

Sunshine Act Meetings

Federal Register

Vol. 49, No. 229

Tuesday, November 27, 1984

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

FEDERAL COMMUNICATIONS COMMISSION

November 20, 1984

Additional Item To Be Considered at Open Meeting, Wednesday, November 21st

The Federal Communications Commission will consider an additional item on the subject listed below at the Open Meeting scheduled for 9:30 A.M., Wednesday, November 21, 1984 at 1919 M Street, NW., Washington, D.C.

Agenda, Item No., and Subject

Common Carrier—8—Title: Second Report and Order, General Docket No. 80-112. Summary: The Commission will consider adopting rules to allow the use of lotteries for the selection of Multichannel Multipoint Distribution Service licensees.

The prompt and orderly conduct of Commission business requires that less than 7-days notice be given consideration of this additional item.

Action by the Commission November 20, 1984. Commissioners Fowler, Chairman; Quello, Dawson, Rivera and Patrick voting to consider this item.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this item may be obtained from Judith Kurtich, FCC Public Affairs Office, telephone number (202) 254-7674.

William J. Tricarico

Secretary, Federal Communications Commission.

[FR Doc. 84-31116 Filed 11-23-84; 10:25 am]

BILLING CODE 6712-01-M

2

FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Monday, December 3, 1984.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW, Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: November 23, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-31175 Filed 11-23-84; 2:55 pm]

BILLING CODE 6210-01-M

3

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 26, December 3, 10, and 17, 1984

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, D.C.

STATUS: Open and Closed

MATTERS TO BE CONSIDERED:

Week of November 26

Tuesday, November 27

10:00 a.m.

Affirmation Meeting (Public Meeting) (if needed)

Week of December 3

Tentative

Monday, December 3

2:00 p.m.

Discussion/Possible Vote on Severe Accident Policy Statement (Public Meeting)

Wednesday, December 5

10:00 a.m.

Discussion of Indian Point Order (Public Meeting) (if needed)

2:00 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

Thursday, December 6

2:00 p.m.

Affirmation Meeting (Public Meeting) (if needed)

Week of December 10

Tentative

Monday, December 10

1:00 p.m.

Discussion of Adjudication Matters Related to Catawba-1 (Closed—Ex. 10) (if needed)

2:00 p.m.

Discussion/Possible Vote on Full Power Operating License for Catawba-1 (Public Meeting)

Tuesday, December 11

10:00 a.m.

Staff Follow-up to 11/15 DOE Briefing on High Level Waste Program (Public Meeting)

2:00 p.m.

Year End Budget Review (Public Meeting)

Thursday, December 13

2:00 p.m.

Affirmation Meeting (Public Meeting) (if needed)

Friday, December 14

10:00 a.m.

Discussion of 1985 Policy and Planning Guidance (Public Meeting)

2:00 p.m.

Briefing and Discussion on the Hearing Process (Public Meeting)

Week of December 17

Tentative

Monday, December 17

10:00 a.m.

Discussion of Material False Statements—Policy Options (Public Meeting)

2:00 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

Tuesday, December 18

9:00 a.m.

Discussion of Adjudication Matters Related to Byron-1 (Closed—Ex. 10)

10:00 a.m.

Discussion/Possible Vote on Full Power Operating License for Byron-1 (Public Meeting)

2:00 p.m.

Discussion/Possible Vote on Proposed Amendments to 10 CFR Part 2 (Public Meeting)

Thursday, December 20

10:00 a.m.

Affirmation Meeting (Public Meeting) (if needed)

ADDITIONAL INFORMATION: Affirmation of "UCS Proposed Correction Regarding Its Status on Management Issues in TMI-1 Restart Proceeding" (Public Meeting) was held on November 15.

Discussion of Management-Organization and Internal Personnel Matters scheduled for November 19, *postponed*.

Briefing by OI (Closed—Ex. 5 & 7) was held on November 21.

TO VERIFY THE STATUS OF MEETINGS CALL: (Recording) (202) 634-1498.

CONTACT PERSON FOR MORE

INFORMATION: Julia Corrado (202) 634-1410.

Dated: November 21, 1984.

George T. Mazuzan,
Office of the Secretary.

[FR Doc. 31190 Filed 11-23-84; 3:59]

BILLING CODE 7590-01-M

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SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of November 26, 1984, at 450 Fifth Street, NW., Washington, D.C.

Closed meetings will be held on Tuesday, November 27, 1984, at 10:00 a.m. and on Thursday, November 29, 1984, following the 3:15 p.m. open meeting. Open meetings will be held on Tuesday, November 27, 1984, at 2:30 p.m. and on Thursday, November 29, 1984, at 2:30 p.m. and 3:15 p.m., in Room 1C30.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meetings. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, the items to be considered at the closed meetings may be considered pursuant to one or

more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10).

Chairman Shad and Commissioners Treadway, Cox and Peters voted to consider the items listed for the closed meetings in closed session.

The subject matter of the closed meeting scheduled for Tuesday, November 27, 1984, at 10:00 a.m., will be:

- Formal order of investigation.
- Settlement of administrative proceedings of an enforcement nature.
- Institution of administrative proceeding of an enforcement nature.
- Institution of injunctive actions.
- Freedom of Information Act requests.

The subject matters of the closed meeting scheduled for Thursday, November 29, 1984, following the 3:15 p.m. open meeting, will be:

Oral argument discussions.

The subject matter of the open meeting scheduled for Tuesday, November 27, 1984, at 2:30 p.m., will be:

1. Consideration of whether to propose for public comment an amendment to General Instruction D to Form 13F which would simplify procedures for managers requesting confidential treatment for open risk arbitrage positions. For further information, please contact Susan P. Hart at (202) 272-2098.
2. Consideration of whether to issue a release adopting an industry guide and rules relating to disclosures about reserves and reserving practices of property-casualty insurance underwriters. For further information, please contact Dorothy Walker or Jeremiah Harrington at (202) 272-2130.

The subject matter of the open meeting scheduled for Thursday, November 29, 1984, at 2:30 p.m., will be:

Oral argument in an appeal by Bruce Paul from the decision of an administrative law judge. For further information, please contact William S. Stern at (202) 272-7400.

The subject matter of the open meeting scheduled for Thursday, November 29, 1984, at 3:15 p.m., will be:

Oral argument in an appeal by Hammon Capital Management Corporation, a

registered investment adviser, and Gabe Hammon, its president, from the decision of an administrative law judge. For further information, please contact Herbert V. Efron at (202) 272-7400.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: David Powers (202) 272-2091.

Shirley E. Hollis,

Acting Secretary.

November 21, 1984.

[FR Doc. 84-31152 Filed 11-23-84; 12:39 p.m.]

BILLING CODE 8010-01-M

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UNITED STATES INTERNATIONAL TRADE COMMISSION

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 49 FR 44974 (11-13-84).

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, November 28, 1984.

CHANGES IN THE MEETING: Addition of agenda items as follows:

2. Investigation 751-TA-9 (Drycleaning Machinery From West Germany)—briefing and vote.

3. Service Awards Recognition.

In conformity with 19 CFR 201.37(b), Commissioners Stern, Liebel, Eckes and Lodwick determined by unanimous vote that Commission business requires the change in subject matter by addition of the agenda items, affirmed that no earlier announcement of the addition to the agenda was possible, and directed the issuance of this notice at the earliest practicable time. Commissioner Rohr did not participate in the vote.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary (202) 523-0161.

[FR Doc. 84-31216 Filed 11-23-84; 4:31 pm]

BILLING CODE 7020-02-M

Test Report Federal Register

Tuesday
November 27, 1984

Part II

Department of Transportation

Research and Special Programs
Administration

Hazardous Materials; Inconsistency
Rulings IR-7 Through IR-15

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket Nos. IRA-20 Through IRA-27 and IRA-30]

Hazardous Materials; Inconsistency Rulings IR-7 Through IR-15

General Preamble

I. *Introduction:* The Materials Transportation Bureau (MTB) announces rulings as to the consistency of regulations or actions taken by the following States, local governments, or political subdivisions, with the Hazardous Materials Transportation Act (HMTA) or the Hazardous Materials Regulations (HMR) adopted thereunder:

- IR-7. State of New York; Letter from Governor's Designated Representative Advising Suspension of Spent Fuel Shipments (Docket IRA-20).
- IR-8. State of Michigan; Radioactive Materials Transportation Regulations of the State Fire Safety Board and the Department of Public Health (Docket IRA-21).
- IR-9. State of Vermont; Letter from Governor Concerning Highway Shipment of Spent Fuel through Vermont (Docket IRA-22).
- IR-10. State of New York; New York State Thruway Authority Restrictions on the Transportation of Radioactive Materials (Docket IRA-23).
- IR-11. State of New York; Ogdensburg Bridge and Port Authority, Radioactive Materials Transportation Rules (Docket IRA-24).
- IR-12. State of New York; St. Lawrence County Local Law Regulating the Transportation of Radioactive Materials Through the County (Docket IRA-25).
- IR-13. State of New York; Thousand Islands Bridge Authority Restrictions on the Transport of Radioactive Materials (Docket IRA-26).
- IR-14. State of New York; Jefferson County Local Legislative Stipulation Regulating Radioactive Materials Transportation through the County (Docket IRA-27).
- IR-15. State of Vermont; Rules for the Transportation of Irradiated Reactor Fuel and Nuclear Waste (Docket IRA-30).

II. *Applicable Federal Requirements:* Hazardous Materials Transportation Act (HMTA) (49 U.S.C. 1801 *et seq.*); and the Hazardous Materials Regulation (HMR) (49 CFR Parts 170-179).

III. *Issue Date:* November 20, 1984.

IV. *General summary:* Each ruling identified in Section I above, represents the opinion of the MTB concerning

whether the regulations or other specified actions of the entities identified therein are consistent, in whole or in part, with the HMTA or the HMR. Each ruling was initiated and is issued under 49 CFR 107.201-107.209.

V. *For further information contact:* Elaine Economides, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, S.W., Washington, D.C. 20590. (Telephone: (202) 755-4972).

VI. *Procedural summary:* The information, discussion, and citations provided in Sections I-X of this General Preamble constitute a part of each of the nine Rulings identified in Section I. Where information or statements in the General Preamble address a specific Ruling, that information is relevant only to that Ruling. This General Preamble includes a discussion of statutory preemption under the HMTA; a description of the Federal routing regulations; a chronology of the events leading up to the issuance of these inconsistency rulings; and a brief discussion of the comments received. It is followed by the nine inconsistency rulings, each of which represents a separate administrative proceeding.

VII. *General authority and preemption under the HMTA:* 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 CFR Parts 170-179, and mostly predate the HMTA. The HMR previously were authorized by the Explosives and other Dangerous Articles Act (18 U.S.C. 831-835), which was repealed in 1979 (Pub. L. 96-129, November 30, 1979). The HMTA was enacted on January 3, 1975 and the HMR were reissued under its authority, effective January 3, 1977 (41 FR 39175, September 9, 1976). 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 apply to persons who offer hazardous materials for transportation in commerce (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 scope of transportation activity affected includes the packaging of shipments of hazardous materials, package markings (to show content) and labeling (to show hazard), vehicle placarding (to show hazard), handling

procedures, such as loading and unloading requirements, routing, care of vehicle and lading during transportation, and the preparation and use of shipping papers to show the identity, hazard class and amount of each hazardous material being shipped. The HMR also require carriers to report in writing to DOT any unintentional release of a hazardous material during transportation.

The HMTA at section 112(a) (49 U.S.C. 1811(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 preempting 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 those 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. Section 112(a) of the HMTA provides that such State (or local) action may not be inconsistent with the HMTA or the regulations issued thereunder. The legislative history of this provision indicates that Congress intended it "to preclude 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. Rep. No. 1192, 93d Cong. 2d Sess. 37(1974)).

In 49 CFR Part 107, the Materials Transportation Bureau (MTB) has published procedures which implement the preemption language of the HMTA by providing for the issuance of inconsistency rulings. At the time that these procedures were published, MTB observed that "(t)he determination as to whether a State or local requirement is consistent or inconsistent with the Federal statute or Federal regulations is traditionally judicial in nature." (41 FR 38167, September 9, 1976). There are two principal reasons for providing an administrative forum for such a determination. First, an inconsistency ruling provides an alternative to litigation for a 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 a determination as to

whether preemption will be waived (49 U.S.C. 1811(b); 49 CFR 107.215-107.225).

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.

Given the judicial character of the inconsistency ruling proceeding, MTB has incorporated into its case law criteria for determining the existence of conflicts:

(1) Whether compliance with both the (non-Federal) requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the (non-Federal) requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act. (49 CFR 107.209(c)).

The first criterion, commonly called the "dual compliance" test, concerns those non-Federal requirements which are incongruous with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, in a sense, subsumes the first and concerns those non-Federal rules that, regardless of conflict with a Federal requirement, stand as "an obstacle to the accomplishment and execution of the (HMTA) and the regulations issued under the (HMTA)." In determining whether a non-Federal 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 MTB's regulatory program.

In enacting the HMTA, Congress recognized that the Department's efforts in hazardous materials transportation regulation lacked coordination by being divided among the various transportation modes, and lacked completeness because of gaps in the Department's authority, most notably in the area of manufacturing and preparation of packagings used to transport these materials. (S. Rep. No. 1192, 93d Cong., 2d Sess. 1-2, 7-9 (1974).) In order 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), Congress consolidated and expanded the

Department's regulatory and enforcement authority.

There is a longstanding Federal-State relationship in the field of highway transportation safety which recognizes the legitimacy of State action taken to protect persons and property within the State, even where such action impacts upon interstate commerce. However, certain areas of transportation safety demand a strong, predominant Federal role. In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation and, by enactment of the HMTA, gave the Department the authority to promulgate such standards. While the HMTA did not totally preclude State or local action in this area, it is the MTB's opinion that Congress intended, to the extent possible, to make such State or local action unnecessary. The comprehensiveness of the HMR severely restricts the scope of historically permissible State or local activity. The nature, necessity and number of hazardous materials shipments make uniform standards extremely important.

There are certain areas where the need for national uniformity is so crucial and the scope of Federal regulation is so pervasive that it is difficult to envision any situation where State or local regulation would not present an obstacle to the accomplishment and execution of the HMTA and the regulations issued thereunder. Cargo containment systems is one area where the MTB believes this to be true. The HMR contain extensive requirements for the packagings necessary for safe transportation of hazardous materials. MTB has studied specific commodities and determined what type of container must be used to move them, as well as, where appropriate, what types of accessories are required, what types of construction tests must be satisfactorily performed, and what other steps must be taken to ensure the integrity of the container. Uniform standards in this area ensure safe, efficient interstate transportation. State and local governments may not issue requirements which differ from or add to Federal ones with regard to packaging design, construction and equipment for hazardous materials shipments subject to Federal regulations.

Another area where MTB perceives the Federal role to be exclusive is that of hazard warning systems, including the hazard class definitions on which these systems are based. MTB has thoroughly

considered this subject and has issued regulations on marking and labeling of packages and placarding of vehicles in order to communicate the hazards of the materials contained therein. The effectiveness of these systems depends to a large degree on educating the public, especially emergency response personnel. Recognizing the special needs of emergency response personnel, MTB has developed and distributed hundreds of thousands of copies of its "Hazardous Materials Emergency Response Guidebook" (DOT P 5800.2) which provides instructions, based on the hazard warning systems, for initial actions to be taken in the event of an accident involving hazardous materials. Among other efforts to widely disseminate information on its systems, MTB conducts and supports educational programs, sponsors demonstration projects, and distributes informational literature. Additional, different hazard warning requirements imposed by States or localities detract from the Federal systems and may confuse those to whom the Federal systems are meant to impart information.

Despite the dominant role that Congress contemplated for Departmental standards, there are certain aspects of hazardous materials transportation that are not amenable to exclusive nationwide regulation. One example is traffic control. Although the Federal Government can regulate in order to establish certain national standards promoting the safe, smooth flow of highway traffic, maintaining this in the face of short-term disruptions is necessarily a predominantly local responsibility. Another aspect of hazardous materials transportation that is not amenable to effective nationwide regulation is the problem of safety hazards which are peculiar to a local area. To the extent that nationwide regulations do not adequately address an identified safety hazard because of unique local conditions, State or local governments can regulate narrowly for the purpose of eliminating or reducing the hazard. The mere claim of uniqueness, however, is insufficient to insulate a non-Federal requirement from the preemption provisions of the HMTA.

Moreover, even when there is an unquestionably unique local safety hazard, a State or local government may not resolve the problem by effectively exporting it to another jurisdiction. (*Kassel v. Consolidated Freightways*, 450 U.S. 662, 1981.) For example, in a previous inconsistency ruling dealing with a hazardous materials routing rule issued by the City of Boston (IR-3, 46 FR 18918, March 26, 1981), MTB stated that

consistency with the HMTA requires a State or local government to "act through a process that adequately weighs the full consequences of its routing choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules." (46 FR 18922).

Section 112(b) of the HMTA (49 U.S.C. 1811(b)) authorizes the Secretary of Transportation to waive preemption of an inconsistent non-Federal requirement upon finding that such requirement:

(1) Affords an equal or greater level of protection to the public than is afforded by the requirements of (the HMTA) or of regulations issued under (the HMTA) and

(2) Does not unreasonably burden commerce.

These criteria apply to the question of whether Federal preemption of an inconsistent non-Federal rule should be waived. They are irrelevant to the issue of whether a non-Federal rule is inconsistent. Therefore, to the extent that comments submitted as part of an inconsistency proceeding address these criteria, they are, as stated in the notice initiating this proceeding, premature and have not been considered in the development of the nine rulings published herein.

VIII. Federal routing regulations: On January 19, 1981, the Department issued a final rule entitled, "Radioactive Materials; Routing and Driver Training Requirements," commonly known by its docket number, HM-164. In relevant part, HM-164 provided that highway carriers of "large quantity" radioactive materials (such as spent nuclear fuel) are required to use "preferred routes," which are defined as Interstate System highways or alternative highway routes designated by the States that provide an equal or greater level of safety as compared with the Interstate System (49 CFR 177.825(b)).

The term "large quantity" was subsequently changed to "highway route controlled quantity" in a Final Rule published on March 10, 1983 under docket number HM-169. The revision was necessary to ensure the compatibility of the HMR with the latest revised international standards for transport of radioactive materials. While there are some differences between the old values for "large quantity" and the new values for "highway route controlled quantity", the differences are relevant to the following inconsistency rulings only insofar as the challenged non-Federal rules have incorporated by reference the definition of "large quantity" in 49 CFR 173.389 which was deleted by HM-169.

In addition to the routing rules, HM-164 contained an Appendix A to Part 177

of the HMR which set forth the Department's views regarding the preemptive effects of the routing rules. The Appendix provides that the Department generally regards State and local requirements to be inconsistent if they:

- Prohibit the highway transport of large quantity radioactive materials without providing for an alternative highway route for the duration of the prohibition;
- Require additional or special personnel, equipment, or escort;
- Require additional or different shipping paper entries, placards, or other hazard warning devices;
- Require filing route plans or other documents containing information that is specific to individual shipments;
- Require prenotification;
- Require accident or incident reporting other than as immediately necessary for emergency assistance; or
- Unnecessarily delay transportation.

Appendix A is not a regulation which imposes obligations to act. It is the Department's interpretation of the general preemptive effect of its regulation on State and local requirements. It was not intended to replace the two-prong test for determining the inconsistency of an existing State or local rule. Rather, it was intended to advise State and local governments contemplating rulemaking action as to the likelihood of such actions being deemed inconsistent. Therefore, while references to Appendix A are not determinative in these rulings, they serve to illustrate the basis for the Departmental policy set forth therein.

IX. Background and chronology: Nuclear Assurance Corporation (NAC), under a contract with Atomic Energy of Canada, Ltd. (AECL), arranges for the transportation of spent nuclear fuel from Chalk River, Ontario, to a U.S. Department of Energy (DOE) facility at Savannah River, South Carolina. AECL has a contract with DOE for reprocessing nuclear fuel which is part of an overall agreement between the United States and Canada for the assured supply of enriched uranium for Canadian research reactors. In the process of arranging for the transportation of spent fuel, NAC has encountered a variety of State and local transportation regulations which have impacted its routing options.

NAC's description of these regulations and their impacts is as follows:

Until 1979, the spent fuel was shipped to the DOE reprocessing facility by truck entering the U.S. by way of the Ogdensburg (NY) Bridge across the St. Lawrence River. In 1980, the Ogdensburg Bridge and Port Authority adopted rules and regulations which banned

shipments of radioactive materials. Concurrently, St. Lawrence County, at the foot of the bridge, enacted a ban on commercial spent fuel shipments. The bridge authority has since amended its rules to incorporate the provisions of the St. Lawrence County Law.

Subsequently, in 1981 and 1982, NAC requested and received Nuclear Regulatory Commission (NRC) approval for five routes entering the U.S. in Michigan, New York and Vermont. After the Michigan route was approved, rules governing the transportation of radioactive materials were adopted by both the Michigan State Fire Safety Board and Department of Public Health. NAC alleges that the rules established packaging, planning, information and equipment requirements more stringent than those required by Federal agencies for spent fuel shipments. Moreover, NAC asserts that the net effect of the Michigan requirements was to prevent spent fuel shipments from entering Michigan by way of the approved routes.

As a result of the Michigan requirements, a ban by the New York Thruway Authority, and a permit requirement based on substantial insurance coverage imposed by the Thousand Islands Bridge Authority and incorporated in a Jefferson County (NY) Resolution on regulating the transport of radioactive materials, NAC turned to the use of a land crossing in Vermont. This route was used without incident for eight of eleven planned shipments. However, when confidential information regarding transport schedules was released, the Governor of Vermont called upon NAC to interrupt the series of shipments in order to preclude possible civil action. Shortly thereafter, NAC was notified by the Governor that Vermont did not intend to permit further through shipments of spent fuel "until such time as the responsible Federal agencies establish(ed) and enforce(d) a uniform national policy regarding such shipments."

Following the prohibition in Vermont, NAC established a sixth route through New York. This route was intended to accomplish the remaining three shipments in the series. Prior to NAC's use of this route, however, the Governor of New York directed his representative to send a notice advising NAC to suspend spent fuel shipments through New York "pending development of a policy applied uniformly, nationwide, covering transportation of radioactive materials."

As a result of the actions described above, NAC was forced to halt shipments of spent fuel from Canada.

Therefore, in October of 1982, NAC filed separate applications for inconsistency rulings seeking preemption of: (1) the regulations of the Michigan State Fire Safety Board and Department of Public Health affecting radioactive materials transportation; (2) the radioactive materials transportation ban on the New York State Thruway; (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.

NAC did not seek inconsistency rulings with regard to the applicable regulations of the Ogdensburg Bridge and Port Authority, St. Lawrence County, the Thousand Islands Bridge Authority, or Jefferson County. However, the aggregate effect of all these regulations has been to significantly affect the ability of carriers, such as NAC, to transport radioactive materials in accordance with the nationally uniform system of highway routing which the Department sought to achieve by promulgation of regulations under HM-164. Therefore, the Department has elected, in accordance with 49 CFR 107.209(b), to consider the issue of inconsistency with regard to these regulations, notwithstanding that application for a ruling has not been filed under 49 CFR 107.203. Under the same authority, the Department initiated a ninth inconsistency proceeding concerning the radioactive materials transportation regulations which the Vermont Agency of Transportation adopted shortly after initiation of the above-described proceedings.

X. Public comment: A public notice and invitation to comment on Docket Nos. IRA-20 through IRA-27 was published in the *Federal Register* on May 12, 1983 (48 FR 21496). A similar notice inviting comment on Docket No. IRA-30 and reopening the comment period on the other eight dockets was published on August 4, 1983 (48 FR 35550). Comments were received from twenty parties including Federal, State and local government agencies, private industry, public interest groups and private citizens. Where appropriate in IR's 7-15, these comments as well as prior administrative decisions are discussed.

Although the above-described invitations for comment repeatedly directed that comments be restricted to the stated issues, many commenters chose to ignore the question of inconsistency, or to touch upon it only tangentially. Such comments contained lengthy, but irrelevant, discourses on either the need to ensure the free flow of interstate commerce without regard to

the role of State and local governments, or the need to suspend all transportation of radioactive materials until the allegedly inadequate Federal safety standards are revised. Those comments which addressed only the question of interstate commerce ignored the essential question of the proper role of State and local governments in hazardous materials transportation safety which the two-prong test is designed to address. Since the HMTA does not preclude all State and local actions, but only those which are inconsistent, comments which failed to address the issue of State and local government action are necessarily irrelevant and have not been considered in these proceedings. Those comments which took issue with the adequacy of the Federal safety standards ignored the fundamental purpose of these proceedings, that is, the determination of whether certain identified State and local requirements are inconsistent with the Federal regulations now in effect. Concern over the adequacy of existing Federal regulations may be properly expressed through the Department's established procedures for submission of petitions for rulemaking (49 CFR 106.31). Inconsistency ruling proceedings are not the appropriate forum for consideration of such matters. Therefore, comments concerning the adequacy of the Federal regulations now in effect are irrelevant to these proceedings and have not been considered.

Issued in Washington, D.C. on November 20, 1984.

Alan L. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-7—New York State; Letter From Governor's Designated Representative Advising Suspension of Spent Fuel Shipments

Applicant: Nuclear Assurance Corporation (IRA-20).

Non-Federal rule affected: Letter dated October 7, 1982, from the New York Governor's Designated Representative advising Nuclear Assurance Corporation to suspend certain proposed shipments of spent nuclear fuel.

Mode affected: Highway.

Ruling: The letter from the Governor's Designated Representative dated October 7, 1982, constitutes a State requirement. It is not found to be inconsistent with the HMTA or the regulations issued thereunder.

I. Background

By letter dated October 8, 1982, Nuclear Assurance Corporation (NAC) applied for an administrative ruling on the question of whether a letter issued by the Designated Representative of the Governor of New York constitutes a State order which is inconsistent with the Hazardous Materials Transportation Act (HMTA) or the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted pursuant to 49 U.S.C. 1811(a). The complete text of the letter is as follows:

October 7, 1982.

Nuclear Assurance Corporation,
24 Executive Park West, Atlanta, Georgia
30329

You are hereby advised to suspend proposed shipments of spent fuel rods through New York State from Chalk River, Canada via two non-interstate routes in the urban areas of Albany-Schenectady-Troy and Binghamton pending development of a policy applied uniformly, nationwide, covering transportation of radioactive materials.

[Signed]

Donald A. DeVito,

Governor's Designated Representative.

NAC contended that the requirements imposed by the Governor's Designated Representative were inconsistent with the intent and language of both the HMTA and the HMR. Specific reference was made to certain sections of the HMR which deal with highway routing of radioactive materials.

Pursuant to 49 CFR 107.205(a), the Governor's Designated Representative submitted comments on behalf of the State of New York regarding NAC's application for an inconsistency ruling. The State contended that its position was fully consistent with the HMTA and the HMR.

II. Analysis

A. Is the Letter From the Governor's Designated Representative a State Requirement?

Under section 112(a) of the HMTA any State requirement which is inconsistent with the HMTA or the regulations issued thereunder is preempted. Before one can reach the question of inconsistency, it is first necessary to determine whether the alleged conflict involves a State requirement.

The Governor's Designated Representative is the individual who is authorized to receive advance notification of nuclear waste shipments through the State of New York (10 CFR 73.37(f)). In the instant case, NAC provided the Governor's Designated

Representative with advance notification of certain spent fuel shipments. Responding to this advance notification, on October 7, 1982, the Governor's Designated Representative issued the letter quoted above advising NAC to suspend proposed shipments via the specified non-Interstate routes which NAC had intended to use.

By telex of the same date, the Governor of New York informed the U.S. Secretary of Transportation that New York considered the proposed shipments to be in conflict with Federal regulations and that the notification to NAC to suspend the shipments had been made on his authorization.

By letter dated November 9, 1982, the Governor's Designated Representative submitted a response to NAC's application for an inconsistency ruling in which reference was made to "the October 7, 1982 New York State Order suspending proposed shipments of spent fuel rods through New York State from Chalk River, Canada via non-interstate routes." (Emphasis added.)

It is clear from the foregoing that the State intended, by issuance of the October 7 letter, to order NAC to suspend the proposed shipments. It is equally clear, as one commenter pointed out, that NAC's failure to comply with the letter would likely result in sanctions imposed by the State.

In addition to New York's intent that the letter constitute a "State Order", the letter must also be considered such by the provisions of the HMR. In Appendix A to 49 CFR, Part 177, a "routing rule" is defined as "any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo." The letter from the Governor's Designated Representative effectively restricts the movement by public highway of motor vehicles containing a specific hazardous material and was issued because of the hazardous nature of that material. Thus, the letter satisfies the HMR's definition of a State routing rule.

On the basis of the foregoing, I conclude that the letter from the Governor's Designated Representative is a State requirement within the meaning of the HMTA.

B. Is the State Requirement Inconsistent?

(1) *Dual Compliance Test.* The State requirement under consideration in this docket amounts to a ban on the use of two non-Interstate highways for transporting spent nuclear fuel. As described in the Preamble, the HMR

require motor carriers of spent nuclear fuel to operate over "preferred routes", i.e., an Interstate System highway for which an alternative route has not been designated or a State-designated alternate route. (49 CFR 177.825(b).) New York has not designated any alternate preferred routes. Thus, on its face, the State's refusal to allow spent fuel shipments on non-Interstate routes would appear to be consistent with the Federal rule, since the Federal requirement prescribing use of an Interstate highway may be met without conflicting with the State requirement prohibiting use of the non-Interstate highway.

In support of its contention that the State requirement is inconsistent, NAC has offered a number of arguments based on the exceptions to the use of preferred routes contained in the HMR. NAC first cites 49 CFR 177.825(a) which states:

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. . . . This requirement does not apply when—

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway

Relying on § 177.825(a)(1), NAC argues that, because of the New York State Thruway's ban on spent fuel transportation, the proposed route is the only "practicable highway route available, considering operating necessity and safety."

The proposed route involves entering New York State at Champlain via Interstate 87 and proceeding south to Albany. Because I-87 south of Albany is part of the New York State Thruway, which bans spent nuclear fuel shipments, NAC proposed to travel approximately ten miles on a non-Interstate route in order to connect from Interstate 87 to Interstate 88. The proposed route would then follow Interstate 88 west to Binghamton where avoidance of the Thruway would once again necessitate travel over a non-Interstate route for approximately fourteen miles to access Interstate 81 and proceed south into Pennsylvania.

Section 177.825(a) applies to all motor vehicles carrying radioactive material for which placarding is required. Not all placarded shipments contain highway route controlled quantity radioactive materials (as defined in 49 CFR 173.403(l)). Those which do, such as carriers of spent nuclear fuel, are required by § 177.825(b) to operate over preferred routes except in the case of certain allowable deviations. NAC

contends that such a deviation is allowable in the instant case and cites § 177.825(b)(2)(iii):

b. . . .

(2) When a deviation from a preferred route is necessary (including emergency deviation, to the extent time permits), routes shall be selected in accordance with paragraph (a) of this section. A motor vehicle may deviate from a preferred route under any of the following circumstances:

(i)

(ii)

(iii) To the extent necessary to pick up, deliver or transfer a highway route controlled quantity package of radioactive materials.

The threshold question, of course, is whether NAC's proposed deviations are necessary. NAC contends that they are necessary if it is to deliver the shipment from Chalk River, Ontario, to Savannah River, South Carolina, while complying with both the Federal requirement that it operate "over preferred routes selected to reduce time in transit" (49 CFR 177.825(b)) and the State requirement that it not operate over the New York State Thruway. The State contends that the deviation is not necessary because another route exists which is entirely Interstate. The referenced route involves entering Vermont via Interstate 91 and proceeding south through Vermont, Massachusetts and Connecticut to access Interstate 84 in New York. (NAC had used this route in the past but ceased use upon receipt of a letter from the Governor of Vermont advising suspension of the shipments. That letter is the subject of Inconsistency Ruling IR-9 published herewith.)

Both arguments are flawed by reliance on the same assumption, to wit, that the New York State Thruway ban on spent fuel shipments is a valid restriction. As demonstrated in Inconsistency Ruling IR-10 published herewith, the restriction is inconsistent with the HMTA and, therefore, preempted. Since the Thruway ban is preempted, there is no necessity to redirect spent fuel shipments either onto non-Interstate routes in New York or onto Interstate routes in other states. And since the deviation is not necessary, NAC may not select a route in accordance with § 177.825(a)(1).

Finally, NAC cites section III of Appendix A to Part 177 which states:

A State routing rule which applies to large quantity radioactive materials is inconsistent with Part 177 if—

1. It prohibits transportation of large quantity radioactive materials by highway between any two points without providing an alternate route for the duration of the prohibition;

The State requirement under consideration does not prohibit the transportation of spent fuel between two points. It merely underscores the Federal rule that such transportation shall take place on preferred routes. There are a number of preferred routes in the State of New York. As a practical matter, these routes were closed to NAC by a variety of State and local restrictions and NAC properly chose to comply with these restrictions pending determination of their inconsistency. The *de facto* closure of the preferred routes, however, is not resolved by abandoning the Federal rule requiring their use, but by determining the validity of the State/local restrictions involved.

On the basis of the foregoing, I find that no incongruity exists between the subject State order and the Federal rules on highway routing of radioactive materials. Not only is it possible to comply with both rules, but the State rule, is, in effect, an order to comply with the Federal rule. I, therefore, find that, under the dual compliance test, no inconsistency exists between the State and Federal requirements.

(2) *Obstacle Test.* In view of my previous finding that the State rule under consideration in this proceeding amounts to a requirement that the Federal rule be complied with, I find that it presents no impediment to the accomplishment and execution of the HMTA or the regulations issued thereunder.

III. Ruling

For the foregoing reasons, I find that the letter of October 7, 1982, from the Designated Representative of the Governor of New York to NAC is a State requirement which is not inconsistent with the HMTA or the regulations issued thereunder.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-8—State of Michigan; Radioactive Materials Transportation Regulations of the State Fire Safety Board and the Department of Public Health

Applicant: Nuclear Assurance Corporation (IRA-21).

Non-Federal rules affected: Rules 1-10 (Sections R29.551-R29.560) of the Rules of the Michigan State Fire Safety Board; and Rules 1-10 (Sections R325.5801-

R325.5810) of the Rules of the Michigan Department of Public Health.

Modes affected: Highway, Rail, Water.

Ruling: Rules 3 through 6 and sections of Rules 1, 7 and 10 of the radioactive materials transportation regulations of both the Michigan State Fire Safety Board and the Michigan Department of Public Health are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted in accordance with 49 U.S.C. 1811(a).

I. Background

By letter dated October 13, 1982, Nuclear Assurance Corporation (NAC) applied for an administrative ruling on the question of whether the radioactive materials transportation regulations of the State of Michigan are inconsistent with and thus preempted by the HMTA or the HMR. The State rules are codified in two parallel sets of ten enumerated rules at §§ R29.551-R29.560 of the State Fire Safety Board (SFSB) Rules and §§ R325.5801-R325.5810 of the Department of Public Health (DPH) Rules.

NAC contended that the SFSB and DPH rules are inconsistent with the HMTA and the HMR issued thereunder. The SFSB and DPH, in a joint response commenting on NAC's application, contended that their rules were reasonable and necessary to ensure compliance with Federal and State safety regulations and to ensure adequate and timely emergency response.

II. Analysis

This proceeding concerns the radioactive materials transportation regulations of the SFSB and DPH. They were published in their entirety as Appendices A and B respectively to the public notice and invitation to comment which appeared in the May 12, 1983, *Federal Register* (48 FR 21503-21505). The rules are considered in consecutive order below.

Rule 1 (SFSB § R 29.551; DPH § R 325.5801)

Rule 1 sets forth a number of definitions, none of which were challenged in NAC's application. However, in view of MTB's most recent inconsistency rulings regarding the exclusive Federal role in hazard class definition (IR-5, IR-6), I consider it necessary to address the possible inconsistency of one of the given definitions.

SFSB Rule 1(d) (DPH Rule 1(e)) defines "radioactive material" as

"irradiated reactor fuel and radioactive wastes that are large quantity radioactive materials as defined in 49 CFR 173.389(b)."

At the time Rule 1 was adopted, § 173.389(b) of the HMR defined "radioactive material" as "any material or combination of materials which spontaneously emit ionizing radiation", but excluding "material in which the estimated specific activity is not greater than 0.002 microcuries per gram of material, and in which the radioactivity is essentially uniformly distributed".

By adoption of a Final Rule which became effective July 1, 1983 (Docket No. HM-169; 48 FR 10218), MTB deleted all of § 173.389 and added a new Subpart I to Part 173 entitled "Radioactive Materials". As defined in § 173.403(y) "radioactive material" means "any material having a specific activity greater than 0.002 microcuries per gram".

Clearly, the SFSB/DPH definition of "radioactive material" differ significantly from the Federal definition now in effect.

In IR-6, MTB gave notice that it considered the Federal role in the definition of hazard classes to be exclusive:

The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing State and local systems of hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulation. This is precisely the situation which Congress sought to preclude when it enacted the preemption provision of the HMTA.

On the basis of the precedent established by IR-5 and IR-6, I find the definition of "radioactive material" in Rule 1 to be inconsistent. Throughout the remainder of this inconsistency ruling, the Michigan rules are interpreted as if the term "highway route controlled quantity radioactive material" had been substituted for the term "radioactive material".

Rule 2 (SFSB § R 29.552; DPH § 325.5802)

Although their language differs, the SFSB and DPH versions of Rule 2 have essentially the same meaning. In both cases, the rule enables the agency to grant exemptions from the requirements of the rules. NAC did not challenge this rule and, since it imposes no obligation to act, the issue of inconsistency does not arise.

Rule 3 (SFSB § R 29.553; DPH § R 325.5803)

Rule 3 requires that application for approval to transport highway route

controlled quantity radioactive material in Michigan be submitted not less than 15 days before the date of planned shipment. The application must be submitted in duplicate through the Operations Division of the State Police for immediate forwarding to the SFSB and DPH. Compliance with Rule 3 is a criterion for transportation approval under Rule 5. Because the application requirements are inextricably linked with the approval process, Rule 3 is considered together with Rule 5 below.

Rule 4 (SFSB § R 29.554; DPH § R 325.5804)

Rule 4 sets forth communications equipment requirements for shipments of highway route controlled quantity radioactive material being transported by highway, railway and waterway. Communications capability is an element of physical security, and Appendix A to 49 CFR, Part 177, sets forth as Departmental policy the opinion that a State transportation rule is inconsistent with Part 177 if it conflicts with the physical security of the Nuclear Regulatory Commission (NRC) at 10 CFR, PART 73, or equivalent requirements approved by MTB. This is based on the requirement in 49 CFR 173.22 that shippers of irradiated reactor fuel provide physical protection in compliance with a plan established under the NRC requirements or equivalent requirements approved by MTB. The requirements for each mode are addressed separately below.

Highway Shipments—Rule 4 forbids the highway transportation of radioactive materials unless the transporting vehicle or an escort vehicle "is equipped with continuous 2-way communications by radiotelephone or other means acceptable to the state fire marshal with land-based stations familiar with, and capable of assisting in" implementing emergency plans. The NRC regulations require shippers (whether by highway, rail or water) to establish a single, continuously staffed communications center which shipment escorts are to call at least every two hours. In addition to this general NRC requirement, highway shippers must ensure that:

Escorts have the capability of communicating with the communications center, local law enforcement agencies, and one another, through the use of:

(i) A citizens band (CB) radio available in the transport vehicle and in each escort vehicle;

(ii) A radiotelephone or other NCR-approved equivalent means of two-way voice communications available in the transport vehicle or in an escort vehicle committed to travel the entire route; and

(iii) Citizens band (CB) radio and normal local law enforcement agency radio communications in any local law enforcement agency mobile units used for escort purposes. (10 CFR 73.3(c)(3).)

Since the HMR require highway transporters to comply with the NRC requirements or their equivalent approved by MTB, these are the standards with which the SFSB/DPH requirements will be compared for consistency.

With regard to the "dual compliance" test, I find that compliance with the Federal rule would place a shipper in violation of the State rule. The communications equipment required by the Federal rules is incapable of ensuring the "continuous two-way communications" required by the State rule because of the existence of radiotelephone dead zones. At least one commenter suggested that "continuous two-way communications" may not, in fact, be technologically possible.

Even assuming that continuous communication could be achieved through the use of special equipment, the Michigan rule fails the "obstacle" test. MTB addressed this issue directly in the section-by-section analysis of HM-164:

The existence of State or local requirements for special equipment may effectively dictate the continuous use of the equipment in all jurisdictions. Varying requirements between jurisdictions pose additional problems that may necessitate equipment changes and delays in route, or avoidance of an otherwise desirable route. (46 FR 5314.)

Were transporters required to change the means and/or frequency of communication each time they entered a different jurisdiction, the overall reliability of the communication system would be seriously jeopardized. Thus, shipments would be subject, not only to the minor delays inherent in system changeover, but also to potentially significant delays necessary to restore communications capability. It is axiomatic that equipment changes pose a greater risk of system breakdown than does maintenance of a single system. And an increased risk of communications breakdown constitutes a serious degradation of physical protection safeguards. The SFSB/DPH rule, therefore, impedes the Congressional purposes of increased safety and regulatory uniformity which underlay enactment of the HMTA.

Rail Shipments—For rail shipments of radioactive materials, Rule 4 requires the transporting vehicle to be "equipped with communications equipment acceptable to the State fire marshal."

The NRC regulations for rail shipments require that:

Escorts have the capability of communicating with the communications center and local law enforcement agencies through the use of a radiotelephone, or other NRC-approved equivalent means of two-way voice communications, which shall be available on the train. (10 CFR 73.37(d)(3).)

Since Rule 4 provides no indication of the minimum level of communications capability which would be acceptable to the State fire marshal, it is not possible to determine whether compliance is possible with both the Federal and State rule. I am, therefore, unable to make a finding under the "dual compliance" test.

Under the "obstacle" test, however, it is possible to reach a definite conclusion. As shown above, State rules requiring special equipment pose an obstacle to the two major Congressional purposes underlying the HMTA. Even greater, then, is the obstacle posed by a State rule which sets no specific requirements but leaves the matter wholly to the discretion of a State official. For this reason and those stated in the discussion of highway shipments *supra*, the Rule 4 equipment requirements for rail shipments constitute an obstacle to the accomplishment and execution of the HMTA.

Water Shipments—Rule 4 sets the same standards for water as for rail shipments, i.e. that the vessel be "equipped with communications equipment acceptable to the State fire marshal." The NRC regulations for shipments by vessel require that:

Escorts have the capability of communicating with the communications center and local law enforcement agencies through the use of a radiotelephone, or other NRC-approved equivalent means of two-way voice communications. (10 CFR 73.37(e)(3).)

As was discussed in connection with rail shipments *supra*, a State rule which grants an official discretionary authority to set equipment requirements for carriers engaged in interstate commerce is inconsistent with the dual objectives Congress sought to achieve by enacting the HMTA.

Rule 5 (SFSB § 29.555; DPH § R 325.5805)

Rule 5 sets forth the criteria for SFSB and DPH approval of applications to transport highway route controlled quantity radioactive material in Michigan. Since the rule prohibits transportation of radioactive materials without the written approval of both the DPH and the State fire marshal, it constitutes a routing rule in the form of a permit requirement.

Section II of Appendix A to 49 CFR, Part 177, defines "routing rule" as follows:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects . . .

The SFSB/DPH rules restrict the movement of radioactive material by public highway by denying access to those shipments which have not obtained written approval. Moreover, this restriction has the effect (as in the case of NAC) of redirecting such shipments to other jurisdictions. And the rules apply because of the nature of the cargo. For these reasons, the SFSB/DPH rules constitute a State routing rule within the meaning of the HMR.

Under HM-164, the Federal rule requires shipments of highway route controlled quantity radioactive material to operate over "preferred routes selected to reduce time in transit, except that an Interstate System bypass or beltway around a city shall be used when available." The term "preferred route" is defined as an Interstate System highway or an alternate route selected by a State routing agency in accordance with DOT guidelines. Because the State of Michigan has not applied these guidelines to designate any alternate preferred routes, the preferred routes in Michigan are the Interstate System highways.

The State and Federal rules having been identified, the question at issue is whether the State rule is consistent.

(1) *Dual Compliance Test.* A carrier which complied fully with the SFSB/DPH rules, thereby obtaining the necessary written approvals, could transport highway route controlled quantity radioactive material via preferred routes in Michigan, and thereby be in compliance with the Federal requirement as well. Consequently, application of the "dual compliance" test reveals that it is physically possible for a carrier of spent nuclear fuel to comply with both the Federal and the SFSB/DPH rules. Therefore, those rules cannot be deemed inconsistent on the basis of that test.

(2) *Obstacle Test.* Under the "obstacle" test, however, I reach a different conclusion.

MTB first addressed the issue of State transportation permit requirements in an inconsistency ruling dealing with a Rhode Island regulation governing the transportation of liquefied energy gases.

(IR-2, 44 FR 75566, Dec. 20, 1979.) In that ruling, it was stated that:

A permit may serve several legitimate State police power purposes, and the bare requirement . . . that a permit be applied for and obtained is not inconsistent with federal requirements. However, a permit itself is inextricably tied to what is required in order to get it. Therefore, the permit requirement . . . must be considered together with the application requirements . . . (44 FR at 75570.1.)

The same reasoning applies here.

Rule 5 sets forth several criteria which must be satisfied before approval is granted to transport highway route controlled quantity radioactive material in Michigan. Each is discussed separately below.

Rule 5(a) requires fulfillment of the application requirements of Rule 3. For discussion purposes, the application requirements can be broken down into three categories: information, documentation and certification.

Information—Rule 3 requires applicants to submit the following information as part of the application to transport highway route controlled quantity radioactive material in Michigan:

(a) The proposed route of travel, specifying all of the following:

- (i) Each road or rail to be used by route number, name, or other identification.
- (ii) Each major bridge to be traversed.
- (iii) Each waterway to be traversed for transport by vessel.

(iv) The reasons for the choice of the proposed route of travel from the site of origin to the receiver of the radioactive material, including the designation of alternative routes and the reasons for the selection of the proposed route and the rejection of alternative routes.

(b) The proposed means of conveyance.

(c) The names, addresses, and emergency telephone numbers of the shipper, carrier, and receiver of the radioactive material, including the individual to contact for current shipment information.

(d) A description of the shipment as specified in the provisions of 49 C.F.R. § 172.203(d).

(e) The estimated date and time of all of the following, as applicable:

- (i) The departure of the radioactive material from the site of origin.
- (ii) The arrival of the radioactive material at the Michigan boundary or at its final destination if the destination is within Michigan.

(iii) The departure of the radioactive material from Michigan.

With the exception of Rules 3 (a)(iv), (b) and (e)(iii), all of the above information is required to be provided in advance to the Commanding Officer of the Michigan State Police Operations Division, who is the Governor's Designated Representative for receipt of advance notification of nuclear waste shipments.

The requirement is set forth as part of the NRC physical protection regulations (10 CFR 73.37(f)). The NRC regulations were not promulgated under the HMTA. However, § 173.22(c) of the HMR requires shippers of highway route controlled quantity radioactive materials to comply with a physical protection plan established under the requirements of the NRC or equivalents approved by MTB. This section of the HMR was adopted as part of HM-164. In the preamble to HM-164, MTB took administrative notice of the fact that NRC was in the process of establishing prenotification requirements and stated:

Unless DOT reaches and acts on a conclusion that prenotification rules are necessary, beyond those Congress has directed NRC to impose on certain radioactive wastes, independent State and local prenotification requirements are not consistent with Part 177. (46 FR 5314.5.)

The absence to date of prenotification requirements in the HMR cannot be construed as an abdication of the field, because MTB has taken several administrative actions regarding prenotification. In the process of promulgating HM-164, MTB received numerous comments urging adoption of a national prenotification regulation. For the reasons stated in the preamble to that rulemaking, MTB declined to do so. That preamble, which discussed the Congressional directive to NRC to establish prenotification requirements, also described MTB's sponsorship of a study by the Puget Sound Council of Governments (PSCOG) to examine the efficacy of prenotification for certain materials. The PSCOG report has since been completed (*Analysis of Prenotification: Hazardous Materials Study, Final Report*, May 4, 1981) and was relied on in an inconsistency ruling (IR-6, 48 FR 760, January 6, 1983) which found a Covington, Kentucky, prenotification ordinance to be inconsistent. MTB has also sponsored a number of emergency response demonstration projects involving State, city and regional governments. Most recently, MTB awarded a contract to Battelle Northwest Laboratories to perform a comprehensive evaluation of prenotification. In view of the above, MTB has clearly demonstrated its intent to occupy the field of prenotification, to the exclusion of requirements adopted by State and local governments.

In its discussion of Rhode Island's permit application requirement in IR-2, MTB noted that, to the extent the State required the same information as appeared on the DOT shipping paper, the State rule was redundant and "(r)edundancy does not further

transportation safety and represents the type of multiplicity that the HMTA intended to make unnecessary." (44 FR 75571.) Of the above-described information requirements of the SFSB/DPH rules, only one (Rule 3(d), proper shipping description) is required to be shown on the DOT shipping papers. All of the items except (a)(iv), (b) and (c)(iii) are required by the NRC prenotification regulations which MTB has recognized as currently providing an adequate standard of national applicability. If shippers could satisfy both the State and the Federal requirements by the same action, then the issue of redundancy would not arise, for the result would be the same as if Michigan had adopted the Federal rules. That is not the case, for the SFSB/DPH rules require additional, separate submissions. To the extent that they require multiple submissions of information which is required by DOT's shipping paper regulations or which other Federal regulations already require to be submitted to the State, the SFSB/DPH rules are redundant, do not further transportation safety and represent the type of multiplicity which Congress sought to preclude by enacting the HMTA. To the extent that they require transporters to provide safeguards information to officials other than the Governor's designated representative, the SFSB/DPH rules create the potential for conflict with the Federal rules on physical security.

Different issues are raised by the three items of information required by the SFSB/DPH rules but not by the Federal rules. Rule 3(a)(iv) calls for a description and justification of the proposed and alternate routes from origin to destination, regardless of what proportion of the route involves Michigan. The logical inference drawn from this requirement is that the State seeks to second-guess carriers' route selections. The standards to be used in selecting highway routes for transportation of radioactive materials are set forth at 49 CFR 177.825. When promulgating those rules, MTB recognized that States were in a better position to know local road conditions. Therefore, HM-164 established a process by which States could apply this knowledge to designate alternate routes which provide an equal or greater level of safety than Interstate System highways. Michigan has yet to avail itself of this process. If there are valid safety reasons why certain preferred routes should not be used in Michigan, then it is incumbent on Michigan to designate safer alternative routes by using the process DOT has designed for this purpose. State approval of route

selections on a shipment-by-shipment basis completely undercuts the primary purpose of national uniformity underlying adoption of HM-164. Rule 3(a)(iv), therefore, fails the "obstacle" test and is, accordingly, inconsistent.

Rule 3(b) requires submission of the proposed means of conveyance. This is implicit in the route selection. (A shipment which will proceed over identified waterways is obviously not being conveyed by train.) Since both the State and the Federal rules call for the State to receive a complete route description, this item is redundant, serves no safety purpose and merely contributes to the type of multiplicity which the HMTA was meant to eliminate. It therefore constitutes an obstacle to the Congressional objective of regulatory uniformity underlying the HMTA.

Rule 3(e)(iii) requires submission of the date and time of the shipment's departure from Michigan. While this is not required by the DOT shipping paper requirements or the NRC prenotification requirements, it is like Rule 3(b) in that it is easily determined from the information which is required to be submitted. With knowledge of the time of entry and the routes and distances to be covered, the time of departure is easily calculated. And, in the event of a schedule change of more than six hours, the NRC regulations require that the State receive a revised notification. Therefore, like Rule 3(b), this item is redundant, serves no safety purpose and merely contributes to the type of multiplicity which the HMTA was meant to eliminate. Accordingly, it constitutes an obstacle to the Congressional objective of regulatory uniformity underlying the HMTA.

Documentation.—Rule 3 requires submission of the following documentation as part of the application for approval to transport highway route controlled quantity radioactive material in Michigan:

(g) Copies of any required NRC approval of the proposed route of travel and any other NRC licensing action specific to the shipment, such as an import license or a license to transport.

(h) A copy of the emergency plan for the carrier which describes procedures to be taken in an emergency to eliminate or minimize the radiation exposure of the public. The plan shall include a provision for notification of the state police operations division upon implementation of the plan.

(i) For transport over a major bridge or on a vessel, provisions to submit the proposed recovery plan to the department for approval before beginning recovery efforts.

Rule 3(g) calls for the submission of copies of all NRC approvals and

licenses related to the shipment for which transportation approval is being sought. Presumably, the purpose of this requirement is to enable the State to ensure that NRC regulations have been complied with. This is a valid concern. However, the chosen manner of resolving this concern raises the possibility of a new kind of risk. Shipment—specific information of the sort included in route plans and licenses is required to be protected against unauthorized disclosure. The NRC regulations (10 CFR 73.21) set forth specific requirements for the protection of safeguards information. The HMR impose physical security requirements in § 177.825(e). By requiring hard copies of these documents to be distributed to two State agencies, the Michigan rules greatly increase the possibility that the information contained therein will be disclosed to an extent sufficient to compromise the physical security of the shipment. The assurances sought by the State could be obtained without the risk of disclosure through the simple expedient of contacting the NRC upon receipt of advance notification of a shipment. The requirement contained in Rule 3(g) adds to the existing paperwork burden on radioactive materials transportation, subjects applicants to potential liability for violation of NRC and/or DOT regulations on protection of safeguards information, and increases the potential for outside interference with shipments. Since the primary objective of the HMTA is to protect the Nation against the risks inherent in hazardous materials transportation, a State rule which increases those risk necessarily poses an obstacle to the accomplishment and execution of the HMTA.

Rule 3(h) calls for applicants to develop and submit a copy of a plan describing procedures to be followed in the event of an emergency to protect the public from radiation exposure. Response to transportation emergencies is necessarily site-specific:

Although the Federal Government can regulate in order to avert situations where emergency response is necessary, and can aid in local and State planning and preparation, when an accident does occur, response is, of necessity, a local responsibility. (IR-2, 44 FR 75568.)

In HM-164, MTB addressed the Federal responsibility for reducing the likelihood of emergencies by requiring not only that such 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 on: (1)

the HMR concerning radioactive materials; (2) the properties and hazards of radioactive materials being transported; and (3) procedures to be followed in case of an accident or other emergency. (49 CFR 177.825(d).) Drivers are also required to carry a route plan which includes the telephone numbers to access emergency assistance in each State to be entered. (49 CFR 177.825(c).)

It is not clear whether the plan required by Rule 3(h) is meant to describe standard procedures to be taken in the event of an emergency or whether it is meant to be tailored to the specific characteristics of the points to be traversed in Michigan. If the former is intended, then applicants can comply merely by submitting a copy of the materials used in the drivers' training course. Such materials are readily available to the State and their submission as part of an application for transportation approval would contribute little to State/local emergency preparedness. If the plan is meant to be tailored to the specific characteristics of the route in Michigan, then the effect of the requirement is to shift the burden of emergency preparedness planning from State and local governments to the carriers. Emergency preparedness is necessarily a continuing process which is predominantly concerned with the site-specific characteristics of a given locale. It is an innately governmental responsibility. Therefore, if Rule 3(h) requires only the submission of standard guidance documents, it is an unnecessary paperwork burden which Michigan has failed to demonstrate addresses any local safety problem requiring its imposition. In addition, State and local emergency preparedness efforts may be adversely affected by reliance on the false assumptions that such documents are sufficient guidance in the event of an emergency. If, on the other hand, the requirement is meant to provide Michigan with a blueprint covering every possible contingency that could arise in the State, then it imposes an unrealistic burden on carriers. Such planning requires indepth knowledge of available emergency services equipment and personnel, demographics, geography and other site-specific factors. No carrier-developed plan could be an adequate substitute for an integrated, on-going State/local system of emergency response preparedness. It is for this reason that the HMR require transporters of highway route controlled quantity radioactive material to comply with a physical protection plan, in accordance with NRC standards or MTB-approved equivalents, which

requires them to make arrangements with local law enforcement agencies along their routes for response to an emergency or a call for assistance.

Finally, were Michigan's requirement found to be consistent with the HMTA, then any State could impose additional planning requirements on transportation of highway route controlled quantity radioactive material. The resulting multiplicity of varying and possible conflicting State planning requirements would completely undermine the radioactive materials routing requirements of the HMR. The provisions of HM-164 retained for the States a defined role in the designation of preferred routes. That role does not include the prohibition of interstate transportation pending approval of State-required emergency plans.

For the foregoing reasons, I find that Rule 3(h) constitutes an obstacle to the accomplishment and execution of the HMTA and is therefore inconsistent therewith.

Rule 3(i) sets forth additional provisions to be included in the emergency plan required by Rule 3(h) when transportation is intended to take place over a major bridge or by vessel. Since the requirement of a plan has been found to be inconsistent, additional provisions to that plan need not be considered, because each component thereof would be inconsistent.

Certifications—Rule 3 requires submission of the following certifications as part of the application for approval to transport highway route controlled quantity radioactive material in Michigan:

(f) Attestation to the fact that the vehicle has been inspected within a period of 6 months prior to the date of the proposed shipment for compliance with the provisions of 49 C.F.R. § 396 or Act No. 300 of the Public Acts of 1949, as amended, being § 257.1 et seq. of the Michigan Compiled Laws, by a law enforcement agency acceptable to the state fire marshal, and that evidence of such inspection shall be carried in the vehicle.

(j) A certification that the shipment will be in compliance with these rules and all applicable state and federal statutes, rules, and regulations governing the shipment.

Rule 3(f) requires an applicant to attest that the transport vehicle has been inspected in accordance with Federal or State law. Safety inspection of vehicles is a legitimate State activity and this proceeding will not address the specific requirements of Michigan's inspection laws. The narrower question involved herein is whether the requirement for a written attestation to the fact of compliance is a legitimate precondition to transportation approval.

Under the cited Federal regulations on vehicle inspection (49 CFR, Part 396), motor carriers are required to maintain copies of each vehicle inspection report and to provide a copy to be carried on the power unit of the vehicle. Within the HMR, § 177.804 requires compliance with Part 396. Since Michigan apparently considers this record-keeping requirement adequate for transporters of all other hazardous materials, the basis for requiring additional attestation by transporters of highway route controlled quantity radioactive material is not clear. It thus appears that the requirement merely imposes another redundant paperwork burden which serves no apparent safety purpose.

Rule 3(j) requires applicants for transportation approval to certify that the shipment will be in compliance with all applicable Federal and State rules. The HMR requires shippers to make such a certification on the shipping papers which accompany each shipment of hazardous materials. (49 CFR 172.204.) As was stated in IR-2:

No matter what the form, any State or local requirement that asks for an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper would be inconsistent with the requirements contained in the Hazardous Materials Regulations. (44 FR 75571.)

Accordingly, Rule 3(j) is inconsistent with the HMR.

The application requirements of Rule 3 (parts a-j) have a cumulative effect which is greater than the "obstacle" presented by any one part individually. That effect is the redirection of radioactive materials shipments into other jurisdictions by transporters seeking to avoid the administrative burden and planning delays inherent in complying with Michigan's application procedure. Like the New York State Thruway ban which is the subject of IR-10, the Michigan application process results in the diversion of such shipments into other jurisdictions, thereby increasing total distance and time in transit. In other words, overall exposure to the risks of radioactive materials transportation is increased and exported. For all of the foregoing reasons, the application procedures of Rule 3 which constitute the approval criteria of Rule 5(a) are an obstacle to the accomplishment and execution of the HMTA's dual purposes of increased transportation safety and national uniformity in safety regulation.

Rule 5(b) of the SFSB rules requires that the application submitted under Rule 3 be approved in writing by the DPH. Since the application has been found to be inconsistent with the

HMTA, written approval of the application is also inconsistent. This issue is addressed in more detail under Rule 6 below.

Rule 5(c) of the SFSB rules (DPH Rule 5(b)) requires certification of compliance with all applicable Federal and State rules. This repeats the application requirement at Rule 3(j). Whether set forth as an approval criterion or an application requirement, this certification is a redundancy, as it requires applicants to provide the same certification as is required to appear on the DOT shipping paper, and is accordingly inconsistent.

Rule 5(d) of the SFSB rules (DPH Rule 5(c)) establishes as a criterion for transportation approval that the emergency plan required to be submitted under Rule 3(h) be acceptable to the State fire marshal and DPH respectively. As was demonstrated in the discussion of Rule 3(h) *supra*, that requirement constitutes an obstacle to the accomplishment and execution of the HMTA. Whether set forth as an approval criterion or an application requirement, the planning requirement described in Rule 3(h) is inconsistent.

Rule 5(e) of the SFSB (DPH Rule 5(d)) requires that:

A certificate of compliance for the container has been issued by the NRC, and the container has been tested and approved for hypothetical accident conditions pursuant to the provisions of 10 CFR § 71.36.

If the purpose of this requirement is to ensure that Federal standards have been met, then it reflects a basic misunderstanding of the Federal regulations on transportation containers for highway route controlled quantity radioactive material. The NRC issues certificates of compliance, not for containers, but for container designs. Moreover, the cited NRC regulations at 10 CFR 71.36 do not require that each container be tested and approved for hypothetical accident conditions. Rather, the rules require that each container be constructed in accordance with a design approved by the NRC as meeting the necessary design criteria including, *inter alia*, the ability to meet the standards for hypothetical accident conditions. The HMR incorporate the NRC requirements in § 173.416. The exclusive Federal role in hazardous materials containment systems has long been established. In IR-2, MTB stated:

The Hazardous Materials Regulations contain extensive requirements for the packaging necessary for the safe transportation of hazardous materials. The MTB has looked at specific commodities and determined what type of containers must be used to move them, including, where appropriate, what types of accessories are

required, what types of construction tests must be satisfactorily performed, etc. Uniform standards in this area insure safe, efficient interstate transportation. State and local governments may not issue requirements that differ from or add to Federal ones with regard to packaging design, construction and equipment for hazardous materials shipments subject to Federal regulations. (44 FR 75568.)

The need to ensure the integrity of spent fuel shipping containers is of such paramount importance that it is difficult to conceive any situation where regulation by Michigan, or by any other State or local government, would not pose an obstacle to the accomplishment and execution of the HMTA. Because it imposes additional packaging standards, SFSB Rule 5(e) (DPH Rule 5(d)) is inconsistent.

Rules 5(f) and (g) of the SFSB (DPH Rules 5(e) and (f)) require containers intended for transport via a major bridge or waterway to be subjected to physical testing under standards which exceed the NRC's standards for hypothetical accident conditions. Unlike Rule 5(e) which relied on the NRC standards in its requirement of additional testing, these rules establish independent test standards to be applied only to those containers to be used over major bridges or on waterways in Michigan. The joint SFSB/DPH comment on this proceeding offered the following justification of the additional testing requirements:

Michigan is unique. Although normal transport conditions and some accident scenarios are adequately addressed in the Federal packaging tests and regulations for radioactive material, the tests and regulations do not address serious accidents which may occur on "major bridges" as designated by the Michigan rules. The Federal packaging rules are inadequate to deal with such extreme conditions, and such accidents were not considered when the packaging regulations were developed. (SFSB/DPH letter dated Nov. 29, 1982, pp 2-3.)

In other words, Michigan apparently has taken the position that, when a State finds Federal safety regulations inadequate to meet local conditions, it may, on its own determination, regulate to overcome the perceived Federal inadequacy. This completely undermines the regulatory system mandated by the HMTA. Congress recognized that rules of national applicability would not always meet unique local conditions. It was for this reason that the HMTA did not preempt all State or local rules, but only those that were inconsistent. Furthermore, Congress recognized that there could be valid safety reasons for permitting certain inconsistent State or local rules to coexist with their Federal

counterparts, and authorized the Department of Transportation to waive preemption in certain circumstances.

In implementing its regulatory authority under the HMTA, MTB has sought to ensure the flexibility necessary to respond to changing conditions. Recognizing that practical experience in applying the regulations can point out the need for change, MTB adopted procedures in 49 CFR, Part 106, whereby "(a)ny interested person may petition the Director to establish, amend, or repeal a regulation." (49 CFR 106.31.) With specific regard to the establishment of highway routes for radioactive materials, MTB had the authority to require the use of the Interstate System without exception. However, the recognition of the wide variety of local conditions and the States' experience in responding to these conditions, MTB adopted a rule which enabled States to apply safety guidelines to their unique local conditions, and, if justified, designate alternative routes.

In view of the foregoing, Michigan's defense of its additional container test requirements must be rejected. If, as alleged, the Federal regulations are inadequate to deal with the "extreme conditions" found in Michigan, the State has recourse to three (possibly concurrent) alternatives to the imposition of independent requirements:

1. Concede inconsistency and apply for a waiver of preemption pursuant to 49 CFR 107.215.
2. File a petition for rulemaking pursuant to 49 CFR 106.31.
3. Designate alternate preferred routes pursuant to 49 CFR 177.825.

Nothing in Michigan's response justifies departure from MTB's established position that the regulation of cargo containment systems is an exclusive Federal function.

On the basis of the foregoing, I find that the application requirements and approval criteria of Rules 3 and 5 are an obstacle to the accomplishment and execution of the HMTA and the HMR are, therefore, inconsistent.

Rule 6 (SFSB § R29.556; DPH § R325.5806)

Rule 6 states that approval shall be granted in writing before shipment of the radioactive materials and shall include any conditions or limitations as determined necessary by the State fire marshal and DPH. Previously in this ruling it was determined that both the application requirements and the approval criteria set forth in the SFSB and DPH rules are inconsistent with the HMTA and, therefore, preempted. Those

sections dealt with the form of the State approval process, but did not address the question of whether the approval process itself, regardless of form, may be inconsistent with the HMTA. That issue is addressed now.

As was noted in IR-2, a permit requirement may serve several legitimate State police power purposes. For example, a State may 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. Such a requirement represents a legitimate exercise of the State's responsibility to maintain the integrity of the roadbed and to prevent disruption of the flow of traffic. Such requirements apply equally to all vehicles, regardless of the nature of the cargo being transported.

In the instant case, Michigan has imposed a requirement to obtain State approval in writing (in effect, a permit) which applies only to those parties wishing to transport highway route controlled quantity radioactive material in Michigan. This requirement is based on a presumption that Michigan has the authority to control, and ultimately, to prohibit this form of interstate commerce.

Michigan asserts that this authority stems from the State's public safety power; that radioactive materials transportation poses higher risks in Michigan than elsewhere; and that the State has a duty to protect the public from those risks. This argument fails to recognize that, in enacting the HMTA, Congress granted to the Secretary of Transportation, and not to the States, the authority to designate as hazardous those materials whose transportation poses an unreasonable risk and to issue regulations to protect the Nation adequately against those risks. Generally, in the absence of Departmental involvement in a safety issue, States and, to the extent authorized by State law, local governments may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the State role is much more circumscribed. The HMR address all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing degree of risk. Under the authority of the HMTA, Federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent State or local action. The extent to which State and local government may regulate the interstate transportation of radioactive materials

is limited to: (1) Traffic control or emergency restrictions which affect all transportation without regard to cargo; (2) designation of alternate preferred routes in accordance with 49 CFR 177.825; (3) adoption of Federal regulations or consistent State/local regulations; and (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 CFR 107.221. Thus, in the absence of an express waiver of preemption, no authority exists, for a State of local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.

For all of the foregoing reasons, I find Michigan's requirement of written approval to transport highway route controlled quantity radioactive material in Michigan to be inconsistent with the HMTA and the regulations issued thereunder.

Rule 7 (SFSB § R29.557; DPH § R325.5807)

Rule 7 states that "(u)nless otherwise specified in the approval notification, the carrier, driver, or operator transporting radioactive material shall notify the operations division of the department of state police" of certain information to be described below. The requirement of a written notification of approval has been found to be inconsistent with the HMTA. Therefore, to the extent that Rule 7 implies an ability to impose requirements other than those specifically set forth, it is inconsistent with the HMTA.

Rule 7(a) requires transporters to notify the Operations Division of the Department of State Police of any schedule change that differs by more than six hours from the schedule information previously furnished. The HMR rely on the notification requirements contained in the NRC standards for physical protection. Included in those standards at 10 CFR 73.37(f)(4) is the requirement that a licensee notify the Governor or the Governor's Designee of any schedule change that differs by more than six hours from the schedule information previously furnished. In Michigan, the Governor's Designee is the Commanding Officer of the Operations Division of the Department of State Police. Thus, Rule 7(a) and the Federal rule are identical. Since one action satisfies both rules, the issue of redundancy does not arise. This differs from the prenotification requirements of Rule 3 which called for submission of the same information required by NRC but in different form and to different parties. The practical

effect of Rule 7(a) is the same as if Michigan had adopted 10 CFR 73.37(f)(4). Therefore, no inconsistency exists.

Rule 7(b) requires transporters to notify the Operations Division of the Department of State Police of any incident causing delay in the transport of radioactive material in Michigan. The HMR require transporters of highway route controlled quantity radioactive material to operate in compliance with a physical protection plan as required by NRC regulations (10 CFR 73.37) or MTB-approved equivalent. The NRC regulations require shipment escorts to make calls to the communications center at least every two hours to advise of the status of the shipment. The communications center required by NRC regulations must be "staffed continuously by at least one individual who will monitor the progress of the spent fuel shipment and will notify the appropriate agencies in the event a safeguards emergency should arise."

Any shipment delay of more than six hours must be reported under SFSB/DPH Rule 7(a) and 10 CFR 73.37(f)(4). Delays of less than six hours may be caused by a variety of factors ranging from a safeguards emergency to simple traffic delay. Since the planned schedule necessarily projects estimated times of arrival, a certain margin is built into the schedule. Rule 7(b) does not define "incident" or "delay" and this vagueness prevents a clear understanding of the circumstances in which notification is required. Clearly, the State of Michigan has a legitimate interest in knowing of shipment delays which could stem from or result in safeguards emergencies. The Federal regulations are designed to ensure that they receive such notice. No showing has been made of any safety problem unique to Michigan which requires carriers to report normal transportation delays of less than six hours. Therefore, were Michigan's requirement allowed to stand, any State could impose its own additional reporting requirements. This type of multiplicity impedes the Congressional objective of national uniformity in hazardous materials safety regulation. Therefore, I find Rule 7(b) to be an obstacle to the accomplishment and execution of the HMTA.

Rule 7(c) requires transporters to notify the Operations Division of the Department of State Police of any implementation of the emergency plan submitted under Rule 3(h). Since Rule 3(h) has been found to be inconsistent, it follows that Rule 7(c) is also inconsistent. Preemption of Rule 7(c), however, does not deprive Michigan of

notification of transportation emergencies as this is ensured by the NRC physical protection regulations set forth at 10 CFR 73.37.

Rule 8 (SFSB § R 29.558; DPH § R 325.5808)

Rule 8 sets forth the standards of confidentiality to be applied to radioactive materials shipment schedule information. The requirements set forth herein are the same as set forth in the NRC regulations (10 CFR 73.21, 73.37) on which the HMR rely. Accordingly, no inconsistency exists.

Rule 9 (SFSB § R 29.559; DPH § R 325.5809)

Rule 9 states that shipments of highway route controlled quantity radioactive material may be inspected by the State Fire Marshal and/or the DPH for compliance with applicable State and Federal statutes, rules, and regulations. It should be noted that State statutes, rules, and regulations governing radioactive materials transportation are "applicable" only if they are not inconsistent with the HMTA. Having noted this distinction, I find that Rule 9 constitutes a valid exercise of the State's inherent police powers. Ensuring that transport vehicles do not threaten public health and safety has long been recognized as a legitimate State function. Far from being an obstacle to the accomplishment of the HMTA, State enforcement of Federal and consistent State regulations concerning hazardous materials transportation safety is a critical element of a regulatory system of national applicability. MTB has long sought to foster a Federal/State partnership in hazardous materials transportation safety and, to this end, has developed and implemented the State Hazardous Materials Enforcement Development Program, in which Michigan participates, to provide States with the financial and technical assistance in the enforcement of a nationally uniform system of hazardous materials transportation safety regulation. Therefore, to the extent that enforcement is directed only to those requirements not found inconsistent, I find that Rule 9 is consistent with the HMTA and the regulations issued thereunder.

Rule 10 (SFSB § R 29.560; DPH § R 325.5810)

Rule 10 incorporates by reference the following sections of the Code of Federal Regulations:

- (a) 10 CFR 71.36;
- (b) 49 CFR 172.203(d); and
- (c) 49 CFR 173.389(b).

Rules 10(1)(a) and (b) incorporate by reference Federal regulations which are currently in effect. Therefore, there is no question as to their consistency.

Rule 10(1)(c) incorporates by reference a regulation which was deleted from the HMR effective July 1, 1983. As stated previously in this ruling, consistency in the definition of hazardous materials is essential to the effectiveness of a regulatory system of national applicability. Therefore, for the reasons set forth in the discussion of Rule 1, I find Rule 10(1)(c) to be inconsistent with the HMTA and the regulations issued thereunder.

III. Ruling

For the foregoing reasons, I find that the radioactive materials transportation rules of the Michigan State Fire Safety Board (SFSB) and the Michigan Department of Public Health (DPH) constitute a regulatory scheme which in many aspects is inconsistent with the HMTA and the regulations issued thereunder. Specifically, I find that the following SFSB rules are inconsistent and thus preempted: Rule 1(d)/R29.551(d); Rule 3/R29.553; Rule 4/R29.554; Rule 5/R29.555; Rule 6/R29.556; Rule 7(b-c)/R29.557(b-c); and Rule 10(1)(c)/R29.560(1)(c). I find the following DPH rules to be inconsistent and thus preempted: Rule 1(e)/R325.5801(e); Rule 3/R325.5803; Rule 4/R325.5804; Rule 5/R325.5805; Rule 6/R325.5806; Rule 7(b-c)/R325.5807(b-c); and Rule 10(1)(c)/R325.5810(1)(c).

The following SFSB rules are not preempted: Rule 1(a-c)/R29.551(a-c); Rule 2/R29.552; Rule 7(a)/R29.557(a); Rule 8/R29.558; Rule 9/R29.559; and Rule 10(1)(a-b) and (2)/R29.560(1)(a-b) and (2). The following DPH rules are not preempted: Rule 1(a-d,f)/R325.5801(a-d,f); Rule 2/R325.5802; Rule 7(a)/R325.5807(a); Rule 8/R325.5808; Rule 9/R325.5809; and Rule 10(1)(a-b) and (2)/R325.5810(1)(a-b) and (2).

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-9—State of Vermont; Letter From Governor Concerning Highway Shipment of Spent Fuel Through Vermont

Applicant: Nuclear Assurance Corporation (IRA-22).

Non-Federal rule affected: Letter dated October 8, 1982, from the Governor of Vermont advising Nuclear

Assurance Corporation to suspend spent fuel shipments through Vermont.

Mode affected: Highway

Ruling: The letter from the Governor of Vermont dated October 8, 1982, does not constitute a State requirement within the meaning of the Hazardous Materials Transportation Act (HMTA). Therefore, the issue of inconsistency with the HMTA does not arise.

I. Background

By letter dated October 14, 1982, Nuclear Assurance Corporation (NAC) applied for an administrative ruling on the question of whether a letter sent to it by the Governor of Vermont constitutes a State requirement which is inconsistent with, and thus preempted by, the HMTA or the HMR. The complete text of the letter is as follows: October 8, 1982.

Nuclear Assurance Corporation,
24 Executive Park West, Atlanta, Georgia 30329

This is to advise you that the State of Vermont does not intend to permit any further shipments of spent fuel through Vermont until such time as the responsible federal agencies establish and enforce a uniform national policy regarding such shipments. 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. More specifically, Vermont may not be used as a route until the federal Department of Transportation and the Nuclear Regulatory Commission fulfill their legal responsibilities with respect to any statutes, regulations or ordinances in the states of Michigan and New York that are inconsistent with preemptive federal law and have the effect of forcing shipments through this state.

Since you stopped shipments through Vermont on September 3, 1982, Vermont Secretary of Transportation Tom Evslin has written to Drew Lewis, Secretary of the U.S. Department of Transportation, expressing our strong concerns regarding the unfair impact on Vermont resulting from the actions of these other states. We are confident now that Mr. Lewis and other responsible federal officials understand the serious nature of the issue and plan to take necessary action to remedy the inequities that now exist.

I must advise you that if you were to plan shipments through Vermont in the meantime, I would seek all legal remedies available to me to stop the shipments, including an immediate injunction.

I hope I have clearly stated my position on this matter. If you should have any questions, I would expect to hear from you immediately.

Sincerely,

[Signed]

Richard A. Snelling,
Governor.

NAC contended that the requirements imposed by the Governor's letter were

inconsistent with the HMTA and the HMR. Specific reference was made to certain sections of the HMR which deal with highway routing of radioactive materials.

Pursuant to 49 CFR 107.205(a), the State of Vermont submitted comments regarding NAC's application for an inconsistency ruling. The State asserted that the Governor's letter was not a State requirement within the meaning of the HMTA, but a mere notice of intent to seek equitable relief at some time in the future.

II. Analysis

A. Is the Governor's Letter a State Requirement?

Section 112(a) of the HMTA holds that any State requirement which is inconsistent with the HMTA or the regulations issued thereunder is preempted. Before one can reach the issue of inconsistency, it is first necessary to determine whether the alleged conflict involves a State requirement.

Unlike the letter which is the subject of inconsistency ruling IR-7, the letter from the Governor of Vermont is not held out as a "State Order". Neither the letter itself, nor any related writings from the State, point to any intent that the letter assume the weight of law whether from executive authority or otherwise. The letter makes no indication of present restraints being placed on NAC's right to ship spent fuel through Vermont. Admittedly, the letter contains forceful language stating that "Vermont may not be used as a route until" the responsible Federal agencies deal with the inconsistent regulations of other states. However, subsequent language clearly demonstrates that this is not an enforceable State requirement. As stated therein: "I must advise you that if you were to plan shipments through Vermont in the meantime, I would seek all legal remedies available to me to stop the shipments, including an immediate injunction." Had the letter been intended as a State requirement, reference would have been made to immediate enforcement action rather than recourse to equitable remedies. Because the Governor's letter did not impose presently exercisable restrictions on the transportation of spent fuel by NAC, it must be accepted as no more than that which Vermont claims, a notice of intent to seek equitable relief.

NAC had been engaged in transporting spent fuel through Vermont via preferred routes that satisfied both the Department's transportation safety regulations and the physical protection

requirements of the Nuclear Regulatory Commission. No suggestion has been made that NAC performed in any manner not in compliance with applicable laws and regulations. Upon receipt of the Governor's letter, NAC chose to suspend activities in Vermont until the issue was resolved. This was a matter of business judgment. Nothing prevented NAC from continuing its planned shipments until such time as Vermont sought, and ultimately obtained, an injunction. While continuation of the planned series of shipments might have been imprudent, it would not have constituted a violation of any State law, order or regulation.

On the basis of the foregoing, I conclude that the October 8, 1982, letter to NAC from the Governor of Vermont is not a State requirement within the meaning of the HMTA.

B. Is the Letter Inconsistent?

Section 112(a) of the HMTA preempts any State requirement which is inconsistent with the HMTA or the regulations issued thereunder. Because the Governor's letter which is the subject of this proceeding has been found not to be a State requirement within the meaning of the HMTA, the question of inconsistency does not arise.

III. Ruling

For the foregoing reasons, I find that the letter of October 8, 1982, from the Governor of Vermont to NAC is not a State requirement within the meaning of the HMTA and therefore is not subject to preemption under that Act.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-10—New York State Thruway Authority Restrictions on the Transportation of Radioactive Materials

Applicant: Nuclear Assurance Corporation (IRA-23).

State rule affected: Section 102.1(q) of the Rules and Regulations of the New York State Thruway Authority (Chapter III, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York).

Mode affected: Highway.

Ruling: Section 102.1(q) of the Rules and Regulations of the New York State Thruway Authority is inconsistent with the HMTA and the regulations issued thereunder and is, therefore, preempted.

I. Background

By letter dated October 20, 1982, Nuclear Assurance Corporation (NAC) applied for an administrative ruling on the question of whether the prohibition on transportation of radioactive materials over facilities operated by the New York State Thruway Authority (NYSTA) is inconsistent with, and thus preempted by, the HMTA or the HMR. The prohibition is contained in section 102.1(q) of Chapter III, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York:

Part 102. Limitations on Use of the Thruway System

102.1 Prohibited uses of the Thruway.

Use of the Thruway system and entry thereon is prohibited at all times, with the noted exceptions:

(q) Vehicles carrying radioactive materials except under such procedures as may be adopted by the authority board, and as thereafter amended, from time to time, by the department of operations with the approval of the chairman.

II. Analysis

A. Dual Compliance Test

The NYSTA rule being challenged by NAC prohibits use of the Thruway system to "vehicles carrying radioactive materials except under such procedures as may be adopted by the authority board." The procedures adopted by the NYSTA apparently involve the case-by-case consideration of requests to use the Thruway. In its response to NAC's application for an inconsistency ruling, NYSTA stated its position on radioactive shipments as:

Apart from certain operational requirements which can easily be met, radioactive shipments will be permitted on the Thruway when we are properly indemnified for any exposure. (NYSTA letter dated July 1, 1983, p. 1.)

In practice, NYSTA has usually granted approval for shipments of low level radioactive materials but, with the recent exception of certain shipments of spent fuel which a Federal District Court ordered removed from New York, NYSTA has historically denied the use of the Thruway to vehicles transporting highway route controlled quantity radioactive material (e.g. spent nuclear fuel).

The Federal routing rule which carriers of highway route controlled quantity radioactive material must follow is set forth at § 177.825(b) of the HMR (49 CFR 177.825(b)). It requires such carriers to:

... ensure that the vehicle operates over preferred routes selected to reduce time in transit, except that an Interstate System bypass or beltway around a city shall be used when available.

The section then defines "preferred route" as:

- (i) An Interstate System highway for which an alternative route is not designated by a State routing agency as provided in this section, and
- (ii) A State-designated route selected by a State routing agency (see § 171.8 of this subchapter) in accordance with the DOT "Guidelines for Selecting Preferred Highway Routes for Shipments of Large Quantity Radioactive Materials".

The State of New York has not designated any alternate preferred routes. Therefore, the preferred routes in New York are Interstate System highways. The New York State Thruway, although financed by construction bonds, has been designated a part of the Interstate System of highways with the exception of that segment of Interstate 87 between Suffern and Newburgh. With the exception of that segment, therefore, the New York State Thruway is a preferred route as defined in § 177.825(b)(1).

Consequently, under the "dual compliance" test, the question at issue is: Is it possible for NAC to comply with both the Federal and the NYSTA rules? NAC sought to transport spent nuclear fuel from Chalk River, Ontario to Savannah River, South Carolina. For the purposes of this ruling, the routes it identified involved entering the United States at a point in New York State and proceeding south to Pennsylvania. As shown below, each of these routes involved operating over a portion of the Thruway and was thus blocked by the NYSTA rule.

1. I-81 south to Syracuse, east on I-90 (Thruway) approximately seven miles to connect with I-481 and then proceeding south on I-81 to Pennsylvania.

2. I-87 south to Newburgh, then west on I-84 to Pennsylvania. I-87 between Albany and Newburgh is part of the Thruway.

3. I-87 south to I-90, west on I-90 (Thruway) to I-88, southwest to I-81, then south to Pennsylvania.

In making its route selection, however, NAC is not limited to consideration of a New York entry only and, by necessity, must examine each of the routes available to it for entry at the Canadian border. As demonstrated in IR-8 and IR-15, it may choose entry points in Michigan or Vermont, utilizing preferred routes in those States. NAC is not required by HM-164 (nor has any showing been made that it is required under Canadian law) to enter the U.S. at

the New York/Canadian border. By selecting a preferred route which begins in the U.S. in either Michigan or Vermont, NAC could comply with the NYSTA restrictions by avoiding the facilities subject to their jurisdiction, and at the same time comply with the broad Federal standard regarding operation over preferred routes. Therefore, on the narrow question of whether it is physically possible for a carrier of spent nuclear fuel to comply with both the Federal and the NYSTA rules, I find in the affirmative. The NYSTA rule cannot be deemed inconsistent on the basis of the dual compliance test.

B. Obstacle Test

Under the "obstacle" test, the question at issue is whether section 102.1(q) of the Rules and Regulations of the NYSTA presents an obstacle to Congress' dual purposes in enacting the HMTA.

The HMTA authorizes the Secretary of Transportation to promulgate regulations in furtherance of the purpose of the Act, "to protect the Nation adequately against the risks . . . inherent in the transportation of hazardous materials. . . ." The Federal rules on highway routing of radioactive materials were issued under this authority. The preamble to the Final Rule (46 FR 5298; hereinafter referred to as HM-164) stated that, while exhaustive studies revealed "that the public risks in transporting (radioactive) materials by highway are too low to justify the unilateral imposition by local governments of bans and other severe restrictions on the highway mode of transportation", MTB believed "that these currently low risks will be further minimized by the adoption of driver training requirements and provisions of a method for selecting the safest available highway routes for carriers of large quantity radioactive materials." (46 FR 5299).

Since one objective of HM-164 was to further the Congressional goal of hazardous materials transportation safety, it is necessary to examine the safety impacts of the NYSTA rule. As described above, the practical effect of the NYSTA rule is to redirect shipments of highway route controlled quantity radioactive material into adjoining states. By doing so, the NYSTA has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If the NYSTA could impose such restrictions on the availability of highway routes to vehicles engaged in the transportation of radioactive materials, then any political subdivision of a State could do so. As

has been stated with regard to similar State and local requirements, the proliferation of independently enacted restrictions would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA.

The NYSTA rule is not based upon any finding that transportation of highway route controlled quantity radioactive materials over the Thruway would present an unacceptable safety risk. Rather, as clearly stated in the NYSTA's response to NAC's application, such transportation is considered to present an unacceptable financial risk. (" . . . radioactive shipments will be permitted on the Thruway when we are properly indemnified for any exposure." NYSTA letter of July 1, 1983.) By denying use of the Thruway to any radioactive materials shipment not offering what the NYSTA considers to be proper indemnification, the NYSTA rule directly results in the diversion of such shipments into other jurisdictions and the increase of overall time in transit. In other words, the overall exposure to the risks of radioactive materials transportation is increased and exported. For this reason, the NYSTA rule necessarily poses an obstacle to the accomplishment of the Congressional objective of enhancing hazardous materials transportation safety.

The second Congressional objective purpose in enacting the HMTA was to prevent a patchwork of varying and conflicting State and local regulations. This goal of national uniformity in hazardous materials transportation safety regulation was balanced by the recognition of valid State and local interests in this area. In order to maintain this balance when promulgating HM-164, the Department incorporated into the rule a procedure whereby States, in consultation with local governments, could designate routes other than Interstate System highways as preferred routes. As set forth in the HMR, States may require vehicles containing highway route controlled quantity radioactive material to operate over routes other than Interstate System highways so long as those alternate routes are selected in accordance with specified DOT guidelines and they are designated as alternate preferred routes by a State routing agency as defined in 49 CFR 171.8. The NYSTA is not a State routing agency.

The NYSTA rule thus stands as a repudiation of the Department's rule of national applicability on highway routing of radioactive materials. It

effectively blocks the use of Interstate System highways without ensuring the availability of alternate preferred routes. It is clearly an obstacle to the accomplishment of the Congressional goals of increased safety and national uniformity in hazardous materials transportation regulation.

In its response to NAC's application, the NYSTA contended that its rule did not prohibit the interstate transportation of radioactive materials through New York. Shipments proceeding south on Interstate 91 through Vermont and Massachusetts to Interstate 84 in Connecticut could proceed on Interstate 84 across the southeastern corner of New York and into Pennsylvania. While this may be so, it does not change the fact that the NYSTA rule severely curtails New York's exposure to radioactive materials shipments at the expense of neighboring jurisdictions.

The Supreme Court has consistently held this kind of State rule to violate the Commerce Clause of the Constitution. See, e.g., *Kassell v. Consolidated Freightways Corporation of Delaware*, 450 U.S. 662 (1981), wherein the Supreme Court stated that "a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it."

While the Department has no authority to rule on Commerce Clause issues, its administrative rulings on preemption under the HMTA have followed Supreme Court rulings in this area. Applying this to the instant case leads inexorably to the conclusion that, if any one State may use insurance requirements to deflect interstate carriers of hazardous materials into other jurisdictions, then all States may do so. The logical result would be, if not a total cessation of a Congressionally recognized form of interstate transportation then the very patchwork of varying and conflicting State and local regulations which Congress sought to preclude.

On the basis of the foregoing, I conclude that the NYSTA rule impedes Congress' dual purposes in enacting the HMTA.

III. Ruling

For the foregoing reasons, I find that section 102.1(q) of the Rules and Regulations of the New York State Thruway Authority is inconsistent with the HMTA and the regulations issued thereunder and, in accordance with 49 U.S.C. 1811(a), is preempted.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-11—Ogdensburg Bridge and Port Authority; Ogdensburg, New York; Radioactive Materials Transportation Rules

Applicant: Department of Transportation (IRA-24).

Non-Federal rule affected: Sections 5701.3, 5702.1, 5702.2, and 5702.3 of the Rules and Regulations Governing the Operation of the Ogdensburg-Prescott International Bridge (Chapter LXV, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York).

Mode affected: Highway.

Ruling: To the extent that they affect the interstate transportation of other than highway route controlled quantity radioactive material, §§ 5701.3, 5702.1, 5702.2, and 5702.3 of the Rules and Regulations Governing the Operation of the Ogdensburg-Prescott International Bridge are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under 49 U.S.C. 1811(a).

No determination is made as to the consistency of §§ 5701.3, 5702.1, 5702.2 and 5702.3 insofar as they affect the transportation of highway route controlled quantity radioactive material.

I. Background

The Ogdensburg Bridge and Port Authority (OBPA) is a public benefit corporation of the State of New York which operates a number of transportation facilities including the Ogdensburg-Prescott International Bridge (Ogdensburg, New York-Prescott, Ontario). The OBPA administers and develops its facilities as an independent, self-supporting agency.

The rules governing operation over the Ogdensburg Bridge are set forth in Chapter LXV, Title 21, Official Compilation of the Codes, Rules and Regulations of the State of New York. In September of 1981, the OBPA adopted amended rules governing the transportation of radioactive materials. The amended rules are set forth in §§ 5701.3 and 5702.1-5702.3. Essentially, the rules: incorporate the provisions of St. Lawrence County Local Law No. 10 (see IR-12); require prior approval by the OBPA of insurance coverage and/or indemnification provisions; and reserve to the OBPA the right to specify the time of crossing, to provide any escort

deemed necessary and to obtain full compensation for the costs associated with the clearance and crossing of radioactive materials.

Shortly after the OBPA adopted the amended rules, the Department's Final Rule, hereinafter referred to as HM-164 (46 FR 5298), regarding the highway routing of radioactive materials went into effect. It set forth general routing requirements for placarded shipments of radioactive materials and specific routing requirements for large quantity radioactive material. A subsequent rulemaking (48 FR 10218) which became effective July 1, 1983, deleted the term "large quantity" and substituted the term "highway route controlled quantity." Whether a highway shipment of radioactive materials is required to comply with the specific routing requirements depends on whether it constitutes a highway route controlled quantity.

As codified at 49 CFR 177.825, HM-164 requires motor carriers of highway route controlled quantity radioactive material to operate over "preferred routes", i.e., Interstate System highways or alternate routes designated by a State routing agency in accordance with DOT guidelines. Such carriers may deviate from preferred routes only when necessitated by the conditions set forth in § 177.825(d)(2). The Ogdensburg Bridge is not part of an Interstate System highway; the State of New York has not designated any non-Interstate highways as alternate preferred routes; and the Department is not aware of any circumstances which currently require transporters of highway route controlled quantity radioactive material to operate over the Ogdensburg Bridge. Therefore, irrespective of the OBPA rules, at the present time, transportation of highway route controlled quantity radioactive material over the Ogdensburg Bridge would constitute a violation of the HMR. While acknowledging this fact, the Department also recognizes that transportation of highway route controlled quantity radioactive material across the Ogdensburg Bridge and through adjacent St. Lawrence County has occurred without incident prior to the adoption of HM-164 and that this route could receive consideration as a possible alternate preferred route in this area of New York at such time as the State choose to designate preferred routes. On this basis, the Department initiated this inconsistency proceeding, in accordance with 49 CFR 107.209(b), on the issue of whether the OBPA rules would be inconsistent with the HMTA, and therefore preempted, if the Ogdensburg Bridge were designated as

part of a preferred route. Accordingly, on May 12, 1983, the Department published a notice and invitation to comment in the *Federal Register* (48 FR 21496).

In response to the public notice, comments were received from ten parties. The New York State Department of Law submitted a comment urging that this proceeding be dropped because the issue presented was hypothetical. Citing the Department's acknowledgement that, at the present time transportation across the Bridge of highway route controlled quantity radioactive material would constitute a violation of the HMR, the State argued that, since the State has not indicated any intention to designate the Ogdensburg Bridge as a preferred route, this proceeding concerns "an issue which is not now, and may never become, ripe for decision." This point is persuasive and, upon consideration, is dispositive of this proceeding insofar as highway route controlled quantity radioactive material is concerned.

However, as asserted in the comment submitted by Federal Express Corporation, and subsequently confirmed by Departmental analysis, the effect of the OBPA rules is not limited to highway route controlled quantity radioactive material. By imposing additional requirements on the transportation of radioactive materials which are not required to operate solely on preferred routes, the OBPA rules present issues which are not hypothetical or speculative. Therefore, the Department has determined that issuance of an inconsistency ruling with regard to the radioactive materials transportation rules of the OBPA is appropriate at this time.

II. Analysis

The following determination of whether any or all of the radioactive materials transportation rules of the OBPA are inconsistent with the HMTA or the HMR, is based on the two-prong test described in MTB's procedural regulations and discussed in the General Preamble.

The radioactive materials transportation rules of the OBPA appeared in their entirety as Appendix C to the public notice and invitation to comment which was published in the *Federal Register* on May 12, 1983. The rules consist of four sections which are addressed in consecutive order below.

§ 5701.03—Permit Requirement

Section 5701.3 sets forth the following requirements:

§ 5701.3. Vehicles requiring special permits or escorts. No vehicle falling within any of the following categories shall be permitted to

use the facilities unless a special permit therefor is issued by the Authority Employee in charge, and, if required as a condition of such permit, a special escort is provided and fees, including consulting engineering services if required, therefor paid, in advance, viz:

(f) Vehicles which are transporting or have recently carried explosives, radioactive materials or other dangerous commodities and show any evidence or residue of such materials or commodities.

In determining whether or not special permits should be issued or, if issued, what conditions should apply thereto, such Authority Employee in charge may confer with the Authority's consulting engineers, counsel and/or whatever other specialist or regulatory agencies he may consider appropriate in the circumstances, but such determination in any given situation shall be the sole and exclusive judgment of such Authority Employee in charge and final and binding upon all persons. Application for a special permit shall be made at least 48 hours in advance of the proposed crossing. If permission is granted, the Authority shall specify the time of the crossing.

Section 5701.3 prohibits the highway transportation of radioactive materials without a permit issued by the Authority Employee in charge, and therefore constitutes a routing rule in the form of a permit requirement. The term "routing rule" is defined in the HMR in Appendix A to Part 177 as follows:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effect.

With regard to other than highway route controlled quantity radioactive material, § 5701.3 restricts such transportation by denying access to those carriers which, although in compliance with the HMR, have not obtained a permit issued by the Authority Employee in charge. Moreover, this restriction creates the likelihood of such shipments being diverted to other jurisdictions. And the restriction applies because of the hazardous nature of the cargo. For these reasons, § 5701.3 constitutes a local routing rule within the meaning of the HMR.

MTB first addressed the issue of local transportation permits for transport of radioactive materials in IR-1 (43 FR 16954, April 20, 1978) which dealt with § 175.111 of the New York City Health Code. That regulation required a certificate of Emergency Transport for each shipment in or through the city of identified quantities of radioactive

material. In that ruling, MTB concluded that the local permit requirement was not inconsistent because there was no identifiable requirement in the text of the HMTA or HMR which provided a basis for a finding of inconsistency. Having reached this conclusion, MTB announced its intent to commence rulemaking to consider the need for routing requirements under the HMTA for highway carriage of radioactive materials. In view of this announcement, MTB added that permit requirement similar to that of New York City "may face a necessary future harmonization with rulemaking that results from the inquiry MTB intends to undertake." (43 FR 16958.)

The planned inquiry alluded to in IR-1 resulted in the promulgation of HM-164 and this proceeding represents the "necessary future harmonization with rulemaking" to be faced by jurisdictions which adopted requirements similar to those in the New York City ordinance. Several commenters argued that HM-164 was invalid as a result of the District Court holding in *City of New York v. DOT*, 539 F. Supp. 1237 (1982). However, that decision was reversed on appeal to the Second Circuit Court of Appeals (715 F.2d 732, August 10, 1983) and on February 27, 1984, the Supreme Court dismissed the city's appeal from the Circuit Court ruling. Therefore, the present case differs from that presented in IR-1, in that there is now an identifiable Federal requirement that provides a standard against which a State/local requirement can be compared for consistency.

Transporters of other than highway route controlled quantity radioactive material are subject to the Federal routing requirements set forth in § 177.825(a) of the HMR.

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider available information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur. In performance of this requirement the carrier shall tell the driver that the motor vehicle contains radioactive materials and shall indicate the general route to be taken. This requirement does not apply when—

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway under conditions described in paragraph (b) of this section.

Section 5701.2 imposes a further restraint on route selection by requiring transporters to obtain a permit to cross the Ogdensburg Bridge. This

requirement is based on a presumption that the OBPA has the authority to control, and ultimately, to prohibit this form of interstate commerce.

The OBPA is a creature of the State of New York. As such, it cannot be imbued with greater authority than resides in the parent State. The extent to which States and the political subdivisions may regulate the highway routing of radioactive materials has been thoroughly addressed in the inconsistency rulings published herewith. As stated in IR-8:

Generally, in the absence of departmental involvement in a safety issue, States and, to the extent authorized by State law, local governments may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the State role is much more circumscribed. The HMR address all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing degree of risk. Under the authority of the HMTA, Federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent State or local action. The extent to which State and local government may regulate the interstate transportation of radioactive materials is limited to: (1) traffic control or emergency restrictions which affect all transportation without regard to cargo; (2) designation of alternate preferred routes in accordance with 49 CFR 177.825; (3) adoption of Federal regulations or consistent State/local regulations; and (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 CFR 107.221. Thus, in the absence of an express waiver of preemption, no authority exists for a State or local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.

In the course of developing the regulations promulgated under HM-164, DOT gave specific consideration to the subcategory of radioactive materials affected by the OBPA rules (i.e., other than highway route controlled quantity radioactive material) and selected the above-quoted general guidelines as the appropriate regulatory measure, as opposed to the possible alternatives of no regulation at all or a regulation mandating the use of preferred routes. In other words, DOT selected and implemented a level of requirements based on a comparative assessment of the risks presented by shipments of different quantities of radioactive materials. In doing so, DOT performed the duty imposed on it by the HMTA and, having satisfied all of the procedural requirements of the HMTA and the Administrative Procedure Act, established a rule which is national in

its scope and application. This rule does not eliminate risk. That is not possible. What the rule does accomplish is to provide an orderly and predictable regimen for the transportation of other than highway route controlled quantity radioactive material, a regimen which presents a low and equitably distributed level of risk from transportation that is far outweighed by the societal benefits derived from that transportation. While a community may legitimately seek to further reduce its exposure to the risk inherent in the transportation of these materials, it may not do so by exporting that risk, albeit a low one, to its neighbors. Such an approach not only frustrates the equitable distribution of risk which the Federal rule sought to achieve, but also impedes the accomplishment and execution of the HMTA's objective of regulatory uniformity. For these reasons, such an approach is clearly inconsistent with the HMTA and the HMR.

The OBPA permit requirements in § 5701.3 is such an approach. By restricting access to the international crossing at the Ogdensburg Bridge, the requirement redirects shipments of other than highway route controlled quantity radioactive material into adjoining jurisdictions. In bringing about this result, the OBPA has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If the OBPA could impose such restrictions on the availability of highway routes to vehicles engaged in the transportation of radioactive materials, then any political subdivision of a State could do so. As has been stated with regard to similar State and local requirements, the proliferation of independently enacted restrictions would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA. The OBPA rules, moreover, have the added dimension of restricting international commerce.

On the basis of the foregoing, I find that § 5701.3 of the OBPA rules, to the extent that it affects the transportation of other than highway route controlled quantity radioactive material, is inconsistent with the HMTA and the HMR and, therefore, preempted under 49 U.S.C. 1811(a).

§ 5702.1—Incorporation of Local Law

Section 5702.1 prohibits passage over the Ogdensburg Bridge by any vehicle which has not satisfied the requirements of St. Lawrence County Local Law No. 10 Regulating the Transportation of Radioactive Materials through St. Lawrence County. St. Lawrence County Local Law No. 10 is the subject of a

separate inconsistency ruling (IR-12, published herewith) and has been determined to be inconsistent to the extent that it affects the transportation of other than highway route controlled quantity radioactive material. Therefore, on the basis of the analysis contained in IR-12, I find § 5702.1 of the OBPA rules to be inconsistent to the extent that it affects the transportation of other than highway route controlled quantity radioactive material.

§ 5702.2—Indemnification

Section 5702.2 of the radioactive materials transportation rules of the OBPA sets forth the following requirements concerning indemnification:

§ 5702.2. In addition to the Certificate of Emergency Transportation, responsible state or federal agencies and the carrier shall submit for Authority's prior approval evidence of proper insurance coverage and/or and acceptable indemnification and hold harmless agreement.

Unlike the Vermont rule on insurance coverage which is considered in IR-15, the OBPA rule does not quantify "proper insurance coverage." Therefore, comparison with Federal requirements on financial responsibility is not possible. Instead, § 5702.2 is comparable to the requirement of the New York State Thruway Authority (NYSTA) which was the subject of IR-10. In that ruling, MTB stated:

The NYSTA rule is not based upon any finding that transportation of highway route controlled quantity radioactive material over the Thruway would present an unacceptable safety risk. Rather, as clearly stated in the NYSTA's response to NAC's application, such transportation is considered to present an unacceptable financial risk. ("... radioactive shipments will be permitted on the Thruway when we are properly indemnified for any exposure." NYSTA letter of July 1, 1983.) By denying use of the Thruway to any radioactive materials shipment not offering what the NYSTA considers to be proper indemnification, the NYSTA rule directly results in the diversion of such shipments into other jurisdictions and the increase of overall time in transit. In other words, the overall exposure to the risks of radioactive materials transportation is increased and exported. For this reason, the NYSTA rule necessarily poses an obstacle to the accomplishment of increased hazardous materials transportation safety.

The same reasoning applies to § 5702.2 of the OBPA rules and, on that basis, I find § 5702.2 to be inconsistent to the extent that it affects the transportation of other than highway route controlled quantity radioactive material.

Because § 5702.2 has been determined to impose a requirement which impedes

the accomplishment of the HMTA, it is not necessary to address the fact that the section imposed an obligation to act, not only on the carrier, but also on Federal agencies. Nevertheless, it should be noted that, regardless of the nature of the requirement imposed, any attempt by a political subdivision of a State to impose an obligation to act on the Federal government would be subject to the strictest scrutiny in connection with both statutory and Constitutional preemption.

§ 5702.3—Additional Requirements

Section 5702.3 of the radioactive materials transportation rules of the OBPA imposes the following additional requirements:

§ 5702.3. As a condition of the special permit or escort set forth in 5701.3, the Authority shall specify the time of crossing, provide escort if deemed necessary and be fully compensated for any and all costs associated with the clearance and crossing of the radioactive materials.

Previously in this ruling, the requirement for advance approval by OBPA to transport other than highway route controlled quantity radioactive material across the Ogdensburg Bridge was found to be inconsistent. Since § 5702.3 imposes additional requirements which transporters must satisfy before a permit will be issued, it constitutes an integral part of the inconsistent regulatory scheme and is, therefore, also inconsistent to the extent that it affects the interstate transportation of other than highway route controlled quantity radioactive material.

III. Ruling

For the foregoing reasons, I find that, to the extent they affect the interstate transportation of other than highway route controlled quantity radioactive material, §§ 5701.3, 5702.1, 5702.2, and 5702.3 of the Rules and Regulations Governing the Operation of the Ogdensburg-Prescott International Bridge are inconsistent with the HMTA and the HMR and, therefore, preempted under 49 U.S.C. 1811(a). No determination is made as to the consistency of §§ 5701.3, 5702.1, 5702.2, and 5702.3 insofar as they affect the transportation of highway route controlled quantity radioactive material.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,
Associate Director, Office of Hazardous
Materials Regulation, Materials
Transportation Bureau.

Inconsistency Ruling IR-12—St. Lawrence County, New York; Local Law Regulating the Transportation of Radioactive Materials Through St. Lawrence County

Applicant: Department of Transportation (IRA-25).

Non-Federal rule affected: St. Lawrence County Local Law No. 10 for the year 1980.

Mode affected: Highway.

Ruling: To the extent that they affect the interstate transportation of other than highway route controlled quantity radioactive material, Sections 2 through 6 of Local Law No. 10 are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under 49 U.S.C. 1811(a). No determination is made as to the consistency of Sections 2 through 6 of Local Law No. 10 insofar as they affect the transportation of highway route controlled quantity radioactive material.

I. Background

On August 11, 1980, the St. Lawrence County Board of Legislators adopted Local Law No. 10 for the year 1980 (hereinafter referred to as "Law No. 10"), which was duly published in accordance with § 24 of the County Law of the State of New York. Law No. 10 established the requirement that any party seeking to transport certain specified quantities of radioactive materials within St. Lawrence County must obtain a Certificate of Emergency Transport.

St. Lawrence County lies at the foot of the international bridge linking Ogdensburg, New York, and Prescott, Ontario. Thus, any restriction on transportation in St. Lawrence County imposes an equal restriction on international transportation over the Ogdensburg Bridge.

The Department of Transportation issued a Final Rule, hereinafter referred to as HM-164 (46 FR 5298), regarding the highway routing of radioactive materials which became effective February 1, 1982. It set forth general routing requirements for placarded shipments of radioactive materials and specific routing requirements for large quantity radioactive material. A subsequent rulemaking (48 FR 10218) which became effective July 1, 1983, deleted the term "large quantity" and substituted the

term "highway route controlled quantity."

As codified at 49 CFR 177.825, HM-164 require motor carriers of highway route controlled quantity radioactive material to operate over "preferred routes", i.e., Interstate System highways or alternate routes designated by a State routing agency in accordance with DOT guidelines. Such carriers may deviate from preferred routes only when necessitated by the conditions set forth in § 177.825(b)(2). No Interstate System highways run through St. Lawrence County; the State of New York has not designated any non-Interstate highways as alternate preferred routes; and the Department is not aware of any circumstances which currently require transporters of highway route controlled quantity radioactive material to operate over non-preferred routes in St. Lawrence County. Therefore, irrespective of local regulation, at the present time, transportation of highway route controlled quantity radioactive material through St. Lawrence County would constitute a violation of the HMR. While acknowledging this fact, the Department also recognized that transportation of highway route controlled quantity radioactive material across the Ogdensburg Bridge and through St. Lawrence County had occurred without incident prior to the adoption of HM-164 and that this route could receive consideration as a possible alternate preferred route in this area of New York such time as the State chooses to designate preferred routes. On this basis, the Department initiated this inconsistency proceeding, in accordance with 49 CFR 107.209(b), on the issue of whether Law No. 10 would be inconsistent with the HMTA, and therefore preempted, if non-Interstate System highways in St. Lawrence County were designated as part of a preferred route. Accordingly on May 12, 1983, the Department published a notice and invitation to comment in the *Federal Register* (48 FR 21496).

In response to the public notice, comments were received from eleven parties. The New York State Department of Law submitted a comment urging that this proceeding be dropped because this issue presented was hypothetical. Citing the Department's acknowledgement that, at the present time, through transportation of highway route controlled quantity radioactive material would constitute a violation of the HMR, the State argued that, since the State has not indicated any intention to designate a preferred route through St. Lawrence County, this proceeding concerns "and issue that is not now, and may never

become, ripe for decision." This point is persuasive and, upon consideration, is dispositive of this proceeding insofar as highway route controlled quantity radioactive material is concerned.

However, as asserted in the comment submitted by Federal Express Corporation, and subsequently confirmed by Department analysis, the effect of Law No. 10 is not limited to highway route controlled quantity radioactive material. By imposing additional requirements on the transportation of radioactive materials which are not required to operate solely on preferred routes, Law No. 10 presents issues which are not hypothetical or speculative. Therefore, the Department has determined that issuance of an inconsistency ruling with regard to Law No. 10 is appropriate at this time.

II. Analysis

Law No. 10, which appeared in its entirety as Appendix D to the public notice and invitation to comment, consists of seven sections which are addressed in consecutive order below.

Section 1 of Law No. 10 sets forth the following policy statements:

Section 1: The St. Lawrence County Legislature hereby regulates the transportation of nuclear materials specified below in or through St. Lawrence County for the purpose of protecting the health and safety of residents until such time as adequate information is made available by Federal and State agencies responsible for radioactive materials to prepare an adequate emergency response plan.

The HMTA does not preempt all State and local regulation of hazardous materials transportation safety, only those regulations which are inconsistent. Therefore, the mere statement of intent to regulate is not inconsistent with the HMTA. Since Section 1 imposes no obligation to act on any party, no problem arises under the "dual compliance" test. With regard to the "obstacle" test, the statement of intent indicates a role for local government which does not exceed that intended by the framers of the HMTA. Accordingly, Section 1 is consistent with the HMTA.

Section 2 of Law No 10 identifies certain classes of radioactive materials for which a transportation permit is required:

Section 2: A Certificate of Emergency Transport issued by the St. Lawrence County Emergency Services Coordinator-Civil Defense Director shall be required for such shipment of any of the following materials:

1. Plutonium isotopes in any quantity exceeding 2 grams, or 20 curies.
2. Uranium enriched in the isotope U235 exceeding 20 percent of the total uranium

content in quantities where the U235 content exceeds one kilogram.

3. Any actinides (elements with atomic number 89 or greater) the activity of which exceeds 20 curies.

4. Spent reactor fuel elements or mixed fission products associated with such spent fuel elements whose activity exceeds 20 curies.

5. Any quantity of radioactive material specified as a "large quantity" by the Nuclear Regulatory Commission in 10 CFR Part 71 and as amended entitled "Packaging of Radioactive Materials for transport", with the exception of Co-60 used for medical radiation therapy or medical research.

The hazard classes identified in subsections 1-5 of Section 2 have no direct counterparts in the HMR. Each subsection encompasses a group of materials, not all of which are highway route controlled quantity radioactive material as defined in 49 CFR 173.403(l). This raises two issues which are relevant to the question of inconsistency: hazard class definition and regulatory effect.

In prior inconsistency rulings, MTB has given notice that it considers the Federal role in definition of hazard classes to be exclusive. (IR-5, 47 FR 51991; IR-6, 48 FR 760; IR-8 and IR-15, published herewith.) As stated in IR-5, which dealt with a New York City ordinance regulating compressed gases:

The HMR are, in and of themselves, a comprehensive and technical set of regulations which occupy approximately 1000 pages of the Code of Federal Regulations. . . . For the City to impose additional requirements based on differing hazard class definition adds another level of complexity to this scheme. Thus, shippers and carriers doing business in the City must know not only the classification of hazardous materials under the HMR and the regulatory significance of those classifications, but also the City's classifications and their significance. Such duplication in a regulatory scheme where the Federal presence is so clearly pervasive can only result in making compliance with the HMR less likely, with an accompanying decrease in overall public safety (47 FR 51994.)

By imposing additional requirements on a subgroup of radioactive materials, St. Lawrence County has, in effect, created a new hazard class. If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety. As stated in IR-6:

The key to hazardous materials transportation safety is precise communication of risk. The proliferation of

differing State and local systems of hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulation. This is precisely the situation which Congress sought to preclude when it enacted the preemption provision of the HMTA (49 U.S.C. 1811). (48 FR 764.)

On the basis of the foregoing, I find that the hazard class definitions set forth in Section 2 of Law No. 10 constitute an obstacle to the accomplishment of Congressional objectives of enhanced safety and regulatory uniformity underlying enactment of the HMTA and adoption of the HMR.

The regulatory effect of the hazard classes defined in Section 2 is to impose a permit requirement on a number of radioactive materials, some of which are highway route controlled quantity and some not. This distinction is critical to a determination of whether Law No. 10 is inconsistent with the HMTA.

Since Section 2 prohibits the highway transportation of certain radioactive materials without a permit issued by the St. Lawrence County Civil Defense Director—Emergency Services Coordinator, it constitutes a routing rule in the form of a permit requirement. The term "routing rule" is defined in the HMR in Appendix A to Part 177 as follows:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects. . . .

With regard to other than highway route controlled quantity radioactive material, Law No. 10 restricts such transportation by denying access to those shipments which, although in compliance with the HMR, have not obtained a Certificate of Emergency transport. Moreover this restriction creates the likelihood of such shipments being diverted to other jurisdictions. And the restriction applies because of the hazardous nature of the cargo. For these reasons, Law No. 10 constitutes a local routing rule within the meaning of the HMR.

MTB first addressed the issue of local permits for transport of radioactive materials in IR-1 (43 FR 18954, April 20, 1978) which dealt with § 175.111 of the New York City Health Code. That regulation required a Certificate of Emergency Transport for each shipment in or through the city of the same materials identified in Section 2 of Law No. 10. In that ruling, MTB concluded: "There is not any identifiable

requirement in the text of the HMTA or in regulations issued thereunder that provides a basis for a finding of inconsistency with § 175.111." (43 FR 16957.) Having reached this conclusion, MTB stated:

The legal validity of § 175.111 is still subject to serious doubt. . . . New York City and any other jurisdictions which have, or are contemplating, similar ordinances, should also bear in mind the fact that § 175.111 may be preempted by the Commerce Clause of the United States Constitution, or by the Atomic Energy Act of 1954 and regulations issued thereunder. . . . Finally, whatever the ultimate legal fate of § 175.111, such provisions may face a necessary future harmonization with rulemaking that results from the inquiry MTB intends to undertake. (43 FR 16958.)

The planned inquiry alluded to in IR-1 resulted in the promulgation of HM-164 and this proceeding represents the "necessary future harmonization with rulemaking" to be faced by jurisdictions which adopted ordinances similar to § 175.111 of the New York City Health Code. Several commenters argued that HM-164 was invalid as a result of the District Court holding in *City of New York v. DOT*, 539 F. Supp. 1237 (1982). However, that decision was reversed by the Second Circuit Court of Appeals (715 F.2d 732, August 10, 1983) and on February 27, 1984, the Supreme Court dismissed the city's appeal from the Circuit Court ruling. Therefore, the present case differs from that presented in IR-1, in that there is now an identifiable Federal requirement that provides a standard against which a State or local rule may be compared for consistency.

Transporters of other than highway route controlled quantity radioactive material are subject to the Federal routing requirements set forth in § 177.825(a) of the HMR:

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider available information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur. In performance of this requirement the carrier shall tell the driver that the motor vehicle contains radioactive materials and shall indicate the general route to be taken. This requirement does not apply when—

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway under conditions described in paragraph (b) of this section.

Section 2 of Law No. 10 imposes a further restraint on route selection by requiring transporters to obtain a local

permit. This requirement is based on a presumption that St. Lawrence County has the authority to control, and ultimately, to prohibit this form of interstate commerce.

In its comments on this proceeding, the St. Lawrence County Board of Legislators asserts that this authority stems from the "fundamental function of local government" to protect the lives and property of its citizens; that its attempts at emergency response planning were hampered by a lack of information; and that its regulation was necessary to ensure adequate emergency response preparedness. Nothing in this argument points to any safety problem unique to St. Lawrence County. Therefore, if the argument is sustained with regard to Law No. 10, equal authority must be conceded to every local jurisdiction in the Nation. And this would lead directly to the proliferation of independent State and local restrictions on the highway transportation of radioactive materials which prompted the Department to adopt HM-164.

In other inconsistency rulings published herewith, radioactive materials routing rules in the form of shipment-specific permit requirements were determined to be inconsistent *per se*. As stated in IR-8:

Generally, in the absence of Departmental involvement in a safety issue, States and, to the extent authorized by State Law, local governments, may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the State role is much more circumscribed. The HMR address all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing degree of risk. Under the authority of the HMTA, Federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent State or local action. The extent to which State and local government may regulate the interstate transportation of radioactive materials is limited to: (1) traffic control or emergency restrictions which affect all transportation without regard to cargo; (2) designation of alternate preferred routes in accordance with 49 CFR 177.825; (3) adoption of Federal regulations or consistent State/local regulations; and (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 CFR 107.221. Thus, in the absence of an express waiver of preemption, no authority exists for a state or local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.

In the course of developing the regulations promulgated under HM-164, DOT gave specific consideration to the

subcategory of radioactive materials affected by Law No. 10 (i.e., other than highway route controlled quantity radioactive material) and selected the above-quoted general guidelines as the appropriate regulatory measure, as opposed to the possible alternatives of no regulation at all or a regulation mandating the use of preferred routes. In other words, DOT selected and implemented a level of requirements based on a comparative assessment of the risks presented by shipments of different quantities of radioactive materials. In doing so, DOT performed the duty imposed on it by the HMTA and, having satisfied all of the procedural requirements of the HMTA and Administrative Procedure Act, established a rule which is national in its scope and application. This rule does not eliminate the risk. That is not possible. What the rule does accomplish is to provide an orderly and predictable regimen for the transportation of other than highway route controlled quantity radioactive material, a regimen which presents a low and equitably distributed level of risk from transportation that is far outweighed by the societal benefits derived from that transportation. While a community may legitimately seek to further reduce its exposure to the risk inherent in the transportation of these materials, it may not do so by exporting that risk, albeit a low one, to its neighbors. Such an approach not only frustrates the equitable distribution of risk which the Federal rule sought to achieve, but also impedes the accomplishment and execution of the HMTA's objective of regulatory uniformity. For these reasons, such an approach is clearly inconsistent with the HMTA and the HMR.

The permit requirement in Section 2 of Law No. 10 is such an approach. By restricting access to highways in St. Lawrence County, the requirement redirects shipments of other than highway route controlled quantity radioactive material into adjoining jurisdictions. In bringing about this result, St. Lawrence County has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If St. Lawrence County could impose such restrictions on the availability of its highways to vehicles engaged in the interstate transportation of radioactive materials, then any local jurisdiction could do so. This would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA.

On the basis of the foregoing, I find Section 2 of Law No. 10, to the extent

that it affects the interstate transportation of other than highway route controlled quantity radioactive material, to be inconsistent with the HMTA and the HMR and, therefore, preempted under 49 U.S.C. 1811(a).

Sections 3 through 6 of Law No. 10 set forth additional provisions related to the permit required by Section 2:

Section No.	Subject
3.....	Application procedure.
4.....	Approval criteria.
5.....	Expiration of the permit.
6.....	Penalties.

All of these provisions implement the permit requirement which has been determined to be inconsistent to the extent that it affects the transportation of other than highway route controlled quantity radioactive material. It, therefore, follows that the provisions for administration and enforcement of the inconsistent requirement are also inconsistent. On this basis, I find that Sections 3 through 6 of Law No. 10, to the extent that they affect the interstate transportation of other than highway route controlled quantity radioactive material, are inconsistent with the HMTA and the HMR and, therefore, preempted.

Section 7 of Law No. 10 sets forth certain exemptions from the requirements of Law No. 10. Since this imposes no obligation to act, the issue of inconsistency does not arise.

III. Ruling

For the foregoing reasons, I find that, to the extent they affect the interstate transportation of other than highway route controlled quantity radioactive material, Sections 2 through 6 of Law No. 10, are inconsistent with the HMTA and the HMR and, therefore, preempted under 49 U.S.C. 1811(a). No determination is made as to the consistency of Sections 2 through 6 of Local Law No. 10 insofar as they affect the transportation of highway route controlled quantity radioactive material.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-13—Thousand Island Bridge Authority; Restrictions on the Transport of Radioactive Materials

Applicant: Department of Transportation (IRA-26).

Non-Federal rule affected: Sections 5503.2 and 5503.3 of Chapter LXIII, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York.

Mode affected: Highway.

Ruling: To the extent that it affects the transportation of radioactive materials, § 5503.3 of the rules governing operation of the Thousand Islands Bridge is inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted in accordance with 49 U.S.C. 1811(a).

I. Background

The Thousand Islands Bridge Authority (TIBA) is responsible for the operation and maintenance of the Thousand Islands Bridge, an international crossing which links Collins Landing, New York, and Ivy Lea, Ontario and which constitutes a part of Interstate Highway I-81. By letter dated March 22, 1982, the TIBA applied to the Department of Transportation for a non-preemption determination regarding its rules and regulations governing the shipment of radioactive materials across the Thousand Islands Bridge. As set forth at 49 CFR 107.215(b)(4), any application for a non-preemption determination must contain an express acknowledgement by the applicant that the rule in question is inconsistent with the HMTA or the regulations issued thereunder. Such acknowledgement is not required if the rule has been determined inconsistent by a court of competent jurisdiction or in an inconsistency ruling issued under 49 CFR 107.209. Neither of these exceptions applied to the rules governing the Thousand Islands Bridge. Therefore, when the TIBA, upon direct request, declined to acknowledge the inconsistency of the rules for which it had requested a non-preemption determination, the Department suspended action on the matter.

The question of whether the rules governing radioactive materials transportation across the Thousand Islands Bridge are inconsistent with the HMTA resurfaced in October of 1982. In a letter to the Department, Nuclear Assurance Corporation cited "a permit requirement for an arbitrary, but substantial insurance coverage at the Thousand Islands Bridge" as one of several factors restricting the availability of routes for transporting spent nuclear fuel from Chalk River, Ontario, to a reprocessing facility at Savannah River, South Carolina. Therefore, notwithstanding that application for an inconsistency ruling

had not been filed, the Department elected, in accordance with 49 CFR 107.209(b), to issue an administrative ruling on the question of whether or not the radioactive materials transportation rules of the TIBA are inconsistent with the HMTA or the regulations issued thereunder.

On May 12, 1983, a public notice and invitation to comment was published in the *Federal Register* (48 FR 21496). Comments were received from ten parties. One commenter, the New York State Department of Law, urged that this proceeding be dismissed "because the issue presented is hypothetical, and no determination is necessary at this time", as no carrier had applied for an inconsistency ruling or otherwise indicated a wish to use a route across the Thousand Islands Bridge. This comment arises from the misapprehension that the Department may issue inconsistency rulings only upon the direct application of a party claiming to have been affected by an allegedly inconsistent State or local rule. The HMTA does not support this interpretation. The preemption provision at section 112(a) states clearly that any State or local requirement which is inconsistent is preempted. No reference of any kind is made to a need for third party involvement. The procedural regulations adopted by MTB to implement section 112 are explicit on this matter:

(b) Notwithstanding that application for a ruling has not been filed under § 107.203, the Associate Director for HMR, on his own initiative, may issue a ruling as to whether a particular State or political subdivision requirement is inconsistent with the Act or the regulations issued under the Act. (49 CFR 107.209.)

The Department clearly has authority to issue an inconsistency ruling *sua sponte*. Furthermore, as part of an Interstate System highway, the Thousand Islands Bridge is a preferred route for the highway transportation of highway route controlled quantity radioactive materials. Whether or not carriers have recently indicated a wish to use the bridge is irrelevant to the question of whether the TIBA rules are inconsistent. While this may be relevant in a non-preemption proceeding which involves consideration of the extent to which an inconsistent rule affects interstate commerce, the argument is premature in the context of an inconsistency proceeding.

The comment that this issue is hypothetical may, therefore, be dismissed as without merit. Where appropriate in the subsequent analysis of the TIBA regulations, other comments

and previous administrative decisions will be discussed.

II. Analysis

The radioactive materials transportation regulations of the TIBA, which are the subject of this ruling, are contained §§ 5503.2 and 5503.3 of Chapter LXIII, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York:

5503.2. Types of vehicles excluded. Vehicles loaded in such a manner or with such materials or so constructed or equipped as possibly to endanger persons or property or likely to render the use of the facilities unsafe, shall be excluded from use of the facilities, and the transportation of any such vehicle is hereby prohibited. Without limiting the foregoing, the following types of vehicles come within the meaning of this section and shall be denied use of the facilities:

(n) vehicles which would be excluded from passage without a special permit or escort, under section 5503.3 of this Part, and for which no such permit has been issued or no such escort provided:

5503.3 Vehicles requiring special permits or escorts. (a) No vehicle falling within any of the following categories shall be permitted to use the facilities unless a special permit therefor is issued by the authority employee in charge and, if required as a condition of such permit, a special escort is provided and fees therefor paid, viz:

(6) vehicles transporting explosives, radioactive materials or other dangerous commodities; and

(7) vehicles which have recently carried explosives, radioactive materials or other dangerous commodities and show any evidence of residue of such materials or commodities.

(b) In determining whether or not such special permit should be issued or, if issued, what conditions should apply thereto, such authority employee in charge may confer with the authority's consulting engineers, counsel and/or whatever other specialists or regulatory agencies he may consider appropriate in the circumstances, but such determination in any given situation shall be the sole and exclusive judgment of such authority employee in charge and final and binding upon all persons.

Although the TIBA regulations affect the transportation of many hazardous materials, only their effect on radioactive materials transportation will be considered in this ruling.

Subsection 5503.2(n) of the TIBA rules prohibits passage over the Thousand Islands Bridge by any vehicle which has failed to obtain a permit or provide an escort under the terms of § 5503.3. MTB first addressed the issue of State transportation permit requirements in an inconsistency ruling dealing with a Rhode Island regulation governing the

transportation of liquefied energy gases. (IR-2, 44 FR 75566, Dec. 20, 1979.) In that ruling, MTB acknowledged that "(a) permit may serve several legitimate State police power purposes, and the bare requirement * * * that a permit be applied for and obtained is not inconsistent with federal requirements." (44 FR 75570.) For example, a State may require operators to obtain a permit when they intend to transport loads of a weight or size which exceeds the limits established for all traffic. Such requirements represent a legitimate exercise of the State's responsibility to maintain the integrity of the roadway and to prevent disruption of the flow of traffic. Moreover, such requirements apply equally to all vehicles, regardless of the nature of the cargo being transported. The same standards apply when a state delegates responsibility for a portion of its transportation system to a political subdivision like the TIBA. (See 49 CFR 107.201(b) for definition of "political subdivision.") Therefore, the mere statement of intent to require a permit is not inconsistent with the HMTA.

Since subsection 5503.2(n) of the TIBA rules imposes a permit requirement but does not describe the actions necessary to obtain that permit, no finding is possible under the dual compliance test. With regard to the obstacle test, the imposition of a permit requirement is not, by itself, beyond the scope of State/local authority recognized by the HMTA. For the foregoing reasons, subsection 5503.2(n) of the TIBA rules is not inconsistent with the HMTA or the regulations issued thereunder.

Section 5503.3 of the TIBA rules describes the radioactive materials shipments for which a permit is required and the process by which such permits may be granted. As set forth in subsection 5503.3(a)(6) and (7), the permit requirement applies to vehicles which are carrying radioactive materials or have recently carried radioactive materials and show any evidence of residue of such materials. This includes an extremely broad range of vehicles which are subject to different degrees of regulation under the HMR. The TIBA permit requirement applies to: vehicles transporting highway route controlled quantity radioactive material, such as spent nuclear fuel; vehicles transporting shipments which are not highway route controlled quantity radioactive material but for which placarding is required, such as used gloves and gowns from hospital radiotherapy facilities; vehicles transporting limited quantities of radioactive materials for which no placarding is necessary, such as home smoke detectors and tritium backlighted

watches; and empty vehicles which have recently carried any of the foregoing and retain trace quantities of radiation which, though detectable by sensitive equipment, pose no hazard in transportation.

Because § 5503.3 prohibits the highway transportation of radioactive materials without a permit issued by the TIBA employee in charge, it constitutes a routing rule in the form of a permit requirement. The term "routing rule" is defined in the HMR in Appendix A to Part 177 as follows:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects. * * *

The TIBA rule restricts the movement of radioactive materials by public highway by denying access to those shipments which have not obtained prior approval. Moreover, the restriction has the effect of redirecting such shipments to other jurisdictions. And the rules apply because of the nature of the cargo. For these reasons, the permit requirement constitutes a local routing rule within the meaning of the HMR.

MTB first addressed the issue of local transportation permits for transport of radioactive materials in IR-1 (43 FR 16954, April 20, 1978) which dealt with § 175.111 of the New York City Health Code. That regulation required a certificate of Emergency Transport for each shipment in or through the city of identified quantities of radioactive material. In that ruling, MTB concluded that the local permit requirement was not inconsistent because there was no identifiable requirement in the text of the HMTA or HMR which provided a basis for a finding of inconsistency. Having reached this conclusion, MTB announced its intent to commence rulemaking to consider the need for routing requirements under the HMTA for highway carriage of radioactive materials. In view of this announcement, MTB added that permit requirements similar to that of New York City "may face a necessary future harmonization with rulemaking that results from the inquiry MTB intends to undertake." (43 FR 16956).

The planned inquiry alluded to in IR-1 resulted in the adoption of a Final Rule on the highway routing of radioactive materials (46 FR 5298, hereinafter referred to as "HM-164") and this proceeding represents the "necessary future harmonization with rulemaking"

to be faced by jurisdictions which adopted requirements similar to those in the New York City Ordinance. Several commenters argued that HM-164 was invalid as a result of the District Court holding in *City of New York v. DOT*, 539 F. Supp. 1237 (1982). However, that decision was reversed by the Second Circuit Court of Appeals (715 F.2d 732, August 10, 1983) and on February 27, 1984, the Supreme Court dismissed the city's appeal from the Circuit Court ruling. Therefore, the present case differs from that presented in IR-1, in that there is now a Federal requirement that provides a standard against which a State/local requirement can be compared for consistency.

HM-164 established different routing requirements for different kinds of radioactive materials shipments. The most stringent requirements were applied to shipments of "highway route controlled quantity radioactive material", such as spent nuclear fuel. As codified at 49 CFR 177.825(b), HM-164 requires transporters of such shipments to operate over preferred routes, i.e. Interstate System highways or alternate routes designated by a State in consultation with local authorities. The Thousand Islands Bridge is part of an Interstate System highway and the State of New York has not designated any alternate preferred routes. Therefore, the Thousand Islands Bridge is part of a preferred route.

Under HM-164, vehicles transporting a shipment of radioactive materials which is not a highway route controlled quantity, but which must be placarded, are required to operate either over preferred routes or over routes selected to minimize radiological risk. The standards are codified at 49 CFR 177.825(a):

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider available information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur. In performance of this requirement the carrier shall tell the driver that the motor vehicle contains radioactive materials and shall indicate the general route to be taken. This requirement does not apply when—

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway under conditions described in paragraph (b) of this section.

Shipments of other than highway route controlled quantity radioactive material for which placarding is not required are not subject to specific routing requirements under the HMR.

However, such shipments are subject to the general requirements of 49 CFR 177.853 that all shipments of hazardous materials be transported without unnecessary delay.

In comparing the routing rules of the TIBA and the HMR, the first criterion for determining inconsistency is the "dual compliance" test. A carrier which complied fully with the TIBA rule and obtained the necessary permit could transport radioactive materials across the Thousand Islands Bridge and thereby also be in compliance with the Federal requirement for using preferred routes. Consequently, on the narrow question of whether it is physically possible for a transporter of radioactive materials to comply with both the HMR and the TIBA rule, I find in the affirmative. The permit requirement contained in § 5503.3 of the TIBA rules cannot be deemed inconsistent on the basis of the "dual compliance" test.

Under the "obstacle" test, however, I reach a different conclusion, for this test considers factors which go beyond the narrow question of whether compliance with both the Federal and the local rule is possible.

As described above, the HMR impose certain requirements on the highway routing of radioactive materials. The TIBA rules impose a further restraint on route selection by requiring transporters to obtain a permit to cross the Thousand Islands Bridge. This requirement is based on a presumption that the TIBA has the authority to control, and ultimately, to prohibit this form of interstate commerce.

The TIBA is a creature of the State of New York. As such, it cannot be imbued with greater authority than resides in the parent State. The extent to which States and their political subdivisions may regulate the highway routing of radioactive materials has been thoroughly addressed in the inconsistency ruling published herewith. As stated in IR-8:

Generally, in the absence of departmental involvement in a safety issue, State and, to the extent authorized by State law, local governments may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the State role is much more circumscribed. The HMR address all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing degree of risk. Under the authority of the HMTA, Federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent State or local action. The extent to which State and local government may regulate the interstate transportation of radioactive materials is limited to: (1) traffic control or

emergency restrictions which affect all transportation without regard to cargo; (2) designation of alternate preferred routes in accordance with 49 CFR 177.825; (3) adoption of Federal regulations or consistent State/local regulations; and (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 CFR 107.221. Thus, in the absence of an express waiver of preemption, no authority exists for a State or local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.

In its comments of this proceeding, the TIBA offered the following argument in support of its permit requirement:

The Federal Department of Transportation has chosen *Interstate* routes due to the fact that design standards afford a high degree of safety given the fact there is direction traffic (four lanes), meets various standards with respect to sight clearance, and there are limited access to and from this type of highway system.

However, the Thousand Islands Bridge system which was opened in 1938, is only two lanes, which does not meet Interstate requirements and carries a heavy volume of traffic, appears to have been placed under the Department of Transportation's criteria as meeting the standards. If there is any inconsistency, it is for the DOT to include the Thousand Islands Bridge in an approved route, bearing in mind its physical limitations. (TIBA letter dated June 30, 1983, p. 5.)

In other words, the TIBA apparently has taken the position that, when a political subdivision of a State finds Federal safety regulations inadequate to meet local conditions, it may, on its own determination, regulate to overcome the perceived Federal inadequacy. This completely undermines the regulatory system mandated by the HMTA. Congress recognized that rules of national applicability would not always meet unique local conditions. It was for this reason that the HMTA did not preempt all State or local rules, but only those that were inconsistent. Furthermore, Congress recognized that there could be valid safety reasons for permitting certain inconsistent State or local rules to coexist with their Federal counterparts, and authorized the Department of Transportation to waive preemption in certain circumstances.

In implementing its regulatory authority under the HMTA, MTB has sought to ensure the flexibility necessary to respond to changing conditions. Recognizing that practical experience in applying the regulations can point out the need for change, MTB adopted procedures in 49 CFR, Part 106, whereby "(a)ny interested person may petition the director to establish, amend, or repeal a regulation." (49 CFR 106.31.)

With specific regard to the establishment of highway routes for radioactive materials, MTB had the authority to require the use of the Interstate System without exception. However, in recognition of the wide variety of local conditions and the States' experience in responding to these conditions, MTB adopted a rule which enabled States, in consultation with local authorities, to apply safety guidelines to their unique local conditions and, if justified, designate alternate routes.

In view of the foregoing, the TIBA's justification of its permit requirement must be rejected. If, as alleged, the Thousand Islands Bridge is inadequate for use as part of a preferred route, then the TIBA should seek State action to designate an alternate preferred route. Nothing in the TIBA's response justifies deviation from the established procedure for State designation of alternate routes.

When promulgating HM-164, MTB sought to balance the HMTA's dual objectives of enhanced safety and regulatory uniformity. The permit requirement in § 5503.3 impedes both objectives. By restricting access to the international crossing at the Thousand Islands Bridge, the requirement redirects shipments of radioactive materials into adjoining jurisdictions.

By causing the diversion of radioactive materials shipments, the TIBA has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If the TIBA could impose such restrictions on the availability of highway routes to vehicles engaged in the transportation of radioactive materials, then any political subdivision of a State could be so. As has been stated with regard to similar State and local requirements, the proliferation of independently enacted restrictions would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA. The TIBA rules, moreover, have the added dimension of restricting international commerce.

For the foregoing reasons, I find that the radioactive materials transportation permit requirement contained in § 5503.3 of the TIBA rules constitutes an impediment to the execution and accomplishment of the HMTA and the regulations issued thereunder. Consequently, I find it to be inconsistent and, therefore, preempted under 49 U.S.C. 1811(a).

Section 5503.3 of the TIBA rules also authorizes the employee in charge to require a special escort and the payment of fees therefor as a condition of the

permit to transport radioactive materials. That permit requirement having been deemed inconsistent, it follows that the additional conditions attached thereto are also inconsistent.

In the public notice and invitation to comment on this proceeding, a form entitled "Application for Permit to Transport Nuclear Materials via the Thousand Islands Bridge" was presented as Appendix E. (48 FR 21505.) That form imposed a variety of requirements for information, documentation, certification, and indemnification. However, the application requirements contained therein are not included in the codification of the TIBA rules. Moreover, § 5503.3(b) of the TIBA rules delegates to the TIBA employee in charge, the sole and exclusive judgment to determine whether or not a permit should be issued and, if so, under what conditions. Thus, it would appear that the number of preconditions on use of the Thousand Islands Bridge by transporters of radioactive materials is limited only by the imagination of the TIBA employee in charge. However, for purposes of this ruling, it is not necessary to identify all application procedures. Since the requirement for a permit has been found to be inconsistent, the application procedures by which that requirement would be administered, are also inconsistent.

III. Ruling

For the foregoing reasons, I find that, to the extent it affects the transportation of radioactive materials, § 5503.3 of the rules governing operation of the Thousand Islands Bridge (Chapter LXIII, Title 21, Official Compilation of Codes, Rules and Regulations of the State of New York) is inconsistent with the HMTA and the regulations issued thereunder and, therefore, preempted.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-14—Jefferson County, New York; Local Legislative Stipulation Regulating Radioactive Materials Transportation through Jefferson County

Applicant: Department of Transportation (IRA-27).

Non-Federal rule affected: Resolution No. 81 Regulating the Transport of Radioactive Materials Through Jefferson County.

Mode affected: Highway.

Ruling: Resolution No. 81 Regulating the Transport of Radioactive Materials Through Jefferson County is inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted in accordance with 49 U.S.C. 1811(a).

I. Background

By letter dated May 13, 1982, the Jefferson County, New York, Board of Supervisors notified the Department of Transportation of its adoption of Resolution No. 81 Regulating the Transport of Radioactive Materials Through Jefferson County. Resolution No. 81 imposed a number of conditions under which radioactive materials would be allowed to travel through Jefferson County.

Jefferson County lies at the foot of the international bridge linking Ivy Lea, Ontario, with Collins Landing, New York, and connecting with Interstate Route I-81. Thus, any restriction on transportation in Jefferson County imposes an equal restriction on international transportation which may operate over the Thousand Island Bridge and Interstate Route I-81.

The Department was on notice of Resolution No. 81 at a time when it was initiating administrative rulings on the consistency of several State and local restrictions on radioactive materials transportation, including the permit requirement of the Thousand Islands Bridge Authority which is incorporated by reference in Resolution No. 81. Because of this direct connection, the Department elected, in accordance with 49 CFR 107.209(b), to initiate an inconsistency proceeding on the issue of whether Resolution No. 81 is inconsistent with the HMTA or the HMR, and thus preempted. Accordingly, on May 12, 1983, the Department published a notice and invitation to comment in the *Federal Register* (48 FR 21496).

In response to that notice, comments were received from nine parties. One commenter, the New York State Department of Law, urged that this proceeding be dismissed "because the issue presented is hypothetical, and no determination is necessary at this time", as no carrier had applied for an inconsistency ruling or otherwise indicated a wish to use a route through Jefferson County. This comment arises from the misapprehension that the Department may issue inconsistency rulings only upon the direct application of a party claiming to have been

affected by an allegedly inconsistent State or local rule. The HMTA does not support this interpretation. The preemption provision at section 112(a) states clearly that any State or local requirement which is inconsistent is preempted. No reference of any kind is made to a need for third party involvement. The procedural regulations adopted by MTB to implement section 112 are explicit on this matter:

(b) Notwithstanding that application for a ruling has not been filed under § 107.203, the Associate Director for HMR, on his own initiative, may issue a ruling as to whether a particular State or political subdivision requirement is inconsistent with the Act or the regulations issued under the Act. (49 CFR 107.209.)

The Department clearly has authority to issue an inconsistency ruling *sua sponte*. Furthermore, Jefferson County contains an Interstate System highway, I-81, which is a preferred route for the highway transportation of highway route controlled quantity radioactive material. Whether or not carriers have recently indicated a wish to use this route is irrelevant to the question of whether Resolution No. 81 is inconsistent. While this may be relevant in a non-preemption proceeding which involves consideration of the extent to which an inconsistent rule affects interstate commerce, the argument is premature in the context of an inconsistency proceeding.

The comment that this issue is hypothetical may, therefore, be dismissed as without merit.

II. Analysis

Resolution No. 81 was published in its entirety as Appendix F to the Federal Register notice of May 12, 1983. Its operative provisions are contained in the following excerpted paragraph:

Now, therefore, Be It Resolved, That the Jefferson County Board of Supervisors does hereby put the United States Department of Transportation and Nuclear Regulating Commission on notice that the transport of radioactive waste through and within Jefferson County is conditioned on compliance with the following provisions: That 24 hour prior notification of said transport be duly given to appropriate Jefferson County officials; that front and rear escort service be provided; that said transport only be made during the six month period from May thru October; that no movement of said material be made on holidays or during periods of inclement weather; and that the permit system as promulgated by the Thousand Islands Bridge Authority regulating the movement of radioactive materials through the Bridge System be recognized and fully adhered to by the Federal Government and/or agents thereof.

Before proceeding with an examination of the specific conditions set forth therein, it is first necessary to determine what kinds of shipments are subject to those conditions. The language of Resolution No. 81 is not clear on this point. The title and introductory paragraphs refer to the transport of "radioactive materials", but the transport restrictions quoted above are imposed on "radioactive waste." These wastes are a subgroup of all radioactive materials. Neither do these terms reflect different degrees of hazard, as each includes materials which span the full range of transportation risk and are subject to appropriately varying degrees of safety regulation under the HMR.

Resolution No. 81 refers to "recent pronouncements by federal officials identify(ing) Interstate 81 as a route for the transport of such materials." From this, it is possible to infer that Resolution No. 81 was intended to place additional requirements on those materials which the Federal rules require to proceed via Interstate System highways.

The Federal rules adopted under HM-164 require carriers of highway route controlled quantity radioactive material to operate over "preferred routes," i.e., an Interstate System highway or an alternate route selected by a State routing agency in accordance with DOT guidelines. The State of New York has not designated any alternate preferred routes. Therefore, the preferred route which carriers of highway route controlled quantity radioactive material are required to use when operating in Jefferson County is I-81.

Since Resolution No. 81 appears to reflect concern over such materials as are required to use I-81, and since HM-164 requires shipments of highway route controlled quantity radioactive material to operate over Interstate System highways, this administrative ruling will interpret Resolution No. 81 as if the term "highway route controlled quantity radioactive material" had been used instead of the terms "radioactive materials" and "radioactive waste" respectively.

The first of the five substantive provisions of Resolution No. 81 is "(t)hat 24 hour prior notification of said transport be duly given to appropriate Jefferson County officials." Appendix A to Part 177 of the HMR sets forth the Department's policy position that a local transportation rule is inconsistent if it requires prenotification. This policy was substantiated by application of the two-prong test for inconsistency in connection with the prenotification requirements of Michigan and Vermont

in inconsistency rulings IR-8 and IR-15, respectively, published herewith.

With regard to the "dual compliance" test, the HMR do not contain an express prohibition of prenotification. Therefore, it is possible for carriers to provide the 24-hour advance notice required by Resolution No. 81 and still remain in compliance with the HMR. The prenotification requirement of Resolution No. 81 cannot be deemed inconsistent on the basis of the "dual compliance" test.

Under the "obstacle" test, however, a different conclusion is reached. While the HMR do not contain an express requirement for prenotification, § 173.22(c) of the HMR requires shippers of highway route controlled quantity radioactive materials to comply with a physical protection plan established under the requirements of the Nuclear Regulatory Commission (NRC) or equivalents approved by MTB. The NRC requirements for advance notification are contained in the physical protection standards at 10 CFR 73.37 and require transporters to provide a minimum of four days advance notification of shipments to the Governor or the Governor's Designated Representative. Local jurisdictions receive notification from the Governor's Designee. The requirement that transporters comply with the NRC requirements or MTB-approved equivalents was adopted as part of HM-164. In the preamble to that rulemaking, MTB took administrative notice of the fact that the NRC was in the process of establishing prenotification requirements and stated:

Unless DOT reaches and acts on a conclusion that prenotification rules are necessary, beyond those Congress has directed NRC to impose on certain radioactive wastes, independent State and local prenotification requirements are not consistent with Part 177. (46 FR 5314, 5.)

The absence to date of prenotification requirements in the HMR cannot be construed as an abdication of the field, because MTB has taken several administrative actions regarding prenotification. In the process of promulgating HM-164, MTB received numerous comments urging adoption of a national prenotification regulation. For the reasons stated in the preamble to that rulemaking, MTB declined to do so. That preamble, which discussed the Congressional directive to NRC to establish prenotification requirements, also described MTB's sponsorship of a study by the Puget Sound Council of Governments (PSCOG) to examine the efficacy of prenotification for certain materials. The PSCOG report has since been completed (*Analysis of*

Prenotification: Hazardous Materials Study, Final Report, May 4, 1981) and was relied on in an inconsistency ruling (IR-8, 48 FR 760, January 6, 1983) which found a Covington, Kentucky, prenotification ordinance to be inconsistent. MTB has also sponsored a number of emergency response demonstration projects involving State, city and regional governments. Most recently, MTB awarded a contract to Battelle Northwest Laboratories to perform a comprehensive evaluation of prenotification. In view of the above, MTB has clearly demonstrated its intent to occupy the field of prenotification, to the exclusion of requirements adopted by State and local governments.

Resolution No. 81 does not provide Jefferson County with any advance notification not already provided for under Federal regulation. What it requires is that shippers of highway route controlled quantity radioactive materials provide advance notice directly to Jefferson County instead of relying on the designated representative of the Governor of New York to provide the information to affected jurisdictions. If Jefferson County could impose such a requirement, then every political subdivision of every State along the shipment route could impose such a requirement. As stated in a previous inconsistency ruling, "(r)edundancy does not further transportation safety and represents the type of multiplicity that the HMTA intended to make unnecessary." (IR-2, 44 FR 75571.) It was for this reason that Appendix A to Part 177 sets forth the Department's opinion that local prenotification requirements are inconsistent. As stated in the section-by-section analysis of Appendix A, which was published as part of HM-164, the Department underlined the seriousness of its concern with redundant regulations by stating that "(p)renotification requirements by State and local governments, if found to be necessary, will be established in a nationally uniform manner." (46 FR 5314.)

On the basis of the foregoing, I conclude that the prenotification requirement of Resolution No. 81 is an obstacle to the accomplishment of the Congressional objective of regulatory uniformity underlying enactment of the HMTA. Accordingly, I find it to be inconsistent and, therefore, preempted.

The second of the substantive provisions imposed by Resolution No. 81 is "that front and rear escort services be provided" for shipments of highway route controlled quantity radioactive material.

As discussed previously, the HMR require transporters of highway route

controlled quantity radioactive material to comply with a physical protection plan in accordance with NRC standards or MTB-approved equivalents. The NRC standards require highway shipments to be accompanied by front and rear escorts. Since the Federal and local requirements are identical, and the same action satisfies both, the issue of redundancy does not arise. In effect, the escort requirement of Resolution No. 81 amounts to an adoption of the NRC physical protection standards on which the HMR rely. This being the case, the local requirement poses no inconsistency under either the "dual compliance" or the "obstacle" test.

The next two substantive provisions of Resolution No. 81 are closely related and will be considered together. They require "that said transport only be made during the six month period from May thru October" and "that no movement of said material be made on holidays or during periods of inclement weather."

The inclusion of these provisions subjects Resolution No. 81 to interpretation as a routing rule. As set forth in Appendix A to Part 177:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects. Traffic controls are not included if they are not based on the nature of the cargo, such as truck routes based on vehicles weight or size, nor are emergency measures.

By prohibiting the transportation of highway route controlled quantity radioactive material during more than half of the year, Resolution No. 81 "significantly restricts" the movement of such materials by public highway. Moreover, it applies because of the nature of the cargo. Therefore, it must be considered a "routing rule" within the meaning of the HMR.

Appendix A to Part 177 sets forth the Department's opinion that a local routing rule is inconsistent if it prohibits or otherwise affects transportation on routes authorized by the HMR or authorized by a State routing agency in a manner consistent with the HMR. Interstate route I-81 in Jefferson County is a route authorized by the HMR. Resolution No. 81 prohibits use of that route for more than half of the year. However, while the Department's policy statement, is relevant to consideration of Resolution No. 81, it is not determinative of the inconsistency thereof. Such determination must be based on the two-prong test contained

in the MTB's procedural regulations and discussed in the General Preamble.

Consequently, under the "dual compliance" test, the question at issue is: It is possible for a carrier of highway route controlled quantity radioactive material to comply with both the HMR and Resolution No. 81? Jefferson County lies at the foot of the Thousand Islands Bridge which links New York and Canada. In selecting a highway route to or from Canada, however, a carrier is not limited to consideration of a crossing at the Thousand Islands Bridge. As demonstrated in IR-8, IR-10 and IR-15, it may choose border crossings in Michigan, Vermont, or elsewhere in New York, utilizing preferred routes at those points. Carriers are not required by HM-164 (nor has any showing been made that they are required under Canadian law) to cross the international border via the Thousand Islands Bridge. By selecting a border crossing using a preferred route in Michigan, Vermont or elsewhere in New York, a carrier could comply with the Jefferson County requirement (to operate only during clement weather on non-holidays in the months of May through October) by avoiding the county altogether, and at the same time comply with the broad Federal standard regarding operation over preferred routes. Therefore, on the narrow question of whether it is physically possible for a carrier of highway route controlled quantity radioactive material to comply with both the HMR and Resolution No. 81, I find in the affirmative. The local routing rule cannot be deemed inconsistent on the basis of the "dual compliance" test.

The second criterion for determining inconsistency is the "obstacle test" which requires consideration of the extent to which the local rule impedes the accomplishment and execution of the HMTA and the regulations issued thereunder. As stated previously, the principal Congressional objectives underlying enactment of the HMTA were safety enhancement and regulatory uniformity. When promulgating HM-164, MTB sought to balance these objectives. Under the authority of the HMTA, MTB could have established an inflexible requirement that carriers of highway route controlled quantity radioactive material operate over Interstate System highways. However, MTB recognized that the States were more knowledgeable about local road conditions. For the reason, HM-164 included a process by which States, in consultation with local governments, could apply this knowledge to designate alternate routes which provide an equal or greater level

of safety than Interstate System highways.

The objectives of the HMTA and the regulations issued thereunder having been identified, the effects of Jefferson County's routing rule may now be examined. Resolution No. 81 prohibits transportation of highway route controlled quantity radioactive material in Jefferson County: (1) During the six-month period from November through April; (2) on holidays; and (3) during inclement weather. (While not critical to the following analysis, the vagueness of the terms "holiday" and "inclement" should be noted. Which holidays—Federal, State or County? Inclement according to whom, in comparison to what?) Presumably, the rationale for these restrictions is that weather conditions and holiday traffic render transportation unsafe at these times.

Weather, traffic and road conditions are all reflected in accident rates and transit time and the HMR require carriers of highway route controlled quantity radioactive materials to consider these factors in selecting routes. For example, if available information demonstrated a higher accident rate during the winter months, a carrier would be required to consider this as a constant. As for short-term adverse weather conditions, carriers of radioactive materials, like all highway users, are subject to a State's inherent power to control traffic. Similarly, chronic highway conditions are inherent in considerations of accident rates and transit times. As for short-term degradation of highway conditions, all highway users are subject to State's inherent power to control traffic.

The above discussion of weather traffic and road conditions is not meant to indicate the such factors are not directly relevant to the development of routing rules. It was precisely because MTB recognized the possibility of chronic problems of portions of the Interstate System of highways, that HM-164 provided for designation of alternate preferred routes by a State routing agency. The State of New York has not yet chosen to designate alternate preferred routes. This does not mean that Jefferson County may take independent action. If Jefferson County could impose a partial ban on radioactive materials transportation, then any political subdivision could do so, and the resulting proliferation of varying and possibly conflicting regulations would completely undercut the Congressional objective of regulatory uniformity as implemented through HM-164.

The restrictions imposed by Resolution No. 81 may be completely

justifiable on the basis of local conditions, but this does not justify their unilateral imposition by Jefferson County. Under HM-164, such restrictions could be imposed by a State routing agency but only if an alternate route were designated for the duration of the prohibition. The reasons for placing such authority at the State level were articulated clearly in the preamble to HM-164.

Local jurisdictions are inherently limited in perspective with respect to establishing routing requirements. While the Department recognizes that local governments are accountable only to their own citizens, such a limited accountability has some undesirable effects. For example, a routing restriction in one community may have adverse safety impacts on surrounding jurisdictions. Also, some communities in determining that they do not have the appropriate expertise or manpower to perform a routing analysis, may find attractive the option of completely prohibiting the transport of radioactive materials through their jurisdictions. This has already happened in some cases. Uncoordinated and unilateral local routing restrictions place on carriers of radioactive materials would simply not be conducive to safe transportation. There is a clear need for national uniformity and consistency. (46 FR 5301).

In its comments on this proceeding, Jefferson County cited "its undeniable obligation to provide for and maintain the public safety of its citizens." (Letter dated July 5, 1983, p. 2.) While in no way denying that such an obligation exists, this ruling must take issue with the manner in which Jefferson County has chosen to fulfill its obligation. By adoption of HM-164, MTB established a nationally uniform system for the designation of transportation routes for highway route controlled quantity radioactive material. Resolution No. 81 was adopted in a manner that completely disregards the nationally uniform regulatory system created by HM-164.

As stated previously, when promulgating HM-164, MTB sought to balance the HMTA's dual objectives of enhanced safety and regulatory uniformity. The transport ban of Resolution No. 81 impedes both objectives. By restricting access to preferred routes in Jefferson County, it redirects shipments of highway route controlled quantity radioactive material into adjoining jurisdictions.

By causing the diversion of radioactive materials shipments, Jefferson County has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If Jefferson County could impose such restrictions on the availability of its highways to vehicles

engaged in the interstate transportation of radioactive materials, then any local jurisdiction could do so. This would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA.

For the foregoing reasons, I conclude that the provisions of Resolution No. 81 which prohibit transportation of highway route controlled quantity radioactive material during certain periods constitute an obstacle to the accomplishment and execution of the HMTA and the regulations issued thereunder. Accordingly, I find them to be inconsistent and, therefore, preempted.

The last of five substantive requirements imposed by Resolution No. 81 is "that the permit system as promulgated by the Thousand Islands Bridge Authority regulating the movement of radioactive materials through the Bridge System be recognized and fully adhered to by the Federal Government and/or agents thereof." The permit system of the Thousand Islands Bridge Authority is the subject of a separate inconsistency ruling (IR-13, published herewith) and has been determined to be inconsistent with the HMTA and the HMR and, therefore, preempted. For the reasons set forth in IR-13, I find the incorporation of the permit system in Resolution No. 81 to be inconsistent and, therefore, preempted.

Because the provision has been found to be inconsistent, it is not necessary to address the fact that it imposed an obligation to act on the Federal Government. Nevertheless, it should be noted that, regardless of the nature of the requirement imposed, any attempt by a political subdivision of a State to impose an obligation to act on the Federal Government would be subject to the strictest scrutiny in connection with both statutory and Constitutional preemption.

In summary, of the five substantive provisions of Resolution No. 81, all but one are inconsistent. However, as drafted, Resolution No. 81 must be considered in its entirety. The Resolution does not lead itself to the severance of individual provisions. Therefore, while noting that the requirement for front and rear escorts is not inconsistent, this ruling considers the effect of Resolution No. 81 as a whole.

III. Ruling

For all of the foregoing reasons, I find Jefferson County Resolution No. 81 Regulating the Transport of Radioactive Materials Through Jefferson County to be inconsistent with the HMTA and the

regulations issued thereunder and, therefore, preempted under 49 U.S.C. 1811(a).

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

Inconsistency Ruling IR-15—State of Vermont; Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste

Applicant: Department of Transportation (IRA-30).

Non-Federal rule affected: Rules I-IX of the Vermont Agency of Transportation regulation entitled "Transportation of Irradiated Reactor Fuel and Nuclear Waste; Approval, Monitoring."

Modes affected: Highway, Rail, Water.

Ruling: Rules I (e), III (D) (3-4), III (E-L) and IV through VII of the radioactive materials transportation regulations of the Vermont Agency of Transportation are inconsistent with the Hazardous Materials Transportation Act and the Regulations issued thereunder and, therefore, preempted.

I. Background

On May 12, 1983, the Department issued a public notice and invitation to comment on the inconsistency of various State and local rules on the transportation of radioactive materials in Michigan, New York and Vermont. (48 FR 21496.) During the comment period on that notice, the State of Vermont adopted new rules governing the transportation of irradiated reactor fuel and nuclear waste. The impact of these rules on radioactive materials routing options and the question of whether these rules are inconsistent with the HMTA were questions of direct relevance to those being addressed in the on-going inconsistency proceedings. Therefore, the Department, pursuant to 49 CFR 107.209(b), elected to initiate an inconsistency proceeding on the question of whether the Vermont rules are inconsistent with the HMTA or the regulations issued thereunder.

On August 4, 1983, a public notice and invitation to comment was published in the *Federal Register* (48 FR 35550). Three comments were received. Where appropriate, these comments and previous administrative decisions will be discussed in this ruling.

II. Analysis

Rule I. Definitions

Rules I sets forth a number of definitions, only one of which need be addressed for possible inconsistency

(e) "RADWAS" means irradiated reactor fuel and radioactive wastes that are large quantity radioactive materials as defined in 49 CFR 173.389(b), or after July 1, 1983, highway route controlled quantities as defined in the latest amended section of 49 CFR 173.403.

It should be noted that the acronym RADWAS is not synonymous with the term "highway route controlled quantity radioactive material"; rather, it defines a subset of that group. In other words, the Vermont regulations do not apply to all highway route controlled quantity radioactive material, but only to highway route controlled quantity shipments of irradiated reactor fuel or nuclear waste. This presents two issues which relate to the question of consistency with the HMR: nomenclature and regulatory effect.

IN prior inconsistency rulings, MTB has given notice that it considers the Federal role in definition of hazard classes to be exclusive. (IR-5, 47 FR 51991; IR-6, 48 FR 760; IR-8, published herewith.) As stated in IR-5 which dealt with a New York City ordinance regulating compressed gases:

The HMR are, in and of themselves, a comprehensive and technical set of regulations which occupy approximately 1000 pages of the Code of Federal Regulations For the City to impose additional requirements based on differing hazard class definitions adds another level of complexity to this scheme. Thus, shippers and carriers doing business in the City must know not only the classifications of hazardous materials under the HMR and the regulatory significance of those classifications, but also the City's classifications and their significance. Such duplication in a regulatory scheme where the Federal presence is so clearly pervasive can only result in making compliance with the HMR less likely, with an accompanying decrease in overall public safety. (47 FR 51994.)

By imposing additional requirements on a subgroup of highway route controlled quantity radioactive material to be known as RADWAS, Vermont has created a new hazard class. If every State were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusing of regulatory requirements would lead ineluctably to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety.

In view of the foregoing, I find that the definition of "RADWAS" contained in Rule I (e) of the Vermont regulation is

inconsistent with the HMR. Throughout the remainder of this inconsistency ruling, the Vermont rules will be interpreted as if the term "highway route controlled quantity radioactive material" had been substituted for the acronym "RADWAS".

Rule II. Carrier's Responsibility

Rule II sets forth the intent of the Vermont regulations and the carrier's responsibility thereunder as follows:

The intent of this regulation is to establish a procedure for monitoring and regulating the transportation of RADWAS in the State in order to protect the public health consistent with national transportation policy. Nothing in these regulations or any directives issued under authority thereof shall release a carrier of any responsibility for the safe transportation of RADWAS in the State.

Both the HMTA and the regulatory system promulgated thereunder recognize the right of States to regulate hazardous materials transportation so long as the State requirements are consistent with the Federal scheme. Thus, the statement of intent in Rule II reflects the State role outlined by Congress in the HMTA. The intent that the Vermont rules coexist with, rather than supplant, the Federal regulations is further supported by the explicit statement that the Vermont rules do not release carriers of any other responsibility for safe transportation.

Since Rule II imposes no requirement to act upon any party, no problem arises under the "dual compliance" test. With regard to the "obstacle" test, the statement of intent is identical to the State role intended by the HMTA. Thus, Rule II poses no obstacle to the accomplishment and execution of the HMTA. Accordingly, Rule II is consistent with the HMTA.

Rule III. Application; procedure; content; and

Rule IV. Transportation approval; criteria

Rules III and IV set forth the criteria to be satisfied before the State Secretary of Transportation will grant written approval to transport highway route controlled quantity radioactive material in Vermont. Since the rule prohibits such transportation without the written approval of the Secretary, it constitutes a routing rule in the form of a permit requirement.

Section II of Appendix A to 49 CFR Part 177, defines "routing rule" as follows:

"Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles

containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects. . . .

The Vermont regulation restricts the movement of radioactive materials by public highway by denying access to those shipments which have not obtained written approval. Moreover, this restriction has the effect of redirecting such shipments to other jurisdictions. And the regulation applies because of the nature of the cargo. For these reasons, the Vermont regulation constitutes a State routing rule within the meaning of the HMR.

The Federal rule which carriers of highway route controlled quantity radioactive material must follow is set forth at section 177.825(b) of the HMR (49 CFR 177.825(b)). It requires such carriers to operate over "preferred routes selected to reduce time in transit, except that an Interstate System bypass or beltway around a city shall be used when available." The term "preferred route" is defined as an Interstate System highway or an alternate route selected by a State routing agency in accordance with DOT guidelines. The State of Vermont has designated preferred routes in accordance with the HMR. They are:

Interstate 89—Total Length
Interstate 91—Total Length
Interstate 93—Total Length
Interstate 189—Total Length

VT 100 and VT 8 between Readsboro and the Massachusetts line in Stamford (includes Deerfield River road in Readsboro).

VT 142 between Vernon and the Massachusetts line in the Town of Vernon.

The State and Federal rules having been identified, the question at issue is whether the routing rule imposed by Vermont's permit requirement is consistent with the HMTA or the regulations issued thereunder.

A carrier which complied fully with the Vermont regulation, thereby obtaining the necessary written approval, could transport radioactive materials via preferred routes in Vermont and thereby be in compliance with the Federal requirements as well. Consequently, on the narrow question of whether it is physically possible for a carrier of spent nuclear fuel to comply with both the Federal and the Vermont rules, I find in the affirmative. The State rule cannot be deemed inconsistent on the basis of the "dual compliance" test.

Under the "obstacle" test, however, I reach a different conclusion, for this considers factors which go beyond the narrow question of whether compliance with both the State and Federal rules is physically possible.

MTB first addressed the issue of State transportation permit requirements in an inconsistency ruling dealing with a Rhode Island regulation governing the transportation of liquefied energy gases. (IR-2, 44 FR 75566, Dec. 20, 1979.) In that ruling, it was stated that:

A permit may serve several legitimate State police power purposes, and the bare requirement . . . that a permit be applied for and obtained is not inconsistent with federal requirements. However, a permit itself is inextricably tied to what is required in order to get it. Therefore, the permit requirement . . . must be considered together with the application requirements . . . (44 FR at 75570, 1.)

This line of reasoning was subsequently applied in IR-8 (published herewith), the inconsistency ruling holding Michigan's radioactive materials transport permit requirement to be inconsistent, which stated that "in the absence of an express waiver of preemption, no authority exists for a State or local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo." There being many similarities between the Michigan and Vermont rules, frequent reference will be made to IR-8.

Rule IV of the Vermont regulation sets forth three criteria which must be satisfied before approval is granted to transport highway route controlled radioactive material in Vermont. Each is discussed separately below.

Rule IV(A) requires fulfillment of the application requirements of Rule III. For discussion purposes, the application requirements can be broken down into four categories: information, documentation, certification and indemnification.

Information—Rule III requires submission of the following information as part of the application for approval to transport highway route controlled quantity radioactive material in Vermont:

(A) The proposed route of travel in Vermont, specifying all of the following:

- (1) Each road to be used by route number, name, or other identification.
- (2) Each railroad or waterway to be utilized.

(B) The names, addresses, and emergency telephone numbers of the shipper, carrier, and receiver of the RADWAS, specifying the individual to contact for current shipment information.

(C) A description of the shipment as specified in the provisions of 49 CFR 172.203(d).

(D) The estimated date and time of all of the following for each shipment as applicable:

- (1) The departure of the RADWAS from the site of origin.

(2) The arrival of the RADWAS at the Vermont boundary and its final destination if the destination is within Vermont.

(3) Scheduled stop(s) in Vermont and reason(s) therefore.

(4) The departure of the RADWAS from Vermont.

(K) A certificate giving the point of origin and point of destination of the shipment and stating that the route to be used is the shortest and most direct, or if not so, then stating the explicit reason(s) that the proposed route was chosen.

With the exception of Rules III (D) (3-4) and (K), all of the above information concerning spent fuel shipments is specifically required by Federal regulation to be provided in advance to the Vermont Secretary of Transportation, who is the Governor's Designee for receipt of advance notification of nuclear waste shipments. The requirement is set forth as part of the NRC regulations on physical protection of irradiated reactor fuel in transit (10 CFR 73.37). The NRC regulations were not promulgated under the HMTA. However, § 173.22(c) of the HMR requires shippers of highway route controlled quantity radioactive material to comply with a physical protection plan established under the requirements of the NRC or equivalents approved by MTB. This section of the HMR was adopted as part of HM-164, wherein MTB took administrative notice of the fact that the NRC was in the process of establishing prenotification requirements and stated:

Unless DOT reaches and acts on a conclusion that prenotification rules are necessary, beyond those Congress has directed NRC to impose on certain radioactive wastes, independent State and local prenotification requirements are not consistent with Part 177. (46 FR 5314, 5.)

The absence of date of prenotification requirements in the HMR cannot be construed as an abdication of the field, because MTB has taken several administrative actions regarding prenotification. In the process of promulgating HM-164, MTB received numerous comments urging adoption of a national prenotification regulation. For the reasons set forth in the preamble to that rulemaking, MTE declined to do so. That preamble, which discussed the Congressional directive to NRC to establish prenotification requirements, also described MTB's sponsorship of study by the Puget Sound Council of Governments (PSCOG) to examine the efficacy of prenotification for certain materials. The PSCOG report has since been completed (*Analysis of Prenotification: Hazardous Materials*

Study, Final Report, May 4, 1981) and was relied on in an inconsistency ruling (IR-6, 48 FR 760, January 6, 1983) which found a Covington, Kentucky, prenotification ordinance to be inconsistent. MTB has also sponsored a number of emergency response demonstration projects involving State, city and regional governments. Most recently, MTB awarded a contract to Battelle Northwest Laboratories to perform a comprehensive evaluation of prenotification. In view of the above, MTB has clearly demonstrated its intent to occupy the field of prenotification, to the exclusion of requirements adopted by State and local governments.

Of the above-described information requirements of the Vermont regulation, all except (D) (3-4) and (K) are required by the NRC prenotification regulations which MTB has recognized as currently providing an adequate standard of national applicability. To the extent that they impose prenotification requirements identical to those of the NRC regulations, the Vermont rules amount to an effective adoption of the Federal prenotification scheme on which the HMR rely and, therefore, pose no inconsistency. This is easily distinguished from the conclusion reached in IR-8 regarding virtually identical information requirements imposed by the Michigan State Fire Safety Board and Department of Public Health. In that case, the State rules required submission of the same information, but to different parties, thus creating regulatory redundancy, in addition to potential conflict with the NRC regulations on access to safeguards information.

Different issues are raised by the three items of information required by the Vermont regulation but not by the Federal rules. Vermont Rule III (K) requires transporters to certify that the proposed route from origin and destination is the shortest and most direct and, if it is not, then to explain the reason(s) for its selection. The HMR do not require highway route controlled quantity shipments of radioactive materials to proceed by the "shortest and most direct" route. As codified at 49 CFR 177.825, HM-164 requires carriers to operate over preferred routes selected to reduce (not minimize) time in transit. When promulgating HM-164, MTB recognized that States were in a better position to know local road conditions. Therefore, the Final Rule established a process by which States, in consultation with local governments, could apply this knowledge to designate alternate routes which provide an equal or greater level of safety than Interstate System

highways. As noted above, Vermont has utilized this process to designate preferred routes. This is the extent to which States may act in designating transportation routes for interstate shipments of highway route controlled radioactive material. In IR-8, a Michigan rule requiring transporters to describe and justify their proposed routes and rejected alternates was found to be inconsistent on the grounds that "State approval of route selections on a shipment-by-shipment basis completely undercuts the primary purpose of national uniformity underlying adoption of the highway routing rule." This applies equally to Vermont Rule III (K). By imposing route selection criteria which exceed those established by the HMR, Rule III (K) presents an obstacle to the accomplishment and execution of the HMTA and the regulations promulgated thereunder. This application requirement is related to the approval criterion set forth in Rule IV (C) and is discussed at greater length below.

Rules III(D) (3) and (4) require transporters to submit shipment-specific information not expressly required by Federal regulations. Section (3) requires advance notification of scheduled stop(s) in Vermont and the reason(s) therefor. Section (4) requires advance notification of the estimated date and time of departure of the shipment from Vermont. While it is possible to argue that this information is deducible from that which the Federal rules require to be provided to the State, the issue presented here is not one redundancy but of multiplicity. Under the provisions of its regulation, Vermont seeks to prohibit the transportation of highway route controlled quantity radioactive material on the basis of a transporter's failure to provide information required only by the State of Vermont. If each State were empowered to prohibit interstate transportation of radioactive materials until all of its additional information requirements were satisfied, the result would be to effectively nullify the nationally uniform system of highway routing which was established by adoption of HM-164. The provisions of HM-164 retained for the States a defined role in the designation of preferred routes to be used by all carriers of highway route controlled quantity radioactive material. That role does not include the selective prohibition of interstate transportation for failure to comply with independent State information requirements.

Documentation—Rule III requires submission of the following documentation as part of the application

for approval to transport highway route controlled quantity radioactive material in Vermont:

(F) Copies of any required NRC approval of the proposed route of travel and any other NRC licensing action specific to the shipment, such as an import license or a license to transport.

(G) A copy of an emergency plan which describes procedures to be taken by the carrier in an emergency to eliminate or minimize the radiation exposure of the public.

(I) A copy of the certificate of compliance for the container issued by the NRC, as evidence the container has been approved for hypothetical accident conditions pursuant to the provisions of 10 CFR 71.36.

Rule III(F) is identical to Michigan Rule 3(g) which was examined in IR-8. The Michigan rule was found to be inconsistent because it required transporters to submit copies of shipment-specific documents to two agencies, neither of which was the Governor's Designee for receipt of advance notification under the NRC regulations, thereby greatly increasing the possibility of the information being disclosed to an extent sufficient to compromise the physical security of the shipment. This reasoning does not apply to the Vermont rule which requires submission of the documents to the State Secretary of Transportation, who is the Governor's Designee for receipt of advance notification. Therefore, the Vermont rule does not present the same potential for breach of security as does the inconsistent Michigan rule.

The Vermont rule, nevertheless, poses a problem which, although not discussed in IR-8, is equally relevant to the Michigan rule. The purpose of requiring submission of copies of NRC approvals and licenses is, obviously, to ensure that transporters of highway route controlled quantity radioactive material operate in compliance with NRC regulations. This is a valid State concern. Nevertheless, the legitimacy of the State's interests does not justify its imposition of an inconsistent routing rule in the form of a permit requirement. There are other, less cumbersome methods by which Vermont could obtain the desired assurances. For example, the State could make procedural arrangements with NRC whereby, upon receipt of the minimum four days advance notification of shipment, the Governor's Designee could obtain telephonic or electronic confirmation that the shipment is in conformance with all NRC licensing requirements.

Rule III(G) requires transporters to develop and submit an emergency plan

describing procedures to be taken by the carrier in an emergency to eliminate or minimize radiation exposure of the public. Response to transportation emergencies is necessarily site/specific:

Although the Federal Government can regulate in order to avert situations where emergency response is necessary, and can aid in local and State planning and preparation, when an accident does occur, response is, of necessity, a local responsibility. (IR-2, 44 FR 75568.)

In HM-164, MTB addressed the Federal responsibility for reducing the likelihood of emergencies by requiring not only that such 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 on: (1) The HMR concerning radioactive materials; (2) the properties and hazards of the radioactive materials being transported; and (3) procedures to be followed in case of an accident or other emergency. (49 CFR 177.825(d).) Drivers are also required to carry a route plan which includes the telephone numbers to access emergency assistance in each State to be entered. (49 CFR 177.825(c).) Since the HMR requires drivers to be trained in emergency procedures, transporters could comply with the Rule III(G) merely by submitting a copy of the materials used in the drivers' training course. Such materials are readily available to the State and their submission as part of an application for transportation approval would contribute little to State/local emergency preparedness. If the purpose of this requirement is to ensure that vehicle operators are aware of proper emergency procedures, then the requirement is redundant, as HM-164 addressed this in its imposition of driver training requirements.

Rule III(I) requires submission of the NRC certificate of compliance for the shipping container as evidence that the container has been approved for hypothetical accident conditions pursuant to the provisions of 10 CFR 71.36. The stated purpose of this requirement reflects a basic misunderstanding of the Federal regulations on transportation containers for highway route controlled quantity radioactive material. The NRC issues certificates of compliance, not for containers, but for container designs. Moreover, the cited NRC regulations at 10 CFR 71.36 do not require that each container be tested and approved for hypothetical accident conditions. Rather, the rules require that each container be constructed in accordance

with a design approved by the NRC as meeting the necessary design criteria including, *inter alia*, the ability to meet the standards for hypothetical accident conditions. The HMR incorporate the NRC requirements at 49 CFR 173.416.

Even if this provision is interpreted as requiring advance submission of a copy of the NRC certificate of compliance for the container design, it still presents a conflict with the HMTA's objective of national uniformity in safety regulation. Just as was discussed in connection with Rule III(F) *supra*, ensuring that transporters comply with NRC regulations is a valid State concern. But the legitimacy of the State's interest does not justify it requiring, a precondition to the use of preferred routes, the advance submission of documents which the NRC regulations require licensees to obtain and to maintain extensive records of.

None of the documentation requirements of the Vermont application procedure relate to any transportation safety risk which is unique to Vermont. It therefore follows that if Vermont may deny access to preferred routes for failure to submit copies of certain documents, then any State (and possibly any jurisdiction) may also do so. The resulting multiplicity of requirements that would result if each State were empowered to prohibit interstate transportation of radioactive materials until all of its additional documentation requirements were satisfied, would effectively nullify the nationally uniform system of highway routing which was established by adoption of HM-164. For these reasons, I find that Rules III (F) and (I) constitute an obstacle to the Congressional objective of regulatory uniformity underlying the HMTA and are, therefore, inconsistent.

Certification—Rule III requires submission of the following certifications as part of the application for approval to transport highway route controlled quantity radioactive material in Vermont:

(E) Certification that the vehicle has been inspected in compliance with the provisions of 49 CFR 396.

(H) A Certification that the shipment will be in compliance with these rules and all applicable state and federal statutes, rules, and regulations governing the shipment, including but not limited to Parts 172, 173 and 177 of 49 CFR and Parts 71 and 73 of 10 CFR.

Rule III(E) requires transporters of highway route controlled quantity radioactive material to certify that the transport vehicle has been inspected in accordance with Federal law. It does not

appear that Vermont requires such certifications from other highway transporters of hazardous materials. Presumably, existing vehicle inspection regulations are adequate to ensure the proper maintenance of such vehicles. It thus appears that the requirement merely imposes another redundant paperwork burden which serves no apparent safety purpose and which, if adopted by all States, would result in precisely the type of multiplicity which Congress sought to preclude by enacting the HMTA.

Rule III(H) requires applicants for transportation approval to certify compliance with all applicable Federal and State Rules. The HMR requires shippers to make such a certification on the shipping papers which accompany each shipment of hazardous materials. (49 CFR 172.204.) As was stated in IR-2:

No matter what the form, any State or local requirement that asks for an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper would be inconsistent with the requirements contained in the Hazardous Materials Regulations. (44 FR 75571.)

Therefore, for the same reasons set forth in connection with similar provisions of the Michigan rules considered in IR-8, Rule III(H) is inconsistent with the HMR.

Like the information and documentation requirements discussed *supra*, the certification requirements of the Vermont regulation relate to no transportation safety risk which is unique to Vermont. Therefore, if Vermont may prohibit access to preferred routes for failure to submit certain certifications, then any State may do so. As stated previously, such regulatory multiplicity would render HM-164 meaningless. Because they constitute an obstacle to the Congressional objective of regulatory uniformity underlying the HMTA, Rules III (E) and (H) are inconsistent therewith.

Indemnification—Rule III requires transporters to secure insurance and pay a fee as preconditions for approval to transport highway route controlled quantity radioactive material in Vermont:

(J) A certificate that a bond or insurance acceptable to the Secretary has been posted to cover all types of damages caused by release of the shipped RADWAS materials, and in no event shall such bond or insurance be for less than Five Million Dollars (\$5,000,000) total damages.

(L) A cashier's check in the amount of \$1,000.00 payable to Treasurer, State of Vermont for each proposed shipment. When moved as a group, two or more vehicles,

railcars or barges will be considered one shipment for the purpose of this subsection.

Rule III(J) establishes \$5 Million as the minimum level of financial responsibility for transporters of highway route controlled quantity radioactive material.

Motor carriers of highway route controlled quantity radioactive material are required to meet the minimum levels of financial responsibility set forth in the Federal Motor Carrier Safety Regulations at 49 CFR, Part 387. By rulemakings dated June 11, 1981 (46 FR 30974), June 26, 1983 (46 FR 29698), and July 2, 1984 (49 FR 27288), the Federal Highway Administration established a phased-in schedule of minimum levels of financial responsibility: July 1, 1981, \$1,000,000; January 1, 1985, \$5,000,000.

The HMR require transporters to comply with the Federal Motor Carrier Safety Regulations. (49 CFR 177.804.) At the present time, the Vermont regulation establishes a higher minimum level of financial responsibility than does the Federal rule.

Indemnification for nuclear transportation accidents, however, is not limited to the carrier's public liability insurance. As discussed in the preamble to HM-164:

If the origin or destination of the radioactive material is an indemnified facility such as a nuclear power plant, the provisions of the Price-Anderson Act (42 U.S.C. 2210) assure a source of funds to cover certain personal injury and property damage claims. The law extends to persons other than the licensee such as the carrier, who may be liable for an accident. Insurance coverage up to \$500 million per accident is provided by a combination of licensee private insurance policies and indemnity agreements between the licensees and the NRC. (46 FR 5304.)

In the course of promulgating HM-164, MTB examined the issue of indemnification and concluded that Federal law provided adequate coverage. State adoption of higher insurance coverage requirements can operate as barriers to transportation. This was addressed in IR-10 (published herewith), which dealt with a New York State Thruway Authority (NYSTA) policy allowing radioactive materials on the Thruway only when there was proper indemnification:

By denying use of the Thruway to any radioactive materials shipment not offering what the NYSTA considers to be proper indemnification, the NYSTA rule directly results in the diversion of such shipments to other jurisdictions and the increase of overall time in transit. In other words, the overall exposure to the risks of radioactive materials transportation is increased and exported.

In the absence of a clear showing that the transportation of highway route

controlled quantity radioactive material in Vermont poses a financial risk which exceeds the level of indemnification provided by Federal law, Rule III (J) poses an obstacle to the nationally uniform system of highway routing established under the HMTA. Because it impedes the Congressional objective of regulatory uniformity underlying the HMTA, Rule III (J) is inconsistent therewith.

Rule III (L) requires payment of a fee of \$1,000 for each proposed shipment of highway route controlled radioactive material. Presumably, this fee is to reimburse the State for the cost of the State Monitoring Team which Rule VII requires to accompany each shipment. In its comments on this proceeding, Vermont asserted that the fee is reasonable and that the deployment of trained State personnel to accompany shipments is necessitated by the fact that response groups in the communities along Vermont's preferred routes are predominately voluntary and subject to high turnover, and therefore have difficulty maintaining the skills and equipment needed to respond to nuclear transportation emergencies. Following this line of reasoning, one would expect Vermont to impose similar requirements on shipments of other hazardous materials which pose a potential for extraordinary transportation emergencies. On the basis of both shipment frequency and accident history, spent nuclear fuel poses a much lower risk of transportation accident than do any number of common chemicals, the containment of which could also be expected to exceed the capacity of local groups to respond.

The discriminatory application of the fee notwithstanding, Vermont's claim of uniqueness can be challenged on other grounds. The transportation of spent nuclear fuel in Vermont poses no safety risk which is not present in any other jurisdiction. It is Vermont's limited capacity for emergency response which is alleged to be unique. However, this is the result of the State's deliberate decision, as reflected in its transportation regulations, to field a completely independent response team, rather than to rely on available Federal resources. An extensive network of emergency assistance has been developed and is maintained by the Federal Government precisely because no individual State could be expected to maintain the necessary depth and breadth of expertise in this specialized area of contingency response. By requiring transporters to pay a fee, Vermont seeks to transfer the financial burden of its decision to replicate Federal efforts and this has two

foreseeable impacts relevant to highway routing of radioactive materials—one direct and one indirect.

The immediate and direct result of Vermont's transport approval fee is to cause transporters to redirect shipments away from Vermont whenever possible. Such diversion onto less direct routes would reduce Vermont's exposure to the risks of radioactive materials transportation at the expense of neighboring jurisdictions by increasing total transport time and, therefore, overall exposure to risk. Thus Vermont's requirement has precisely that effect on other States from which it sought to insulate itself, that is, being used as the path of least resistance "to avoid more difficult regulatory terrain." (Vermont comments on IRA-30, September 15, 1983.)

The foreseeable indirect effect of Vermont's imposition of a transport approval fee is to encourage other States to take similar action. The proliferation of escalating fees, as States sought to finance elaborate response systems and/or to reduce their exposure to radioactive materials transportation, would amount to a system of internal tariff barriers which would completely undermine HM-164 by forcing transporters to select routes on the commercial basis of reduced cost rather than the safety basis of reduced time in transit.

In view of these impacts, the transport approval fee imposed by Vermont Rule III (L) presents an obstacle to the accomplishment and execution of the HMTA as implemented through the adoption of HM-164 and is, therefore, inconsistent.

In summary, the indemnification provisions of Rule III, like the information, certification and documentation provisions discussed above, relate to no safety risk which is unique to Vermont. If Vermont could impose such preconditions upon access to preferred routes, any State could do so. This would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA. Therefore, I find that the application requirements in Sections (D) (3-4) and (E) through (L) of Rule III, as reflected in the approval criterion of Rule IV (A), constitute an obstacle to the accomplishment and execution of the HMTA and the regulations promulgated thereunder.

The second criterion for transport approval is set forth at Rule IV (B) and requires that the plan required to be submitted under Rule III (G) be acceptable to the State Secretary of Transportation. As was demonstrated in

the discussion of Rule III (G) *supra*, that requirement constitutes an obstacle to the accomplishment and execution of the HMTA. Since the application requirement of Rule III (G) has been found to be inconsistent, it follows that the approval criterion of Rule IV (B) is also inconsistent.

The third criterion for transport approval is set forth at Rule IV (C) and concerns the standards to be applied in approving a transporter's choice of route from origin to destination:

(C) If the proposed route from origin to destination is not the shortest and most direct, the route has been determined to be acceptable by the Secretary after consultation with the Commissioners of Health and Public Safety on the health, safety and security aspects of the proposal. Avoidance or circumvention of one or more jurisdictions which have precluded or restricted shipments of radioactive materials shall not constitute an acceptable reason for approval of a route through Vermont which is not the shortest and most direct.

In the discussion of Rule III (K) *supra*, the requirement for submission of a justification for the selection of a transport route which is not the shortest and most direct was determined to be inconsistent and, therefore, preempted. It therefore follows that Rule IV (C) is also inconsistent. Nevertheless, because the rule provides Vermont's rationale for its imposition, additional discussion is warranted on the matter.

Vermont's interest in the reasons behind a transporter's route selection reflects the concern that Vermont was being subjected to a disproportionate share of exposure to the risks inherent in radioactive materials transportation; that this had resulted from the diversion into Vermont of shipments which had encountered bans or other significant restrictions in States along the route selected to reduce time in transit (i.e., the route required by HM-164); and that Vermont was being penalized for complying with the Federal routing scheme while other jurisdictions continued to enforce their inconsistent regulations. The Department shares Vermont's concern over the subversion of HM-164 by inconsistent State and local regulations. The fact situation which gave rise to the issuance of inconsistency rulings IR-7 through IR-15 involved precisely the cause and effect of concern to Vermont. The shipper, Nuclear Assurance Corporation, in attempting to transport spent nuclear fuel from Ontario to South Carolina, encountered a variety of inconsistent State and local restrictions which prevented the use of routes through New York and Michigan. Recourse was subsequently made to a route through

Vermont. The route was not selected because it reduced time in transit, but because it was the last available alternative.

In view of the validity of Vermont's concern, its requirement for approval of route selections would seem, on first impression, to be consistent with the HMTA by ensuring compliance with the intent of HM-164. On closer examination, however, the flaws in this reasoning became apparent. First of all, good intentions notwithstanding, the immediate effect of the requirement is to contribute yet another impediment to the interstate transportation of radioactive materials. Additionally, by operating on its own determination that the regulations of another State or local government are unjustified, Vermont is effectively usurping the Federal responsibility for determining inconsistency. For these reasons, as well as those discussed in connection with Rule III (K) *supra*, the route approval criterion set forth in Rule IV (C) is inconsistent with the HMTA and the MHR.

Preemption of the requirement for State approval of the proposed route does not, however, deprive Vermont of means to redress its grievances. No shipper certification, is necessary to determine whether a proposed route is the most direct. The NRC regulations require licensees to provide the State with a minimum of four days advance notice of the route a shipment will follow. Reference to a standard road atlas should immediately reveal whether a proposed route appears to be unnaturally skewed through Vermont. Should this be the case, two avenues are open to Vermont: (1) application to MTB for an inconsistency ruling on the State or local regulation(s) which appear to have caused a diversion of traffic into Vermont and (2) petition to a Federal District Court to permanently enjoin the State or local jurisdiction from enforcing a routing rule which is inconsistent with the HMTA and therefore preempted.

In summary, Rules III and IV constitute a State routing rule in the form of a permit requirement. Such a requirement is inconsistent with the HMTA. As stated in IR-8:

Generally, in the absence of Departmental involvement in a safety issue, States and, to the extent authorized by State law, local governments may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the State role is much more circumscribed. The HMR address all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing degree of risk. Under the authority of the HMTA,

Federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent State or local action. The extent to which State and local government may regulate the interstate transportation of radioactive materials is limited to: (1) traffic control or emergency restrictions which affect all transportation without regard to cargo; (2) designation of alternate preferred routes in accordance with 49 CFR 177.825; (3) adoption of Federal regulations or consistent State/local regulations; and (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 CFR 107.221. Thus, in the absence of an express waiver of preemption, no authority exists for a State or local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.

Rule V. Approval Notification

Rule V states that approval shall be granted in writing and shall indicate any conditions or limitations pertaining thereto. The requirement of prior State approval to transport radioactive materials via preferred routes has been found to be inconsistent, not only in this proceeding, but also in other inconsistency rulings published herewith. Therefore, to the extent that Rule V designates the form such approval shall take, it is also inconsistent.

Rule VI. Transporter notification of Changes

Rule VI sets forth the following requirements:

Unless otherwise specified in the approval notification, the carrier, driver, or operator transporting RADWAS shall notify the Secretary or his designee of the following not less than 4 hours prior to beginning movement in the States:

- (A) Any schedule change that differs by more than 1 hour from the schedule information previously furnished.
- (B) Any incident or situation anticipated to cause a delay in the transport of the RADWAS through Vermont.

The requirement for obtaining State transportation approval has been determined to be inconsistent with the HMTA. Therefore, to the extent that Rule VI implies an ability to impose requirements other than those specifically set forth, it is inconsistent with the HMTA.

Rule VI(A) requires transporters to notify the State Secretary of Transportation of any schedule change that differs by more than one hour from the schedule information previously furnished. The HMR rely on the notification requirements contained in the NRC standards for physical protection. Included in those standards

at 10 CFR 73.37(f)(4) is the requirement that a licensee notify the Governor or the Governor's Designee of any schedule change that differs by more than six hours from the schedule information previously furnished. In Vermont, the Governor's Designee is the State Secretary of Transportation.

Rule VI(B) requires transporters to notify the State Secretary of Transportation of any incident or situation anticipated to cause a delay in transportation through Vermont. The HMR require transporters of radioactive materials to operate in compliance with a physical protection plan as required by NRC regulations (10 CFR 73.37) or MTB-approved equivalent. The NRC regulations require shipment escorts to make calls to the communications center at least every two hours to advise of the status of the shipment. The communications center required by NRC regulations must be "staffed continuously by at least one individual who will monitor the progress of the spent fuel shipment and will notify the appropriate agencies in the event a safeguards emergency should arise."

Any schedule change or shipment delay of more than six hours must be reported under 10 CFR 73.37(f)(4). Delays of less than six hours may be caused by a variety of factors ranging from a safeguards emergency to simple traffic delay. Since the planned schedule necessarily projects estimated times of arrival, a certain margin is built into the schedule. Rule VI(A) would reduce this margin from six hours to one. Rule VI(B) would reduce it even further by requiring notification of any circumstance which could be anticipated to cause any degree of delay in the estimated travel time through Vermont. Clearly, the State of Vermont has a legitimate interest in knowing of shipment delays which could stem from or result in safeguards emergencies. The Federal regulations ensure that they receive such notice. No showing has been made of any safety problem unique to Vermont which requires carriers to report normal transportation delays of less than six hours. Therefore, were Vermont's requirements allowed to stand, any State could impose its own additional reporting requirements. This was the basis for finding inconsistency in IR-8 with regard to similar requirements imposed by the State of Michigan. The multiplicity of differing notification requirements impedes the Congressional objective of national uniformity in hazardous materials transportation safety regulation.

A further problem is presented by the requirement in Rule VI that transporters

provide the required notification "not less than 4 hours prior to beginning movement in the State". If a shipment which had proceeded to a point within four hours of entry into Vermont were to encounter some circumstance resulting in a schedule change of one hour or the anticipation of any delay in Vermont, then, in order to comply with the requirement of at least four hours advance notification, the shipment would have to stop short of the Vermont border and wait out the clock. The HMR at 49 CFR 177.853 require that all shipments of hazardous materials be transported with unnecessary delay. This was the basis for finding a Rhode Island transportation permit requirement to be inconsistent in IR-2:

The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. (44 FR 75571.)

In view of the foregoing, Rule VI impedes both the safety and uniformity objectives of the HMTA. Accordingly, I find Rule VI to be inconsistent with the HMTA.

Rule VII. Monitoring

Rule VII sets forth the following requirements:

(A) Each motor vehicle shipment of RADWAS shall be monitored by:

(1) a leading State Police vehicle occupied by at least one law enforcement officer;

(2) a vehicle occupied by State Monitoring Team personnel; and

(3) a trailing State Police vehicle occupied by at least one law enforcement officer.

(B) Each shipment by railcar or barge through or in the state shall be accompanied as directed by the Secretary.

(C) The ranking state police officer accompanying the shipment shall be the authority to modify the conditions of the approval in response to weather, accident or exigent circumstances which may affect the safety of the shipment. Any modification which will result in a delay of more than two hours in the time of departure of the shipment from Vermont shall be approved by the Secretary or his designee.

With regard to Rules VII (A) and (B), it is difficult to determine whether an obligation to act is being imposed on the transporter or the State Agency of Transportation. In other words, if a shipment arriving at the Vermont border is not met by the State officials assigned to monitor its progress, must the shipment stop and wait for them in order to ensure compliance with Rule VII? If this is the intended effect, then the requirement imposes a degree of delay which is incongruous with the safety objective of reducing time in transit. As stated in IR-2:

Given that the materials are hazardous and that their transport is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized. (44 FR 75571.)

Therefore, to the extent that Rules VII (A) and (B) impose an obligation to act upon transporters of radioactive materials, they are inconsistent with the HMTA.

Rule VII(C) is a delegation of authority to modify the conditions of the written approval to transport radioactive materials in Vermont. Since the underlying requirement for obtaining prior State approval has been determined to be inconsistent, provisions for modifying the conditions of that approval need not be considered, because each element thereof would be inconsistent.

Rule VIII. Schedule information, confidentiality

Rule VIII sets forth the standards of confidentiality to be applied to radioactive materials shipment schedule information. The requirements set forth herein are the same as set forth in the NRC regulations (10 CFR 73.21, 73.37) on which the HMR rely. Accordingly, no inconsistency exists.

Rule IX. Transport inspection

Rule IX states that shipments of radioactive materials may be inspected by State personnel for compliance with applicable State and Federal statutes, rules and regulations. It should be noted that State statutes, rules, and regulations governing radioactive materials transportation are "applicable" only if they are not consistent with the HMTA. Having noted this distinction, I find that Rule IX constitutes a valid exercise of the State's inherent police powers. Ensuring that transport vehicles do not threaten public health and safety has long been recognized as a legitimate State function. Far from being an obstacle to the accomplishment of the HMTA, State enforcement of Federal and consistent State regulations on hazardous materials transportation is a critical element of a regulatory system of national applicability. MTB has sought to foster a Federal/State partnership in hazardous materials transportation safety and, to this end, has developed and implemented the State Hazardous Materials Enforcement Development Program, in which Vermont participates, to provide States with the financial and technical assistance necessary for enforcement of a nationally uniform system of hazardous materials transportation safety regulation. For

these reasons, I find Rule IX to be consistent with the HMTA and the regulations thereunder.

III. Ruling

For the foregoing reasons, I find that the radioactive materials transportation rules of the Vermont Agency of Transportation constitute a regulatory scheme which in many aspects is inconsistent with the HMTA and the regulations issued thereunder.

Specifically, I find the following rules to be inconsistent and thus preempted under 49 U.S.C. 1811(a): Rules I(e), III(D)(3-4), III(E-L) and IV through VIII.

The following rules are not preempted: Rules I(a-d), I(f-g), II, III(A-C), III(D)(1-2), VIII, and IX.

Any appeal to this ruling must be filed within thirty days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on November 20, 1984.

Alan I. Roberts,

Associate Director, Office of Hazardous Materials Regulation, Materials Transportation Bureau.

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