STATE AND LOCAL GOVERNMENT REGULATION OF NUCLEAR WASTE TRANSPORTATION:A U.S. DEPARTMENT OF ENERGY PERSPECTIVE

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ABSTRACT

The Hazardous Materials Transportation Act (HMTA), authorizes the U.S. Department of Transportation (DOT) to promulgate rules governing the safe transportation in commerce of hazardous materials, including nuclear waste. The HMTA further provides that any State or local government requirement is preempted and thus invalid if it is inconsistent with a DOT requirement issued pursuant to the HMTA.

DOT has issued 24 Inconsistency Rulings, that set forth a continuously developing body of advisory opinions on this subject. DOT has upheld State and local regulation in certain limited areas, such as inspection requirements and immediate, oral accident reporting, but State and local rules requiring special or additional insurance, equipment, time-of-day restrictions, and pre-notification requirements have been held invalid. Furthermore, requirements causing significant delays or unreasonable redirecting or restricting of nuclear materials transportation have been held inconsistent.

Nonetheless, there is still substantial uncertainty as to when a State or local transportation requirement is inconsistent with the regulations issued under the HMTA, especially in the area of State-imposed permit and fee requirements for high-level radioactive waste, transuranic waste, and spent nuclear fuel shipments. The Department of Energy (DOE) has opposed these permit and fee systems as unnecessary and burdensome. DOE believes that if it becomes necessary to enhance the regulatory system for radioactive waste transportation, it should be accomplished through the Federal rules rather than State and local regulations. A uniform Federal regulatory system avoids the "multiplicity of state and local regulations and the potential for varying as well as conflicting regulations" the HMTA sought to avoid.

BACKGROUND

Since the inception of the nuclear industry, nuclear safety has been regulated by the Federal government pursuant to the Atomic Energy Act of 1954, and it is generally recognized that State and local laws regulating nuclear safety are preempted and invalid. In the field of nuclear materials transportation, preemption has not been as certain since the regulation of transportation in general has been viewed as part of the States' inherent police power and obligation to protect the health and safety of their citizens.

But in 1975, Congress enacted the HMTA, authorizing the Secretary of Transportation to promulgate rules governing the safe transportation in commerce of hazardous materials, including nuclear waste. The HMTA provides that any requirement of a State or local government that is inconsistent with any requirement in the HMTA or the regulations issued under the HMTA is preempted and thus invalid.

The DOT has implemented the HMTA through a comprehensive set of Hazardous Materials Regulations (49 CFR Parts 171 to 177) and issued a detailed policy statement on when a State or local rule is inconsistent with the Federal regulations. (Appendix A to 49 CFR Part 177). Furthermore, DOT has issued 24 Inconsistency Rulings, that set forth a continuously developing body of advisory opinions on this subject.

DOT has upheld State and local regulation in certain limited areas, such as inspection requirements and immediate, oral accident reporting, but State and local rules requiring special or additional insurance, equipment, time-of-day restriction, and pre-notification requirements have been held invalid. DOT has frequently found that any requirements causing significant delay or unreasonable redirecting or restricting of nuclear materials transportation are inconsistent.

Nonetheless, there is still substantial uncertainty as to when the regulations issued under HMTA, especially in the area of State-imposed permit and fee requirements for highway route controlled quantity radioactive materials (HRCQ), including high-level radioactive waste, transuranic waste, and spent nuclear fuel shipments.

VERMONT AND ILLINOIS TRANSIT FEE REQUIREMENTS

In 1983, DOT held that a Vermont transit fee of $1000 per shipment of HRCQ was inconsistent with the Federal regulations. (Inconsistency Ruling 15.) But in 1986, an Illinois rule imposing a $1000 per cask fee for transportation of spent nuclear fuel was upheld. (Inconsistency Ruling 17.) DOT distinguished the Illinois fee from the Vermont fee on the ground that the Vermont fee supported an inconsistent regulatory program, which required prior State approval before shipment could commence, while the Illinois fee supports a consistent inspection and escort program, which does not require prior State approval before shipment.

DOE submitted comments in the Illinois proceeding, arguing that while Illinois did not impose an actual permit or prior approval requirement on spent fuel shipments, the fee requirement was the equivalent of a permit requirement since the State regulation provided for payment of the fee prior to shipment. But DOT found that in actual practice, Illinois did not attempt to prevent shipment even though the

fee was not paid. For example, when DOE declined to pay the fee for its shipments of damaged spent fuel from the Three Mile Island Nuclear Plant, Illinois allowed the shipments nonetheless and subsequently requested payment by letter. Thus, DOT found that Illinois requirement differs from the Vermont prior approval requirement.

DOE also argued that the Illinois inspection and escort program could cause significant delay in the transportation of spent fuel and unreasonable redirection and restriction of such shipments. DOT stated that any delay actually caused was not significant, that the evidence did not show any actual diversion around Illinois, and that the restriction did not impose unreasonable burdens on shippers and carriers.

COLORADO PERMIT AND FEE SYSTEM

In July, 1988, DOE requested an Inconsistency Ruling from DOT on the validity of the rules promulgated under the Colorado Nuclear Materials Transportation Act. The Colorado rules establish a permitting system for motor carriers of HRCQ and require inspections and fees before traversing the State. DOE believes that the Colorado permit system is invalid and thus the fee is also invalid, as in the Vermont case. The comment period and rebuttal comment period closed in November 1988. DOE, the Utilities' Nuclear Waste Management Group, and the Western Governors Association (WGA) submitted comments, but Colorado did not. Instead, Colorado filed suit against DOE in the United States District Court for the District of Colorado, and requested that DOT stay its proceedings until the court rules on the constitutionality of the Colorado program. DOT has declined DOT's request and plans to issue a ruling without waiting for the district court's decision. DOT has not yet issued its ruling.

The State of Colorado filed its action for a declaratory judgment in the United States District Court for the District of Colorado on September 23, 1988. As provided in the Federal Rules of Civil Procedure, DOE answered the State's specific allegations and also filed a motion to dismiss the suit. In addition, DOE asked the court to consider suspending its proceedings, until DOT has had an opportunity to rule on DOE's request for an Inconsistency Ruling.

DOE based its motion to dismiss Colorado's suit on two theories. The first is an argument, based on the Supremacy Clause of the Constitution. Colorado's efforts to apply State law to the Federal government and to regulate the activities of the Federal government are not permitted without the consent of the Federal government. Here the United States has not consented to being regulated by Colorado. The second basis is a more general preemption argument. Congress, through the HMTA, has decided that the most efficient way to regulate hazardous materials is at the Federal level, and expressly chose to preempt "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth ... in a regulation issued" under the Act. DOE asserts that the Colorado statute is inconsistent with the Federal regulatory scheme and is therefore invalid.

This case should prove to be very interesting, as well as important, because it is the first time a state has requested a ruling on the general validity of a radioactive materials transportation statute. It has already attracted a fair amount of attention and participation by parties who are not part of the suit.

A group of utilities has asked the court for permission to join the case on DOE's side and the Environmental Defense Fund has asked for permission to join on Colorado's side. In addition, the State of Nevada, joined by the States of California, Illinois, Michigan, Minnesota, Ohio, Texas, Vermont, Virginia, Washington, Wisconsin and New Mexico has received permission from the court to present their views. The States have expressed concern that the court's ruling in this case will affect their ability to enforce their radioactive materials transportation laws.

Because the case is still in a very early stage, the outcome is difficult to predict. Whatever the outcome, it will have a significant impact on nuclear materials transportation.

OAKLAND, CALIFORNIA

States are not alone in the attempt to regulate nuclear materials transportation. There are a growing number of local ordinances as well. Approximately 150 cities, towns and counties have enacted "nuclear free zone" legislation, the bulk of which affect nuclear materials transportation in some way. A recent, and very far reaching ordinance, went into effect in Oakland, California in December of 1988. Section 5 of the ordinance deals with transportation. Although the section is not an outright ban on transportation as such, that may be the practical effect of the requirements of section 5. The requirements of Section 5 include:

- 45 days notice prior to shipment;
- at least one public hearing with advance notice to the public by radio, television and press release;
- the safest route and method of transport is to be determined by the City Council;
- the public shall receive 15 days advance notice of the selected route;
- the City shall monitor the transport;
- each vehicle shall have signs, visible 150 feet in any direction, with the warning "Transportation of Hazardous Radioactive Materials."

PACIFIC STATES AGREEMENT

The States of Idaho, Oregon and Washington have entered into the Pacific States Agreement on Radioactive Materials Transportation, which provides for meetings of the three States' representatives to discuss radioactive materials transportation issues. These three States have proposed model legislation to be enacted in each State that

would provide a permit and fee system for each State for shipment of all radioactive materials.

Under the model legislation, a permit must be issued before transportation of radioactive materials could take place. A permit would be issued only if the applicant demonstrates that the proposed transportation will be conducted in a safe and workmanlike manner consistent with Federal requirements, without endangering the health and safety of the citizens or the environment. Upon receipt of an application, the issuing agency would notify all other interested State agencies and local entities affected in that and other compact States. The issuing agency could place reasonable conditions upon the permit holder based on comments from these other affected entities.

Any person obtaining a permit would have to establish and maintain any records, make any reports and provide any information as may be required by rule of the issuing agency.

The proposal also provides for annual and/or per shipment fees for radioactive material shipments, as well as the inspection of each permitted HRCQ shipment at the port of entry into each State. Permit holders would be required to indemnify each State for any claims against any or all of the States arising from release of radioactive material during transport and for the cost of response to an accident.

The legislation is still in the preliminary draft stages and DOE representatives have been attending the meetings of the three Agreement States to express our concerns over the proposed legislation.

CONCLUSION

The Department of Energy finds this recent trend troubling and opposes State and local permit and fee systems for nuclear waste transportation. We believe that they are unnecessary. Nuclear waste transportation has an admirable safety record. Federal regulations have proven more than adequate in protecting the public and the environment from injury or damage during nuclear waste transport. If safety standards need enhancement, this should be done through the Federal rules. As stated in the legislative history to the HMTA, there is a need to avoid "a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Reg. 1192, 93rd Cong., 2d Sess., 37-38 (1974).