Recent Legal Developments in Radioactive Materials Transportation: A U.S. Department of Energy Perspective

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INTRODUCTION

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 radioactive materials. 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 27 Inconsistency Rulings, setting 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, taking the position they are unnecessary and unduly burdensome. DOE believes that if it becomes necessary to enhance the regulatory system for radioactive waste transportation, regulatory enhancement 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" S.Rep. 1192, 93rd Cong; 2d. Sess., 37-38 (1974) the HMTA sought to avoid.

Nuclear materials transportation has sparked a fair amount of litigation. For the last eleven years DOE has been involved in a series of proceedings, before the Interstate Commerce Commission and the federal courts, against the nation's railroads, seeking a reasonable level of rail rates as well as the ability to move nuclear materials, specifically spent fuel, in regular train service.

More recently DOE has been involved as a defendant in two cases involving the transportation of spent fuel that have been filed under the National Environmental Policy Act (NEPA). The plaintiffs in those two cases have asserted that DOE must complete Environmental Impact Statements prior to the commencement of spent fuel shipments. DOE believes that, because the risk of a severe accident is so small, these shipments do not constitute a major federal action significantly affecting the environment and, therefore, an Environmental Assessment, rather than an Environmental Impact Statement, is appropriate.

FEDERAL PREEMPTION OF STATE AND LOCAL GOVERNMENT REGULATION OF RADIOACTIVE MATERIALS TRANSPORTATION

Since the inception of the nuclear industry, nuclear safety has been regulated by the Federal government under the Atomic Energy Act of 1954, and it is generally recognized that State and local laws regulating nuclear safety are preempted and, thus, 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 authority to protect the health and safety of their citizens.

In 1975, however, Congress enacted the HMTA, authorizing the Secretary of Transportation to promulgate rules governing the safe transportation in commerce of hazardous materials, including nuclear materials. 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.

DOT has implemented the HMTA through a comprehensive set of Hazardous Materials Regulations (49 C.F.R. 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 C.F.R. Part 177.) Furthermore, DOT has issued 27 Inconsistency Rulings, setting 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. DOT has frequently found that any requirements causing significant delay or unreasonable redirecting or restricting of nuclear materials transportation are inconsistent with Federal law. Nonetheless, there is still substantial uncertainty as to when a State or local requirement is preempted by the regulations issued under HMTA.

Vermont and Illinois Transit Fee Requirements

In 1983, DOT held that a Vermont transit fee of $1000 per shipment of Highway Route Controlled Quantity (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 supported a consistent inspection and escort program, which did not require prior State approval before shipment.

DOE submitted comments in the Illinois proceeding, arguing that although 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 called 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, by letter, requested payment. Thus, DOT found that Illinois scheme 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, however, that any delay actually caused was not significant, that the evidence did not show any actual diversion around Illinois, and that the restrictions 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. Colorado declined to participate in the DOT proceeding, but instead 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 ruled on the constitutionality of the Colorado program. DOT declined Colorado's request and issued a ruling without waiting for the district court's decision.

On April 17, 1989, DOT found that Colorado's annual permit requirement was inconsistent with Federal law because it (1) prohibits transportation of HRCQ in the absence of a permit without regard to whether that transportation is in compliance with the Federal regulations, (2) applies to selected hazardous materials, (3) involves extensive information and documentation requirements and (4) contains considerable discretion concerning permit issuance. Also, the $500 annual permit fee was found inconsistent because it supported the inconsistent annual permit program. On the other hand, DOT found Colorado's $100 per shipment fee to be consistent with Federal law because there was no showing that these fees are related to inconsistent provisions or cause diversion or unreasonable delay of shipments.

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.

DOE's motion to dismiss Colorado's suit asserts two legal theories. The first is that, by virtue of 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 argument is based on Federal preemption. Congress, through the HMTA, has decided that the most efficient way to regulate hazardous materials is at the Federal level. In so doing, Congress 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 HMTA. To the extent that the Colorado statute is inconsistent with the Federal regulatory scheme, it is preempted by Federal law and regulations and, therefore, invalid.

This case should prove to be interesting because it is the first time a state has sought a ruling on the general validity of a radioactive materials transportation statute. An additional, and yet unknown, aspect of this case is the amount of weight the court will give to the DOT Inconsistency Ruling. The case has already attracted a fair amount of attention, as well as participation by groups who are not parties to the suit.

A group of utilities has received permission from the court to file papers in support of DOE's position, and the Environmental Defense Fund has received the court's permission to do the same in support of Colorado. 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 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. Oral argument on the motion is scheduled to be heard by the court on June 23, 1989.

Oakland, California

States are not alone in attempting 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, most of which purports to 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 of nuclear materials as such, that may be the practical effect of the requirements of Section 5. The requirements of Section 5 include:

- 45 days notice to the city 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."

The United States Navy has requested that DOT find that the transportation provisions of the Oakland ordinance are inconsistent with the HMTA. DOE and the Navy are also reviewing the possibility of filing a suit directly against the City of Oakland, challenging the validity of the ordinance.

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 that would establish a permit and fee system for shipment of all radioactive materials.

Under the model legislation, a permit would have to be issued before transportation of radioactive materials could take place. A permit would be issued only if the applicant demonstrated that the proposed transportation would be conducted in a safe and workmanlike manner, consistent with Federal requirements, and 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 records, make reports and provide information as required by rule of the issuing agency.

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

The model legislation is still in a preliminary draft stage, and DOE representatives have been attending the meetings of the three Agreement States to express our concerns regarding the proposed legislation.

California Driver Training Requirements

On April 21, 1989, DOT issued a seminal inconsistency ruling (Inconsistency Ruling 26) addressing the issue of driver training requirements. California Department of Motor Vehicles regulations establishing training requirements for all hazardous materials transporters, including transporters of radioactive materials, were held consistent with Federal law insofar as they apply to California residents and, in certain circumstances described below, to non-California residents. Previously, DOT had ruled in Inconsistency Ruling 8 that DOT regulations (49 C.F.R. §177.825) establish a near total

occupation of the field of training requirements relating to radioactive materials transportation. But with the passage of the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (49 U.S.C. App. §§ 2701-2716), DOT recognized "the legitimate training requirements role which States have under the CMVSA." Inconsistency Ruling 26. The CMVSA requires a single commercial driver's license (CDL) for each driver of a commercial vehicle and requires States to extend reciprocity to CDL's issued by other States. Under the CMVSA, DOT implementing regulations and Inconsistency Ruling 26, a State now may impose more stringent hazardous materials training requirements on its own commercial motor vehicle operators than do Federal regulations as long as those requirements do not directly conflict with Federal regulations. States also may impose their more stringent requirements on out-of-state drivers who have not been issued a CDL with a hazardous materials endorsement from another State, but only after April 1, 1992, the date by which States must implement the CDL program.

ENVIRONMENTAL CHALLENGES TO RADIOACTIVE MATERIALS TRANSPORTATION

In Sierra Club v. Herrington (United States District Court for the District of Columbia), the Sierra Club filed an action alleging that DOE failed to comply with the National Environmental Policy Act (NEPA) in connection with the DOE program that accepts shipments of spent nuclear fuel from foreign research reactors and, also, in connection with DOE's spent fuel shipments from a research reactor in Taiwan.

For many years, DOE has accepted highly enriched spent research reactor fuel from other countries under the provisions of the Nuclear Non-Proliferation Act. DOE's program expired on December 31, 1988, and DOE is currently in the process of preparing an Environmental Assessment (EA) to determine what impact, if any, the extension of this program will have on the environment. The Sierra Club has asserted, however, that an Environmental Impact Statement (EIS) must be prepared prior to the program's extension.

The second allegation in the Sierra Club's suit is that DOE must prepare an EIS in conjunction with the ongoing shipments of spent research reactor fuel from Taiwan. DOE completed two EAs on the Taiwan fuel, both of which concluded that the environmental impact of these shipments was not significant. DOE must now defend the analysis and the conclusions contained in the EAs.

CONCLUSION

DOE recognizes the legitimate concerns of State and local jurisdictions, as well as those of interest groups and the general public, in ensuring that radioactive materials are transported safely and in compliance with applicable transportation and environmental statutes and regulations. DOE is committed to moving radioactive materials safely and in compliance with all applicable laws and regulations. But DOE also believes that a multiplicity of different, and sometimes conflicting, State and local requirements can cause delay and confusion, so that safety is actually impaired rather than enhanced, and therefore that regulatory authority should be at the Federal level. Litigation and controversy will no doubt follow radioactive materials transportation for many years to come.