

other relevant factors, so as to minimize any resulting hardship upon such individual. In the event such individual dies before such adjustment has been completed, a similar adjustment shall be made by decreasing subsequent payments, if any, payable under this Act with respect to such individual's death.

* * * * *

Signed at Washington, DC, this 31st day of March, 1988.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

[FR Doc. 88-7445 Filed 4-6-88; 8:45 am]

BILLING CODE 4510-27-M

DEPARTMENT OF LABOR

Office of Worker's Compensation Programs

20 CFR Part 10

Claims for Compensation Under the Federal Employees' Compensation Act

AGENCY: Employment Standards Administration, Office of Worker's Compensation Program, Labor.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Department of Labor proposes to change those provisions of the Federal Employees' Compensation Act regulations which (1) concern the recoupment of forfeited compensation from continuing benefits (section 10.125(b)); and (2) describe the method of collection of overpayments of compensation (section 321(a)). The changes would provide for recoupment of forfeited compensation at the rate of 100% of continuing benefits. The reader may recognize these changes as part of final rules published April 1, 1987. In response to challenges made to the method of publication, however, they are being republished as proposed rules with a request for comments. Appearing elsewhere in this issue of the *Federal Register* are interim final rules dealing with recoupment of forfeited compensation; the provisions of the April 1, 1987 rules which provide for recoupment of forfeited compensation at the rate of 100% of continuing benefits are no longer in effect.

DATE: Written comments must be submitted on or before June 6, 1988.

ADDRESS: Send written comments to Thomas M. Markey, Associate Director for Federal Employees' Compensation, Employment Standards Administration, U.S. Department of Labor, Room S-3229, Francis Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210; Telephone (202) 523-7552.

FOR FURTHER INFORMATION CONTACT: Thomas M. Markey, Associate Director for Federal Employees' Compensation, Telephone (202) 523-7552.

SUPPLEMENTARY INFORMATION:**Background**

The Department of Labor published final rules revising the regulations governing the administration of the Federal Employees' Compensation Act (FECA) on April 1, 1987, which were effective June 1, 1987 (see *Federal Register*, Volume 52 at page 10486, *et seq.*). Among the many areas affected by the revisions were §§ 10.125(b) and 10.321(a) dealing with recoupment of

compensation benefits forfeited under section 8106 of the FECA. Section 8106 provides that employees receiving compensation under the Act may be required to report earnings and that any employee who knowingly fails to report or misreports earnings shall forfeit the right to compensation for the reporting period. The April 1, 1987, rules, at § 10.125(b), clarified the position of the Department that forfeited compensation was subject to recoupment from continuing benefits in an amount equal to the total (100%) of any ongoing compensation. To § 10.321(a), which details the procedures used to determine recoupment of other overpayments, was added a sentence making clear that those procedures did not apply to recoupment of forfeited compensation.

Two unions representing Federal employees have petitioned the Department under section 553(e) of the Administrative Procedure Act (APA) to repeal the regulations dealing with the recoupment of forfeited compensation. The petitions raised questions about the opportunity provided for notice and comment on the sections calling for recoupment of forfeited compensation at the rate of 100% of continuing compensation. In order to resolve these questions and ensure every opportunity for comment by interested parties, the Department takes the following actions: (1) It has published as interim final rules, revised §§ 10.125(b) and 10.321(a) deleting the references to the 100% rule; and (2) publishes these proposed rules which contain provisions for recouping forfeited compensation at the rate of 100% of continuing benefits. Comments are invited on this proposal.

Other Rules in Effect

Because this republication would not void the challenged rules published April 1, 1987, interim final rules, which do not include the challenged provisions, are being published elsewhere in today's *Federal Register*. The reader should consult these rules, which are effective immediately and explain that the Department will recoup forfeited compensation the same as any other type of overpayment.

Recoupment of Forfeited Compensation

These proposed rules allow the Department to collect forfeited compensation at the rate of 100% of continuing benefits. The provision (§ 10.125(b)) detailing how forfeited compensation is collected is amended to clarify that recoupment will be at 100% of any continuing benefits. Section 10.321(a) which details how other types of overpayments are recouped is

amended to distinguish forfeited compensation.

Overpayments can be created in several ways, including where compensation has been declared forfeit under section 8106 of the FECA. That section provides that any employee who fails to report income "forfeits his right to compensation" for the reporting period. Forfeited compensation "shall be recovered by a deduction from compensation" under section 8129, which provides that recovery of overpayments of compensation "shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled."

Forfeited compensation constitutes a penalty. Unlike other forms of overpayments, which may result from an inadvertent action by the claimant or even through an error by OWCP, forfeited compensation results from a willful and knowing action to deprive the Department of information about income which is necessary to determine the appropriate amount of compensation. To use the same ability-to-pay criteria in determining how to recoup the forfeited compensation as is used in other overpayment situations, would in effect void that penalty provision, and severely lessen the administrative incentive to report income accurately and timely. For this reason the Department proposes the 100% rule.

Classification—Executive Order 12291

The Department of Labor does not believe that this regulatory proposal constitutes a "major rule" under Executive Order 12291, because it is not likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in cost or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory analysis is required.

Paperwork Reduction Act

There are no information collection requirements in the proposed regulations. No new forms are required.

Regulatory Flexibility Act

The Department believes that the rule will have "no significant economic

impact upon a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 91 Stat. 1164 (5 U.S.C. 605(b)). The proposed regulation applies primarily to Federal agencies and their employees. No additional burdens are being imposed on small entities. The Assistant Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory impact analysis is required.

For the reasons set out in the preamble, Title 20, Subchapter B of the Code of Federal Regulations is proposed to be amended as follows:

**PART 10—CLAIMS FOR
COMPENSATION UNDER THE
FEDERAL EMPLOYEES'
COMPENSATION ACT, AS AMENDED**

1. The authority citation for Part 10 is revised to read as follows:

Authority: 5 U.S.C. 301; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; 5 U.S.C. 8145, 8149; Secretary's Order 7-87, 52

FR 48466; Employment Standards Order 78-1, 43 FR 51469.

2. In § 10.125, paragraph (b) is revised to read as follows:

§ 10.125 Affidavit or report by employee of employment and earnings.

(b) Where the right to compensation is forfeited, any compensation already paid for the period of forfeiture shall be recovered by deducting the amount from compensation payable in the future. The amount deducted shall equal the total compensation payable until the full amount forfeited has been recovered. If further compensation is not payable, the compensation already paid may be recovered pursuant to 5 U.S.C. 8129 and the Federal Claims Collection Act (31 U.S.C. 952).

3. In § 10.321, paragraph (a) is revised to read as follows:

§ 10.321 Recovery of overpayments.

(a) Except for an overpayment resulting from forfeiture of previously

paid compensation, such as provided in § 10.125, whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual. In the event such individual dies before such adjustment has been completed, a similar adjustment shall be made by decreasing subsequent payments, if any, payable under this Act with respect to such individual's death.

Signed at Washington, DC, this 31st day of March, 1988.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

[FR Doc. 88-7446 Filed 4-6-88; 8:45 am]

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Register

Thursday
April 7, 1988

Part III

Department of Transportation

Research and Special Programs Administration

Inconsistency Ruling No. IR-19; Nevada
Public Service Commission Regulations
Governing Transportation of Hazardous
Materials; Decision on Appeal

DEPARTMENT OF TRANSPORTATION

[Docket No. IRA-39]

**Inconsistency Ruling No. IR-19;
Nevada Public Service Commission
Regulations Governing Transportation
of Hazardous Materials****AGENCY:** Research and Special Programs
Administration, DOT.**ACTION:** Decision on appeal.**SUMMARY:** In response to the appeal of
the Nevada Public Service Commission
from the findings made in Inconsistency
Ruling No. IR-19 (52 FR 24404; June 30,
1987), that Inconsistency Ruling is
affirmed.**EFFECTIVE DATE:** April 1, 1988.**FOR FURTHER INFORMATION CONTACT:**Edward H. Bonekemper, III, Senior
Attorney, Office of Chief Counsel,
Research and Special Programs
Administration, 400 Seventh Street SW.,
Washington, DC 20590. (Tel. 202/366-
4400).**SUPPLEMENTARY INFORMATION:****I. Background**

Section 112(a) of the Hazardous
Materials Transportation Act (HMTA)
(49 App. U.S.C. 1811(a)) expressly
preempts any requirement of a state or
political subdivision thereof, which is
inconsistent with any requirement of the
HMTA or the Hazardous Materials
Regulations (HMR), issued thereunder
(49 CFR Parts 171-179). Section
107.209(c) of Title 49, Code of Federal
Regulations sets forth the following
factors which are considered in
determining whether a state or political
subdivision requirement is inconsistent:

(1) Whether compliance with both the
state or political subdivision
requirement and the HMTA and the
HMR is possible (the "dual compliance"
test); and

(2) The extent to which the state or
political subdivision requirement is an
obstacle to the accomplishment and
execution of the HMTA and the HMR
(the "obstacle" test).

Inconsistency rulings and decisions on
appeals of such rulings only address
preemption issues under the HMTA and
the HMR. They do not address issues of
preemption arising under other statutes
or under the Commerce Clause of the
United States Constitution.

On October 21, 1986, Southern Pacific
Transportation Company (SP) applied
for an administrative ruling on the
question of whether §§ 705.310 through
705.380 of the Nevada Administrative
Code are inconsistent with, and thus
preempted by, the Hazardous Materials
Transportation Act (HMTA) (49 App.

U.S.C. 1801-1811) and the Hazardous
Materials Regulations (HMR) (49 CFR
Parts 171-179). The procedural
regulations governing issuance of
inconsistency rulings are codified in 49
CFR 107.201-107.211.

Inconsistency Ruling 19 (IR-19) was
issued in accordance with § 107.209 on
June 30, 1987, by the Director of the
Office of Hazardous Materials
Transportation. That ruling determined
that §§ 705.310 through 705.370 of the
Nevada Administrative Code were
inconsistent with the HMTA and the
HMR. In that ruling, it was also
determined that § 705.380 was
consistent with the HMTA and the HMR
and thus not preempted.

II. The Appeal

On July 24, 1987, pursuant to 49 CFR
107.211, an appeal of IR-19 was filed
with the Administrator of the Research
and Special Programs Administration by
the Nevada Public Service Commission
(Nevada). The arguments made by the
appellant are discussed in the following
sections.

Comments opposing the appeal were
filed by Southern Pacific Transportation
Company, the National Tank Truck
Carriers, Inc., Union Pacific System, the
Association of American Railroads, and
the State of New Jersey. Without
exception, those comments urge the
affirmation of IR-19 and dispute the
contentions of Nevada. On September 4,
1987, Nevada filed rebuttal comments
addressing only Southern Pacific's
comments opposing the appeal.

III. Decision on Appeal**A. Introduction**

I am issuing this decision in my
capacity as Administrator of the
Research and Special Programs
Administration (RSPA). I have
thoroughly considered all of the issues
raised in the appeal and the discussions
of them in the comments and rebuttal
comments. All of the issues being
appealed were discussed exhaustively
by the Director of OHMT in IR-19. I will
respond only to the specific issues
raised on appeal and generally will not
reiterate the Ruling's discussions, with
all of which I fully concur.

B. Definitions

Nevada appeals the finding in IR-19
that the definitions of "hazardous
material" and "storage" as set forth in
§ 705.310 of the Nevada Administrative
Code are inconsistent with the HMTA
and the HMR. Nevada contends that it
incorporated the definitions of
hazardous materials found in the Code
of Federal Regulations (CFR) into its

definition of "hazardous material" and
therefore does not understand where
there is an inconsistency. This
contention is incorrect. Nevada's
§ 705.310 defines "hazardous material"
as follows:

"Hazardous material" means low specific
activity material as defined in 49 C.F.R.
§ 173.403(n) and radioactive material as
defined in 49 CFR § 173.403(y) and:

(a) Class A explosives as defined in 49
C.F.R. § 173.53;

(b) Class B explosives as defined in 49
C.F.R. § 173.88;

(c) Poison A as defined in 49 C.F.R.
§ 173.26; and

(d) Flammable solids (DANGEROUS
WHEN WET labels only) as defined in 49
C.F.R. § 173.150, which are subject to the
requirements for placards in Table 1 of 49
C.F.R. § 172.504

While this definition of "hazardous
material" found in Nevada's § 705.310
cross-references specific sections of the
CFR, it contains ambiguities and
selectively lists only certain hazardous
materials. For those reasons, it
undermines RSPA's definition of
"hazardous material," the nationally
uniform interpretation of which is
critical to the effective regulation of
hazardous materials transportation.

As stated in IR-19, it is unclear
whether the phrase "which are subject
to the requirements for placards in
Table 1 of 49 CFR 172.504" applies to
flammable solids only, to the four (a)-(d)
materials, or to all six types of materials
referred to in the regulation. The
primary problem with the Nevada
definition of "hazardous material",
however, is that it fails to include many
materials which are regulated as
"hazardous materials" by the HMR. In
essence, Nevada is selectively
determining which of DOT's hazardous
materials are subject to its regulations.
Uniform definition of that term is critical
to the efficacy of the entire system of
regulating hazardous materials
transportation, and thus the Federal role
in defining them is exclusive. IR-18 (52
FR 200; Jan. 2, 1987); IR-20 (52 FR 24396;
June 30, 1987); IR-21 (52 FR 37072; Oct. 2,
1987); *Missouri Pacific RR Co. v.*
Railroad Commission of Texas, Civ. No.
A-86-CA-569 (W.D. Tex. 1987).

Ambiguity and selectivity in defining
hazardous materials create problems.
State and local hazardous materials
definitions, like Nevada's § 705.310,
which result in regulation of either more
or fewer materials than those in the
HMR, create confusion among the
regulated community, are obstacles to
uniformity in transportation regulation,
and thus are inconsistent with the HMR.

Nevada also appeals the finding in IR-19 that its definition of "storage" is inconsistent with 49 CFR 174.14(a). Section 705.310 defines "storage" as "keeping any hazardous material for more than 48 hours." This definition relates to the prohibition in § 705.310 of storage of hazardous materials on railroad property without a permit. Nevada contends that its regulations allow a railroad to store hazardous materials at designated railroad property locations for as long as necessary, and therefore is consistent with Federal regulations allowing storage up to 120 hours.

That contention is not correct. 49 CFR 174.14(a) allows a carrier 48 hours, *excluding* Saturdays, Sundays and holidays, to forward shipments of hazardous materials. This definition permits retention up to 120 hours, whereas the Nevada definition results in a prohibition on retention beyond 48 hours without a permit. Moreover, as fully explained in IR-19, the Federal regulations allow retention for even longer periods where infrequent service is provided and allow indefinite storage at the destination shown on the shipping papers or the final agency station. The effect of Nevada's definition of "storage" is to require a permit for activities which already are deemed legal under Federal regulations in a manner which creates an obstacle to accomplishment and execution of those regulations. For example, when hazardous materials arrive at a storage location on Friday or Saturday, it would be extremely difficult to obtain the required State permit within 48 hours, particularly in light of the permit requirements discussed below.

Therefore, I affirm the findings in IR-19 that Nevada's definitions of "hazardous material" and "storage" are inconsistent with the HMR.

C. Requirements of Issuance of Permit

Nevada appeals the finding in IR-19 on the basis that the activities for which § 705.320 requires a permit are not activities covered by the HMTA and the HMR. Nevada argues that the federal regulations address *how* hazardous materials are to be loaded, unloaded, transferred and stored, whereas the Nevada regulations relate to *where* such activities will take place on the railroad's property.

Therefore, Nevada argues, its regulations do not fail the "dual compliance" test. In short, Nevada contends that DOT's regulations provide standards for the actual loading, unloading, transfer and storage of hazardous materials, and Nevada's regulations deal with the location of

such activities. Nevada states that after a railroad receives a permit designating the appropriate locations, the railroad then can perform the activities according to the requirements of the HMR. Nevada further contends that its regulations do not fail the "obstacle" test because simultaneous compliance with the HMR is possible.

Nevada's contention that the Federal regulations address *how* hazardous materials are to be loaded, transferred and stored rather than *where* such activities take place is both erroneous and irrelevant. First, the following sections of the HMR regulate where such activities take place:

(1) Section 174.16 requires certain location-specific unloading from rail cars.

(2) Section 174.700 regulates the loading of radioactive materials onto rail cars and provides distance limitations.

(3) Section 177.841(a) prohibits loading or unloading of poisons from motor vehicles "near or adjacent to any place where there are likely to be * * * assemblages of persons * * * or upon any public highway or in any public place."

The above-listed examples demonstrate potential "dual compliance" difficulties which may arise under Nevada's regulations. In many instances they require or allow loading, unloading or transfers by carriers which the Nevada regulations prohibit without a permit. However, the State's regulations are so discretionary that they authorize Public Service Commission approval of storage prohibited by the HMR and prohibition of storage authorized or required by the HMR. The permit requirements, therefore, are inconsistent with the above-mentioned HMR provisions under the "dual compliance" test.

Second, Nevada's allegation of a "how"/"where" dichotomy fails to raise issues, relevant to the standards for determining consistency. RSPA has established a comprehensive series of regulations concerning the who, what, when, where and how of railroad-related storage of hazardous materials. Nevada also would require a permit, including additional substantive requirements at the discretion of the State, even where a railroad is meeting the plethora of applicable Federal regulations. Such additional requirements constitute an obstacle to accomplishment of the HMR and, therefore, are inconsistent with the HMR under the "obstacle" test. In essence, Nevada is questioning the adequacy of the Federal regulations; those issues are irrelevant in an inconsistency

proceeding but may be raised either in a petition for rulemaking under 49 CFR 106.31 or in a request for waiver of preemption under 49 CFR 107.215.

Therefore, I affirm the finding in IR-19 that the permit requirements of § 705.320 are inconsistent with the HMR.

D. Transportation of Radioactive Materials

Nevada appeals the finding in IR-19 that Nevada's permitting system, as applied to the transportation of radioactive materials, is inconsistent with the HMTA and the HMR. Nevada states that this finding is based on IR-15 (49 FR 46660; Nov. 27, 1984; affirmed IR-15 (Appeal), 52 FR 13062; Apr. 20, 1987), which stands for the proposition that states are without authority to establish a permitting system for radioactive materials transportation since the HMTA and the HMR totally occupy that field. Nevada contends that the HMTA does not totally occupy the field of radioactive materials transportation and, further, that the Vermont regulations reviewed in IR-15 are not related to Nevada's regulations. Nevada claims that the HMTA and the HMR together do not constitute a pervasive regulatory scheme for the transportation of radioactive materials because they do not address the locations for the storage of radioactive materials, pending transfers to trucks for ultimate disposal.

As stated in IR-19, state and local regulations requiring approval for the transportation of radioactive materials constitute unauthorized prior restraints on shipments that are presumptively safe based on their compliance with Federal regulations. This is so because the HMTA and the HMR provide a comprehensive scheme of regulation for radioactive materials transportation and thus virtually completely occupy the field of radioactive materials transportation.

As indicated earlier in this decision, the HMR do extensively regulate storage-related activities of railroads. Again, the gist of Nevada's argument is that it believes the Federal regulations are inadequate. Adequacy of the HMR, however, is not a relevant issue in an inconsistency proceeding. That issue may be addressed by Nevada through a petition for rulemaking to amend the HMR or through a request for waiver of preemption.

IR-8 (49 FR 46637; Nov. 27, 1984); IR-15, *supra*; IR-20, *supra*; and IR-21, *supra*, among others, stand for the proposition that state and local governments may not impose their own permitting requirements on radioactive materials transportation. As Nevada has done

here, attempts were made to justify the permitting systems found inconsistent in those other rulings by contending that they were intended to compensate for the inadequacies of the HMR. The mere fact that Nevada's permitting system is different than those at issue in the earlier rulings does not change the conclusion that it is inconsistent and thus preempted.

Therefore, I affirm the finding in IR-19 that Nevada's permitting system, as applied to the transportation of radioactive materials, is inconsistent with the HMTA and the HMR.

E. Transportation of Nonradioactive Materials

Nevada further contends that its regulations regarding nonradioactive hazardous materials are clear regarding which party is required to obtain a permit. As part of its discussion of the burdensome nature of Nevada's permit requirements, IR-19 stated that the State's § 705.320 literally required any trucking company loading, unloading, or transferring hazardous materials on railroad property to obtain a State permit. Nevada states that once a railroad receives an annual permit designating the locations for loading, unloading, transfer and storage of hazardous materials, *any person* may perform these activities at the authorized locations.

Despite this explanation provided by Nevada, § 705.320 itself does not, in fact, clearly state which party conducting a regulated activity is required to obtain a permit and thus imposes potential civil and criminal liability on anyone who conducts those activities in the absence of a permit—even if those activities are conducted in accordance with, or even mandated by, the HMR. Section 705.320 broadly states: "A person shall not * * * [l]oad or unload * * * [t]ransfer * * * or * * * [s]tore hazardous material * * * without a permit issued by the commission." The actual language of state and local requirements, rather than later statements of intent, are controlling. IR-8(Appeal) (52 FR 13000; Apr. 26, 1987), IR-16 (50 FR 20872; May 20, 1985), unless there is a demonstrated actual practice to the contrary. IR-17 (51 FR 20925; June 9, 1986; *affirmed* IR-17(A), 52 FR 36200; Sept. 25, 1987). In addition, the fact that the permits are issued annually does not eliminate the need for some permit to have been issued with respect to any shipment of hazardous materials.

As discussed in IR-19 and elsewhere in this decision, the burdensome, delay-inducing and discretionary Nevada permitting system constitutes an unauthorized prior restraint on

shipments of nonradioactive hazardous materials that are presumptively safe based on their compliance with the HMR. Therefore, I affirm the finding in IR-19 that Nevada's permitting system as applied to the transportation of nonradioactive hazardous materials is an obstacle to accomplishment and execution of the HMTA and the HMR and thus is inconsistent with the HMTA and HMR.

F. Information and Documentation Requirements

Nevada appeals the finding that the HMTA and the HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials and that the information required by Nevada's regulations to be furnished on an application for a permit constitutes an obstacle to implementation of these Federal regulations and is therefore inconsistent with them. Nevada contends that since U.S. District Judge Thompson, in denying a request to enjoin enforcement of the Nevada regulations, stated that an annual permit application could be completed in one day, the information required on a permit application does not constitute a burden on transportation.

Again, Nevada's contentions concerning the sufficiency of the HMR's information and documentation requirements are irrelevant in this proceeding; they may be raised in a petition for rulemaking or in a request for waiver of preemption. In addition, burdens on commerce are a factor specified in 49 App. U.S.C. 1811(b) and 49 CFR 107.215(b)(7) as relevant to waiver of preemption—not to inconsistency rulings.

Nevada's information and documentation requirements not only are quite extensive, but they also are open-ended. Section 705.330(l) provides a detailed list of information and documentation to be submitted with an application for a permit. In addition, § 705.340 contains an extensive list of facts which Nevada takes into consideration in evaluating a permit application. Section 705.350 requires the applicant to certify that the information initially provided is accurate. Under § 705.370, Nevada has the authority to dismiss a permit application if there is insufficient information or if the applicant fails to submit additional information required by Nevada. These extensive requirements would take more than one day for a railroad to meet—in fact, Nevada controls the time by being able, without limitation, to require submission of additional information.

As stated in IR-19, RSPA has determined which specific information and documentation requirements are needed for the safe transportation of hazardous materials and state and local requirements going beyond them are obstacles to the accomplishment of the objectives of the HMTA and the HMR and are inconsistent with them. This has been a long-held position of RSPA. IR-2 (44 FR 75566; Dec. 20, 1979); IR-6 (48 FR 760; Jan. 6, 1983); IR-8, *supra*; IR-8 (Appeal), *supra*; IR-15, *supra*; IR-15 (Appeal), *supra*; IR-18, *supra*; IR-21, *supra*.

Therefore, I affirm the finding in IR-19 that Nevada's open-ended and extensive information and documentation requirements constitute such obstacles and are inconsistent with the HMTA and the HMR.

G. Potential for Delay

Nevada appeals the finding in IR-19 that its permitting process creates the potential for delay in the transportation of hazardous materials. Nevada contends that its failure to issue Union Pacific (UP) a permit to transport 7200 tons of radioactive dirt for disposal in Nevada is irrelevant because UP filed its application under Nevada's earlier Emergency Regulation. It also asserts that it failed to issue a permit based on reasons which were not germane to the permitting process. Nevada contends that it failed to issue a permit to UP for public safety reasons, and that UP wanted to transport radioactive soil from New Jersey to a location in Nevada which the State's Department of Human Resources had decided was a public nuisance. Nevada further contends that UP was not harmed by Nevada's failure to allow transportation, as evidenced by UP's failure to commence a legal action against Nevada.

Nevada's admitted earlier use of its permitting authority to deny transportation for reasons not related to the permit requirements set forth in its regulations demonstrates the risks inherent in the discretionary permitting system at issue here. As accurately pointed out by all the commenters opposing Nevada's appeal, under its permitting system, not only can the State delay transportation for any or no reason, but it also can deny or ban transportation-related activities for any or no reason.

Not only the State's past practice, but the provisions of the Nevada Administrative Code at issue here raise issues concerning potential delays in transportation of hazardous materials. Section 705.350 provides for an annual renewable permit and for a temporary

permit which may be issued upon a showing of "compelling need" while an annual application is pending. Section 705.370(1) provides that Nevada will give 30 days' notice of permit applications before taking action on them. Under these two provisions, Nevada can take as much time as it believes is necessary to consider, grant or deny permit applications.

Moreover, it can prolong the permit process by insistence upon compliance with its extensive information and documentation requirements and upon submission of any other "pertinent" information under § 705.340(9). Further, Nevada has considerable discretion concerning whether to act on a permit application as there is no requirement that Nevada even issue a permit when certain conditions have been met by the applicant or determined by Nevada.

Delays and the potential for delay, many of them similar to those present here, consistently have resulted in findings of inconsistency with the HMTA and the HMR. IR-2, *supra*; IR-3 (46 FR 18918; Mar. 26, 1981); IR-6 *supra*; IR-18, *supra*; IR-20, *supra*; IR-21, *supra*; *Missouri Pacific RR Co. v. Railroad Commission of Texas*, *supra*.

Therefore, I affirm the finding in IR-19 that the entire permitting process contained in the Nevada regulations is likely to cause extensive delays and thus is inconsistent with the HMR.

H. Regulation of Transportation-Related Storage

Nevada appeals the finding in IR-19 that the HMR contains comprehensive

regulations dealing with the storage of hazardous materials transported by rail and that Nevada's regulatory scheme for storage of hazardous material transported by rail constitutes an obstacle to the accomplishment of the objectives of the HMTA and the HMR.

Nevada claims that if the HMR provisions relating to storage were as comprehensive as stated in IR-19, then the storage of explosives by Southern Pacific at Hafd certainly would have been in violation of those regulations. This contention is not relevant to the issue of the consistency of Nevada's permit requirement for storage of hazardous materials for more than 48 hours. Once again the State fails to distinguish between its concept of adequacy and the relevant issue of consistency. Issues of adequacy may be properly addressed in petitions for rulemaking and requests for waivers of preemption.

Under Nevada's §§ 705.310 and 705.320, storage of hazardous materials on railroad property is prohibited for more than 48 hours without a permit. However, it is unclear how long and under what conditions Nevada would allow hazardous materials to be stored on railroad properties if and when a permit were issued. IR-19 contains numerous examples of extensive HMR regulations concerning railroad-related storage of hazardous materials. These regulations either authorize or prohibit specific types of hazardous materials storage under specified circumstances. Nevada's regulatory scheme for storage of hazardous materials transported by

rail creates the risk of widespread confusion. In essence, Nevada's regulations are so discretionary that they authorize Nevada to approve storage prohibited under Federal regulations or to disapprove storage authorized under Federal regulations. Such potential inconsistencies were manifested in a criminal action instituted against Southern Pacific for holding cars at a siding beyond 48 hours to wait for a weekly train on a branch line (a holding authorized under § 174.14 of the HMR).

Therefore, I affirm the finding in IR-19 that Nevada's regulations relating to storage of rail-transported hazardous materials are inconsistent with the HMTA and the HMR.

III. Conclusion

For the reasons indicated above and for the reasons set forth in IR-19 itself, I affirm the determination by the Director of the Office of Hazardous Materials Transportation in IR-19 that §§ 705.310 through 705.370 of the Nevada Administrative Code are inconsistent with the HMTA and the HMR.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued in Washington, DC on April 1, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[FR Doc. 88-7682 Filed 4-6-88; 8:45 am]

BILLING CODE 4910-60-M