulting delay in transportation. Given the long lead time in planning spent fuel shipments, the MTB concluded that transporters had ample time to pay the fee without causing any delays in the shipment.

In addition, and as discussed above, Illinois provided as part of their emergency preparedness program for the inspection of all highway shipments of spent fuel through the state at the point of entry. The purpose of the inspection was, according to the State of Illinois, to identify and rectify any violations of the federal standards and regulations before a transport vehicle proceeds through Illinois. While Illinois did concede that a delay of 20 to 60 minutes was inherent in its inspection program, it asserted that such a delay could not be considered as a significant delay. Illinois asserted that such a delay of 20 to 60 minutes is commensurate with other delays inherent in spent fuel transportation, such as rest, food and fuel stops.

WEPCO, in response, argued that if a comprehensive inspection was undertaken at the port of origin, duplicative inspections enroute did not add to the safety, but created demands for notification and scheduling problems that would severely impair the most time efficient transportation of radioactive materials. In addition, WEPCO described the extent to which the shipments underwent repetitive inspections. Illinois responded, in turn, that the reasonableness of its inspection program was substantiated by the number of violations that it found among shipments which had been inspected prior to entry into Illinois. The MTB held that although repeated delays could occur in view of the many state borders crossed, there was no national safety inspection program, and so there was no basis for finding Illinois' inspection program in violation of the HMTA or its associated regulations.

The MTB considered the requirement for state escorts, which were partially funded by the transit fee. WEPCO asserted that the escort requirement imposed both a financial and a logistic burden on the transportation of spent fuel because

of the requirement of giving precise information regarding the time of arrival at the Illinois border. However, the MTB concluded that the requirement did not significantly delay the movement of motor vehicles carrying spent fuel over the public highways in view of the HMR requirement for a physical protection plan for all shipments of spent fuel. The transit fee was therefore not a prohibited routing rule within the meaning of HM-164.

The MTB also considered whether the transit fee effectively redirected or otherwise significantly restricted or delayed rail shipments of spent nuclear fuel. It noted that although the DoT had not promulgated routing requirements for rail shipments or radioactive materials as it had for highway shipments and that there was therefore no routing regulation with which the transit fee could be compared for consistency, an application of the obstacle test could still be made. The MTB re-enunciated the basic principle that delay in the transportation of hazardous materials is incongruous with safe transportation. The MTB also noted that rail shipments are not subject to federal routing regulations as are highway shipments. Therefore, rail shippers have much greater discretion in selecting routes which avoid Illinois, although they do have fewer routes to choose from.

The basis for routing decisions would therefore be economic considerations. Thus, the cost savings achieved by avoiding Illinois would be balanced against the increased operational costs of more circuitous route. If the cost savings clearly exceeded the operational costs, then redirection of rail shipments would be a logical result of the transit fee. However, the MTB did not believe that such was demonstrated. Although the transit fee would stimulate shipper considerations of alternate routes, the MTB could not conclude that the alternatives are categorically more cost-effective. Longer routes increase not only risks but also costs of transportation. The imposition of an extraordinary fee could upset the balance to the extent that it operated as a *de facto* ban, but that was not the situation that the MTB perceived in this case. The MTB concluded that the transit fee did not effectively redirect rail shipments of spent fuel away from Illinois and therefore held that the transit fee did not significantly restrict rail shipments of spent fuel in Illinois.

With respect to delays of movement, the MTB stated that the earlier discussion of highway shipments was applicable since the requirement that transit fees be paid prior to movement was the same, so there was no basis for reaching a different conclusion than in the case of highway shipments. The Illinois requirement for escort required only that the escorts remain in visual or radio contact with the shipment, not on roads parallel to the shipment. Without more specific information, the MTB held that it could not include that the escorts would significantly delay time and transit.

Next to be considered was whether the transit fee comprised an inconsistent permit requirement. The MTB distinguished the instant situation from that in *State of Vermont Rules*, IR-15. In the instant situation, the transit fee did

not involve an application for state approval to transport spent fuel nor did it involve any assertion by Illinois of a right to deny entry to any shipment which was in compliance with federal safety standards. Vermont's permit system involved a detailed application, administrative processing by the state and an affirmative action by the state to grant written approval. Thus, the potential for delay was significant. The transit fee in the instant situation required only one action by the transporter, that is, payment of the required fee. The nature of spent fuel transportation is such that ample time exists between identification of a shipment and commencement of the actual transportation to enable transporters to make that payment prior to the actual movement of any shipment into Illinois. Thus, the MTB concluded that the problem of delay was not inherent and that Illinois regulation was not an inconsistent permit requirement. The MTB did, however, note that such was not the case with most hazardous materials shipments, where no significant time lag exists, so the conclusions in the instant situation could not necessarily be applied to per-trip fees on the transport of other hazardous materials.

With regard to whether the transit fee was part of a regulatory program which was inconsistent with the HMTA, the MTB stated that the DoT had long recognized that preparedness for transportation emergencies was not the exclusive province of any single level of government and that the federal courts have held that governmental entities may statutorily require payment for services provided in the performance of governmental functions. Illinois had, by statute, created an emergency preparedness program which coordinated federal, state and local responsibilities and provided for the financing of the state and local expenditures. The MTB found no evidence that the INSPP either reduced the transportation safety or increased the regulatory multiplicity and held that the INSPP was not inconsistent with the HMTA and the transit fee was not part of a regulatory program which was inconsistent with the HMTA.

The MTB went on to consider the potential problem of other jurisdictions implementing similar pre-requirements. The MTB relied on the holding in *New Hampshire Motor Transport Association* v. *Flynn*, in which the court was presented with arguments that the proliferation of fees would greatly increase transport costs and seriously burden interstate commerce. The MTB noted that the DoT had not adopted any rules which preempt state fees *per se* and concluded that the multiplicity that may result from other jurisdictions enacting similar fees to the Illinois transit fee was not the type of regulatory multiplicity which would give rise to a finding of inconsistency with the HMTA.

The MTB ruled that,

"So long as a state-imposed fee is not an element of an inconsistent transportation requirement, there is no basis for preemption under the HMTA. There may be multiple reasons for finding such a fee to be preempted under other statutes or under the U.S. Constitution. But these are not issues to be resolved by the Department of Transportation. The Department's responsibility is limited to issuing interpretations of the preemptive effect of that statute under which it has implemented

a national program of safety regulation, the HMTA. And even the most confirmed federalist must concede there are limits to the scope of Federal preemption under the HMTA."

11. Requirements limiting hazardous materials transportation as to time, date, or place

Limitations concerning the time, date, or place of hazardous materials transportation are typically more burdensome than other types of regulations, and thus, transporters are rather likely to challenge such regulations.

In *National Tank Truck Carriers, Inc.* v. *Burke*, a state regulation forbidding the transportation of certain hazardous materials over any highway, street or road in the state during the hours of 7:00 to 9:00 a.m. and 4:00 to 6:00 p.m., Monday through Friday, was held preempted because, although it did not directly conflict with the HMTA, it did undermine its full purposes concerning delay prevention and safety. Although the court agreed with Rhode Island that its concern about an accident occurring during periods of maximum traffic density was legitimate, the regulation, which forced carriers to remain loaded and stationary or remain outside the state, or both, would result in unnecessary delay and would therefore be both contrary to the terms of the HMR and would tend to shift the risk of accidents to adjacent states.

In *South Dakota Department of Public Safety* v. *Haddenham* 339 NW 2d 786 (1983), the court held that, to the extent that the South Dakota regulation allowed the transportation of fireworks by certain motor vehicles, but not by rail, air, or water, the regulation was preempted. The regulation permitted the delivery of legal fireworks only by certified motor carrier or in the vehicles owned or leased by licensed fireworks wholesalers, manufacturers or permitholders. The court noted that federal regulations, in particular 49 C.F.R. 174–176, permit delivery by the additional means of rail, air, and water. Thus, the state regulation was invalid to the extent that such transport was prohibited in view of the supremacy clause in the federal statute until South Dakota obtained a DoT non-preemption determination pursuant to 49 U.S.C. § 1811.

In *State of Rhode Island Rules*, IR-2, the MTB noted that, despite the dominant role Congress contemplated for the DoT under the HMTA, there were still certain aspects of hazardous materials transportation routing that were not amenable to effective nationwide regulation. One example was safety hazards peculiar to a local area. Thus, where nationwide regulations did not adequately address a particular local safety hazard, state or local governments could regulate narrowly for the purpose of eliminating or reducing those hazards.

Thus, in *American Trucking Associations, Inc.* v. *City of Boston*, Civil Action No. 81-628-MA (1981), a Boston regulation which prohibited the use of downtown streets for transporting hazardous materials during business hours was not preempted to the extent that a preliminary injunction would not be granted against its enforcement. The court acknowledged that the DoT had found the

ordinance inconsistent with, and thus preempted by, the HMTA (*City of Boston Rules*, IR-3) and that such administrative determinations were entitled to some deference. However, the court pointed out that the DoT ruling had been based on the belief that Boston had not acted through a process that adequately weighed the consequences of its rules so as to ensure the safety of citizens in other effected jurisdictions. The court determined, however, that the regulations had been submitted to a state department of public safety for approval and were commented upon by the fire marshals of neighboring jurisdictions. That information was not made available to the DoT. The court additionally found that the city's unique geography and its historical development had resulted in a highway system that was peculiarly vulnerable to the dangers of transporting hazardous materials.

However, in *Jefferson Country, New York, Local Legislative Stipulation*, DoT Inconsistency Ruling IR-14, 49 Fed. Reg. 46656 (1984), Jefferson County attempted to restrict the transportation of radioactive materials to only the six-month period from May through October. Also prohibited was the transportation of such materials on holidays or during periods of inclement weather. The MTB held that this constituted an obstacle to the accomplishment and execution of the HTMA and was therefore preempted. This may be distinguished from *American Trucking* since even if the Jefferson County provisions were justifiable on a basis of local conditions, the MTB held that such restrictions could be imposed only by a state routing agency and only if an alternative route were designated for use during the period of prohibition from the primary route.

In *New York State Letter*, IR-7, the MTB considered a letter from the New York Governor's designated representative which advised a carrier to suspend proposed shipments of spent nuclear fuel via two non-interstate routes and held that the routing requirement was not preempted. The MTB noted that the HMR required motor carriers of spent nuclear fuel to operate over preferred routes comprised of the interstate system highway for which an alternative route has not been designated or a state designated alternative route. The carrier argued that there was already a ban in effect on the New York throughway, with the result that the only practical highway route available was one that would require travel over non-interstate routes in New York. New York argued that such deviation was not necessary because a route through Vermont existed which was entirely interstate. The MTB noted that both arguments were flawed by their reliance on the assumption that the New York throughway ban was a valid restriction and pointed out that *State of New York Restriction*, IR-10 had held that the ban was preempted. Given that the throughway ban was preempted, there was no necessity to redirect the shipments onto non-interstate routes and therefore no inconsistency existed.

12.Requirements concerning operation and handling of vehicles

Requirements concerning the operation and handling of vehicles have resulted in both judicial and administrative challenges to regulations concerning both highway and rail transport.

In *Atchison T. & S. F. R. Co.* v. *Illinois Commerce Commission*, 453 F. Supp. 920 (N.D. Ill., 1977), an Illinois Commerce Commission general order which prohibited railroad cars carrying certain hazardous materials from being cut off in motion, or being struck by other cars moving under their own momentum, or being coupled with more force than necessary, was held preempted by the HMTA when read in conjunction with the Federal Railroad Safety Act of 1970 (45 U.S.C. §§ 421, *et. seq.*).

The Commission's order applied to certain DoT specified tank cars which were transporting hazardous materials. The court stated that under the Federal Railroad Safety Act, a state railroad regulation was preempted if the Secretary of Transportation had adopted regulations covering the subject matter of the state requirement. This applied not only to acts under the Federal Railroad Safety Act, but to any action taken by the Secretary. The regulations issued by the Secretary under the HMTA, together with an emergency order of the Federal Railroad Administration, covered the subject which the Illinois order addressed. The Secretary had mandated special handling for railroad cars carrying certain hazardous materials and had withdrawn proposals to extend coverage to all hazardous materials. The court was thus required to assume that the Secretary had determined that no further regulation was necessary.

However, in *City of Boston Rules*, IR-3, a city hazardous materials transportation regulation which required that regulated vehicles, except when overtaking or passing in opposite directions of travel, keep at least 300 feet apart from each other when traffic conditions allowed was ruled consistent with the HMTA. The Boston regulation was applicable to all vehicles carrying hazardous materials, except where the conditions of traffic made the keeping of the required distance impractical. It also applied whether the vehicles were moving or parked, except when at a destination or point of origin.

In the *National Truck Carriers, Inc.* v. *Burke*, a state regulation which required drivers transporting hazardous materials to inspect their vehicles for safety defects upon arrival and departure at loading and unloading areas was also held not preempted by the HMTA.

13. Hazardous warning systems requirements

State and local requirements not limited to the transportation of nuclear materials which required certain types of hazardous warning systems have been held preempted in certain circumstances but not in others.

In *State of Rhode Island Rules*, IR-2, a Rhode Island regulation that required tank trailers carrying LNP or LPG to have rear bumper signs at least three inches high, illuminated for evening travel, and reading "MUST STAY BACK 500 FEET" was ruled preempted. The MTB stated that the need for nation-wide uniformity was so crucial and the scope of federal regulation in the hazardous warning systems area was so pervasive it was difficult for the MTB to envision any situation in which such a requirement by a state or local regulation would not present an obstacle to the accomplishment and execution of the HMTA and the HMR.

In *City of Boston Rules*, IR-3, a section of certain Boston hazardous materials transportation regulations which would require every truck subject to the regulations to carry a decal identifying the product carried was similarly ruled inconsistent and preempted. The reasoning was the same as in *State of Rhode Island Rules*, Ruling IR-2.

However, in *National Tank Truck Carriers, Inc.* v. *Burke*, a state regulation requiring that all vehicles transporting hazardous materials through the state, whether loaded or empty, travel with their headlights on, was not preempted by the HMTA. Similarly, in *City of Boston Rules*, IR-3, a Boston hazardous materials transportation regulation requiring vehicles carrying hazardous materials to use their headlights at all times when operating on city streets was ruled not preempted by the HMTA. The MTB cited *National Tank Truck Carriers, Inc.* v. *Burke* as authority.

14. Requirements concerning shipping paper

Regulation of shipping paper is discussed extensively in the federal regulations and it would appear unlikely that a state would attempt to further regulate the area. Yet, the state of Washington did so.

In *State of Washington House Bill Number 1870*, IR-4, a state law which required either a red colored bill of lading or red border on all bills of lading, receipts, or manifests for all intrastate shipments of hazardous materials was preempted by the HMTA. The MTB expressed concern that drivers and emergency response personnel might tend to place exclusive reliance on the presence of a red border in determining whether a shipment contained hazardous materials and might therefore fail to take proper note of the existing federally mandated scheme for describing hazardous materials on shipping papers. Such a failure might result in the use of inappropriate emergency response techniques, which could lead to substantially greater safety risks, which was clearly an obstacle to the accomplihsment of the HMTA's primary purpose, the enhancement of public safety. The MTB also noted that this was another of the areas where the need for national uniformity was so crucial and the scope of federal regulations so pervasive that it was difficult to envision any situation where state or local regulation would not be preempted.

15. Communications equipment, escort and monitoring requirements

Depending on the circumstances, state communications, monitoring and escort requirements for the transportation of nuclear materials may be either preempted or not preempted. In *National Tank Truck Carriers, Inc.* v. *Burke*, a state hazardous materials transportation communications requirement that required that all vehicles transporting hazardous materials through the state be equipped with a two-way radio in order to notify appropriate authorities of any accident or mishap occurring within the state was not preempted by the HMTA. The court stated that the subject matter of the regulation did not conflict with the Federal Motor Carrier Regulations ("FMCR") incorporated by reference to the HMTA inasmuch as the FMCR did not concern two-way radios. The court thus found that the state regulation did not conflict with the HMTA and was not preempted.

In *State of Michigan Regulations*, IR-8, a state regulation which forbid the highway transportation of radioactive materials unless the transporting vehicle or the escort vehicle was equipped with continuous two-way communications with land-based stations by radio telephone or other means acceptable to the state fire marshal and requiring rail and water shipment vehicles to be equipped with communications equipment acceptable to the fire marshal was ruled inconsistent, since communication capability was an element of physical security and that Appendix A to 49 C.F.R. 177 set forth a DoT policy that a state transportation rule was inconsistent with Part 177 if it conflicted with the physical security regulations of the NRC or equivalent requirements approved by the MTB.

The communications equipment required by the federal rule was not capable of ensuring continuous two-way communications required under the state rule due to the existence of radio-telephone dead zones and because such communications might not be technologically possible. The MTB concluded that compliance with the federal rule would place a shipper in violation of the state rule. Even assuming that the continuous communications required by Michigan could be achieved, it would be an obstacle to the accomplishment and execution of the HMTA. In addition, the complexity of the state-required system might result in increased failures, which would impede the purposes of increased safety and regulatory uniformity desired by Congress.

With respect to rail and water shipments, the MTB similarly concluded that the state regulation constituted an obstacle to the accomplishment and execution of the HMTA. Not only was there the obstacle posed by the basic state rule, but there were no specific requirements, leaving the matter wholly within the discretion of a state official.

In *Jefferson County, New York Local Legislative Stipulation*, DoT Inconsistency Ruling IR-14, the MTB found that a county radioactive materials resolution provision which required front and rear escort services to be provided

was not inconsistent with the HMTA. NRC standards already required highway shipments to be accompanied by front and rear escorts. Inasmuch as the requirements were identical, the county resolution's escort requirement amounted to the mere adoption of the NRC requirement.

However, in *State of Vermont Rules*, IR-15, the MTB ruled that a Vermont radioactive materials transportation regulation that required motor vehicle shipments to be monitored by a leading state police vehicle occupied by at least one law enforcement officer, a vehicle occupied by state monitoring team personnel, and a trailing state police vehicle occupied by at least one law enforcement officer, and which required rail or barge shipments to be accompanied as direct by the State Secretary of Transportation, was ruled inconsistent and preempted. It was difficult for the MTB to determine whether there was an obligation to act imposed on transporters or whether it was on the state agency of transportation. If the intended effect of the regulations was such that a shipment arriving at the state border which was not met by state official assigned to monitor the travel, that the shipment had to stop and wait for them to insure compliance, then the regulation imposed a degree of delay that was incongruous with the safety objective of reducing time of transit.

16. Requirement to give notice of accident

Regulations concerning notice of accidents have been held preempted in the case of written notice but not preempted in the case of oral notice under the circumstances delineated below.

In *National Tank Truck Carriers, Inc.* v. *Burke*, a state requirement requiring that written notice be given within 24 hours of any accident, mishap or other safety irregularity concerning the transportation of LNG or LPG was preempted by the HMTA. The court interpreted the DoT ruling in State of Rhode Island Rules, IR-2, as forbidding state regulations "similar" to those at 49 C.F.R. 171.16, which regulation required that any unintentional release of a hazardous material or occurrence of any of the instances enumerated in 49 C.F.R. 171.15(a) be reported to the DoT in writing within 15 days.

However, a regulation which required an immediate oral report to the state police of any accident, mishap or other "safety irregularity" concerning the transportation of LNG or LPG was held not preempted, inasmuch as such notice promoted the public safety by facilitating a prompt emergency response and should be given with or without a regulation requiring it.

In *City of Boston Rules*, IR-3, the written notice section of a Boston city hazardous materials transportation regulation was similar to a federal regulation requiring reports to the DoT within 15 days of any inadvertent release of hazardous materials was therefore a redundant additional piece of paperwork and therefore unnecessary, inconsistent, and preempted. However, a reg-

ulation requiring an immediate oral report to the fire department of all incidents occurring in the city was ruled not inconsistent.

17. Container requirements

Regulation of shipping containers like shipping paper, is discussed extensively in the federal regulations and it would appear unlikely that a state would attempt to further regulate the area. Yet, both the states of Rhode Island and Michigan did so, but to no avail.

In *State of Rhode Island Rules*, IR-2, the Rhode Island regulation which required tank trailers carrying LNG or LPG to be equipped with a frangible shank-type lock to prevent tampering of valves or equipment and to therefore prevent unauthorized persons from releasing the hazardous contents of the container into the atmosphere was inconsistent with and therefore preempted by the HMTA, this being yet another area that the MTB believes the need for national uniformity is crucial and the scope of the federal regulations totally pervasive.

In *State of Michigan Regulations*, IR-8, the MTB noted that Michigan had other remedies in instances where it deemed federal regulations inadequate and that a requirement for containers intended to be transported over a major bridge or waterway be subjected to physical testing under standards which exceeded NRC standard was inconsistent with the HMTA and HMR and therefore preempted.

18. Requirements imposing additional penalty for violation of regular traffic laws

A regulation which merely imposes an additional penalty for the violation of regular traffic laws was held not to be preempted. In *City of Boston Rules*, IR-3, a city hazardous materials transportation regulation required ordinary traffic violations by transporters of hazardous materials to be treated as violation of its provisions, thus making violators subject to up to one year imprisonment, up to $1,000 in fine, or both. The MTB stated that there was no indication that the penalties involved, as applied to those parts of the regulations consistent with the HMTA, would in and of themselves be inconsistent with federal requirements and that it did not know of any reason why a mere difference in penalty provisions between a state or local requirement and the HMTA would be a basis for finding inconsistency.

19. Requirement for route justification for transportation of nuclear materials

Routing is an important tool for states and local governments for preventing or reducing the consequences of nuclear materials accidents. Increasing num-

bers of cities, counties, and townships are adopting ordinances requiring nuclear materials carriers to use designated routes.

Carefully made routing decisions restrict nuclear materials shipments to the safest routes, often the interstate highway system. This provides a low cost prevention measure that local police can enforce without the need for additional equipment or training.

However, routing requirements may lengthen and complicate trips for truck transporters, bringing those regulations into conflict with the federal regulations. The transporters have challenged several such regulations.

In *State of Michigan Regulations*, IR-8, a state radioactive materials transportation regulation which required applicants for permits to submit a description and justification of their proposed and alternate routes from origin to destination, regardless of what portion of the route was within the state, the MTB held that this was an obstacle to the accomplishment and execution of the HMTA and the HMR, was inconsistent with Federal requirements, and was therefore preempted. The MTB believed that the state's requirement appeared to indicate that the state intended to "second guess" the carriers' route selections.

The MTB went on to state that when the standards to be used in selecting highway routes for the transportation of radioactive materials were promulgated, it was recognized that the states had superior knowledge of local road conditions and it therefore established a process by which the state could apply this knowledge to designate alternate routes which provided an equal or greater level of safety than the Interstate System highways. It was incumbent on the states to designate the safer alternative routes by using the process that was designed specifically for that purpose. State approval of route selections on a shipment-by-shipment basis was at odds with the intent of national uniformity of regulations.

20. Requirement for emergency plan for transportation of nuclear materials

Both the states of Michigan and Vermont have promulgated regulations concerning the preparation of an emergency plan for the transportation of nuclear materials.

In *State of Michigan Regulations*, IR-8, the MTB ruled that a Michigan radioactive materials transportation regulation that required permit applicants to develop and submit a plan describing procedures to be followed in the event of an emergency was preempted. The MTB stated that it was not clear whether the plan required by the state was meant to describe standard procedures to be implemented in event of an emergency or whether it was meant to describe customized procedures, tailored specifically to Michigan. In the event that the first delineated alternative was correct, then applicants could comply

merely by submitting a copy of the materials used at the drivers' training course required by the HMR, which rendered the requirement an unnecesssary paperwork burden. If the latter delineated alternative was the actual intent, then the requirement imposed an unrealistic and unacceptable burden on radioactive material transporters. The effect of the requirement would be to shift the burden of emergency preparedness planning from the state and local government to the carrier. The MTB stated that the emergency preparedness was a governmental responsibility.

Similarly, in *State of Vermont Rules*, DoT Inconsistency Ruling IR-15, the MTB ruled that a state radioactive materials transportation regulation requiring applicants who were seeking transport permit approval to develop and submit a plan describing procedures to be taken by the carrier in an emergency to eliminate or minimize radiation exposure to the public was preempted. The MTB stated that HM-164 addressed the federal responsibility for reducing the likelihood of emergencies by requiring not only that radioactive materials be transported over those routes which have been demonstrated to offer the highest safety levels, but also that the drivers of such shipments receive, and carry certification of, written training concerning the HMR, the properties of hazards of the radioactive materials being transported, and the procedures to be followed in case of an accident or other emergencies. In addition, drivers were required to carry a route plan which included the telephone numbers needed to access emergency assistance in each state to be traversed. The MTB therefore concluded that transporters could comply with the state regulations merely by submitting a copy of the materials used in the HMR required drivers' training course. Such materials were readily available to the state and their submission as part of an application for transportation approval would contribute little.

21. Requirement to be prepared to indemnify for loss from transporting nuclear materials

State and local nuclear materials transportation requirements which required that carriers be prepared to indemnify the state or local jurisdiction from a potential loss have been held preempted in a number of rulings.

In *New York State Thruway Authority Restrictions*, IR-10, the MTB ruled that a New York State Thruway Authority regulation that required radioactive materials carriers to indemnify the Authority from exposure was preempted, inasmuch as the rule, in practice, denied access to the thruway to vehicles which transported spent nuclear fuel. In doing so, the regulation blocked the use of the interstate system highways without providing for alternative routes.

The MTB stated that carriers of radioactive materials were required to operate over "preferred routes" which were either an interstate system highway or a state-designated alternative route. The subject thruway had been designated

a part of the interstate system of highways, and the state had not designated any alternative preferred rules. Thus, the thruway was a preferred route. A carrier could comply with the New York requirement by using preferred routes through Michigan or Vermont, but that would redirect shipments into adjoining states, which was violative of the Congressional intent in enacting the HMTA.

In *State of Vermont Rules*, IR-15, a Vermont radioactive materials transportation regulation which required transporters to secure a bond or insurance of not less than $5 million to cover damages which might result from the release of transported radioactive materials was held inconsistent with established federal law inasmuch as it established a higher minimum level of financial responsibility than that established by federal law. The MTB stated that Vermont's adoption of the higher insurance requirements could operate as a barrier to transportation. In the absence of a clear showing by Vermont that the transportation of radioactive material in Vermont posed a financial risk which exceeded the level of indemnification provided by federal law, the regulation posed an obstacle to the nationally uniform system of highway routing established under the HMTA.

In *Ogdensburg Bridge and Port Authority Rules*, IR-11, the MTB ruled that the requirement that carriers of radioactive materials submit for the Authority's approval evidence of "proper insurance coverage and/or an acceptable indemnification and hold harmless agreement" was inconsistent with the HMTA and HMR and was therefore preempted despite the fact that the regulation did not quantify "proper insurance coverage" and so a comparison by the MTB between the federal requirements on financial responsibility and this requirement was not possible. However, the requirement resulted in diversion of traffic into other jurisdictions.

22. Inspection requirements for shipments of nuclear materials

Both the states of Michigan and Vermont enacted statutes incorporating inspection requirements for shipments of nuclear materials. In *State of Michigan Regulations*, IR-8, the MTB considered a Michigan regulation which provided that shipments of highway route controlled quantity radioactive material be inspected by the Michigan fire marshal and/or the Michigan Department of Public Health for compliance with applicable state and federal statutes and regulations. The MTB stated that state enforcement of federal and consistent state regulations concerning hazardous material transportation safety was a critical element of the regulatory system and that Michigan's Hazardous Materials Enforcement Development Program was developed and implemented in order to provide it with financial and technical assistance. Thus, to the extent that it was directed only to those requirements that were not incon-

sistent, the Michigan regulation was consistent with the HMTA. *State of Vermont Rules*, IR-15, is in accord.

23. Complete prohibition against importation of nuclear materials

Complete prohibitions against the importation of nuclear materials are not popular with transporters of such materials or those whose material is to be shipped.

In *Jersey Central Power and Light Company* v. *The Township of Lacey*, 72 F. 2d 1101 (3rd Cir., 1985), an electric utility company brought an action seeking a declaration that a township ordinance that prohibited the importation of nuclear waste was unconstitutional. The Jersey Central Power and Light ("JCPL") owned the Oyster Creek Nuclear Generating Station ("Oyster Creek") in Lacey Township, New Jersey. Oyster Creek was a nuclear power plant and a federally licensed utilization facility as defined by the Atomic Energy Act. As such, it was authorized to generate nuclear energy and also to receive and store on site "special nuclear material", the classification defined in 42 U.S.C. § 2014(a) to include spent nuclear fuel, here uranium enriched in the isotope 233 or 235 which became depleted after a few years in the reactor and required replacement.

The spent fuel constituted a "hazardous material" as defined in the HMTA. At the time of the decision, it was the general practice to store spent fuel in a water-filled pool at the reactor site. However, in the late 1960s and early 1970s, it was assumed by the nuclear industry that this spent fuel would be reprocessed to recover and recycle the remaining fissionable products. Accordingly, the storage pools at the reactor sites were designed only as short-term holding facilities.

In 1975, Nuclear Fuel Services ("NFS") contracted to supply the reprocessing services needed by JCPL for the spent fuel that was generated at Oyster Creek and to store that fuel at the Western New York Nuclear Service Center. Pursuant to that agreement, JCPL transported 224 of its 980 spent fuel assemblies from its Oyster Creek nuclear plant to the NFS facility. However, in September 1976, NFS withdraw from the reprocessing business and the 224 spent fuel assemblies were never reprocessed. They simply remained in a storage pool at the facility. The owner of the storage facility, the New York State Energy Research and Development Authority ("NYSERDA") and JCPL and certain other public utilities storing fuel at the facility did not agree on the terms of the storage.

NYSERDA thereupon commenced an action in the United States District Court for the Western District of New York entitled *New York State Energy Research and Development Authority* v. *Nuclear Fuel Services, Inc.*, CIV No. 82-426 (W.D. N.Y.) (the "NYSERDA case"). NYSERDA alleged liability for the removal of the spent fuel stored at the facility and for compensation

based upon theories of trespass, breach of contract and unjust enrichment. The District Court ruled that JCPL would be a trespassor if NYSERDA's unequivocal demand for removal was made and ignored. Subsequently, NYSERDA made such a unequivocal demand. On September 30, 1983, NYSERDA and JCPL entered into a partial settlement agreement wherein JCPL was to commence the removal of its 224 spent fuel assemblies by October 1, 1984 and complete removal by May 31, 1985. The transportation of these spent fuel assemblies back to the Oyster Creek facility resulted in additional proceedings in the United States District Court for the District of New Jersey.

On August 25,1983, during the pendency of the New York Federal action, the Township of Lacey, an inincorporated village located in Ocean County, New Jersey, enacted into law the "spent fuel ordinance" which resulted in the instant litigation. The ordinance prohibited the importation of any spent nuclear fuel or any other radioactive waste for the purpose of storing it within the Township of Lacey.

JCPL wanted to return the 224 spent fuel assemblies to the Oyster Creek storage facility since that was the only viable alternative storage facility. JCPL therefore filed a complaint against the Township of Lacey seeking a declaration that the ordinance was invalid and unenforceable because it violated the Constitution and the statutes of the United States. In addition, JCPL sought an order enjoining enforcement of the ordinance as well as other relief. JCPL then moved for summary judgment, which was granted on September 24, 1984. The court ruled that there was no dispute as to the issue of material fact and that the spent fuel ordinance was, as a matter of law, unconstitutional under both the Supremacy Clause of the United States Constitution (Article 6, Clause 2) and the Commerce Clause.

The Court of Appeals considered this action despite the appearance that the case might be considered moot inasmuch as the controversial shipping had been completed and the 224 spent fuel assemblies were being stored at the Oyster Creek Nuclear Facility. However, the ordinance also regulated to the storage of rods, not just the transportation into the jurisdiction.

The Court of Appeals affirmed the District Court's grant of summary judgment invalidating the spent fuel and penalty ordinance because (a) these were no genuine issues of material fact in dispute, (b) the ordinances were preempted by the AEA and thus contrary to the Supremacy Clause as a matter of law; and (c) the ordinances were preempted by the HMTA and thus contrary to the Supremacy Clause as a matter of law. With respect to the District Court's reasoning that the Township ordinances were preempted because they regulate the operation of the nuclear plant and are predicated on safety concerns, the Court of Appeals held that,

"We find his analysis cogent and thorough.

"We further agree with his determination that this case is not materially distinguishable from cases in other Circuits which have found that state laws prohibiting the importation and storage of nuclear waste violated the Supremacy Clause." *Id.* at 112.

In addition to considerations of the AEA and NRC regulations, the court considered regulation of transportation and storage by the DoT and the scope of the HMTA. Referring to HM-164, the Court of Appeals held that the HMTA regulations preempt the Lacey Spent Fuel Ordinance as "inconsistent" pursuant to 49 U.S.C. § 1811(a), since it effectively restricted or delayed movement by public highway of motor vehicles which contain hazardous materials.

In *Washington State Building and Construction* v. *Spellman*, 684 F.2d 627 (9th Cir., 1982), the plaintiffs challenged the constitutionality of the State of Washington's Radioactive Waste Storage and Transportation Act of 1980 ("RWSTA"). By means of the RWSTA, the state sought to ban the storage of all non-medical radioactive waste generated outside the State of Washington. The RWSTA also banned the transportation of such waste to storage sites in Washington. It did not, however, ban the transportation for storage or the storage of waste generated in Washington. Further, it did not ban the transportation of radioactive material through Washington for use or storage elsewhere.

The storage area which initiated the RWSTA initiative is the Hanford Reservation, a federal reservation consisting of 562 square miles of land and facilities in and around Benton County, Washington. Since 1943, that reservation had been used for federal nuclear programs. There were three storage areas on the reservation at the time of the litigation. The first two areas were owned and operated by the federal government. The first area provided storage for waste generated from federal energy programs and national defense activities. The second area contained a test facility to determine the feasibility of storing spent fuel and high-level waste in underground basalt formations. The third area arose out of a lease of approximately 1000 acres by the United States to the State of Washington. The State of Washington subleased approximately 100 of that acreage to U.S. Ecology, Inc., who used that acreage for the operation of a low-level radioactive waste storage facility. Although there were two other active commercial facilities in the United States at that time, the U.S. Ecology site was the only facility which had the capability to store absorbed low-level radioactive liquids. U.S. Ecology received 40% of the country's low-level radioactive waste. The District Court held that the RWSTA violated the Supremacy Clause and the Commerce Clause of the United States Constitution. The Court of Appeals concurred and affirmed.

As an unqualified closing of the Richland Facility to all out-of-state users, the RWSTA violated the Supremacy Clause inasmuch as the RWSTA sought both to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act.

With respect to the Commerce Clause considerations, the Court of Appeals stated that,

"Even in the absence of pervasive federal legislation 'the Commerce Clause prevents the states from erecting barriers to the free-flow of interstate comerce.' A state statute may effect commerce without violating the Commerce Clause, however, if the statute serves legitimate state interest and if it is applied in a nondiscriminatory manner." *Id.* at 630, citations omitted.

The criteria for determining whether the Commerce Clause has been violated had previously been articulated in the case of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970) to which the appellate court referred. The Pike test is a three-pronged test which asks whether the state law (1) regulates even-handedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce.

With regard to even-handedness, inasmuch as only out-of-state waste bound for disposal within Washington is banned, this prong was not satisfied. The legitimate local public purpose prong was also not satisfied. The court held that,

"Undoubtedly, the release of radioactive materials and emissions in inimical to the safety to the people of any state. The State of Washington neglects to address, however, the matter in which local waste, transported and sorted within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory virtues." *Id.* at 631.

As to the requirement for only incidental effect on interstate commerce, that criteria is not met inasmuch as Washington received, at the time of this case, 40% of the Country's low-level radioactive waste and had the only site available to receive absorbed liquid low-level radioactive waste.

24. Conclusion

Concurrent federal regulations on the one hand and state or local government regulations on the other hand may have either a positive or negative effect on the risks associated with the transportation of hazardous materials and may have either a positive or negative economic effect on all of the parties concerned, including the regulating jurisdictions, the transporters, and the entities desiring that hazardous materials be transported.

The Congress has established both judicial and administrative systems intended to insure that resolution of conflicts results in a safety level no less than the minimum level established by Congress.

These systems have not been widely used, as is indicated by the fact that there have been only seventeen inconsistency rulings to date and only a handful of judicial determinations. The fact that there have been so few may be a

result of minimal intrusion by the many hundreds of regulations that have not been challenged. However, it is far more likely that there are few challenges because of the costs, both in money and in time, incurred in undertaking such challenges.

Congress has failed, to date, to make a comprehensive effort to resolve inter-jurisdictional differences. The judicial and DoT procedures of case-by-case review are time consuming and costly. They do not prevent the continued adoption of further state and local regulations, further exacerbating the already significant problem.

TABLE 1

Summary of hazardous materials regulations in title 49 of the Code of Federal Regulations

Part 106:	General rulemaking procedures for adopting regulations.
Part 107:	Procedures for the submission and review of packaging exemption applications, inconsistency rulings and nonpreemption determinations. Enforcement authorities.
Part 171:	General introduction to hazardous materials regulations. Special requirements for hazardous wastes. Definitions of terms. List of technical documents incorporated by reference. Accident reporting requirements.
Part 172:	Hazardous Materials Table. Regulations for shipping papers, markings, labels and placards.
Part 173:	Hazard class definitions. Packaging regulations. General shipping regulations.
Part 174:	Rail transport regulations.
Part 175:	Aircraft (passenger and cargo) regulations.
Part 176:	Non-bulk transportation by waterborne vessels.
Part 177:	Highway transportation.
Part 178:	Packaging specification.
Part 179:	Rail tank car specifications.