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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2011-0294 (PD-35(R)]

# New Jersey Regulations on Transportation of Regulated Medical Waste

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODES AFFECTED: All transportation modes

SUMMARY: Federal hazardous material transportation law preempts the following requirements in the New Jersey Administrative Code (N.J.A.C.) because the requirements are not substantively the same as the requirements in the HMR:

1. N.J.A.C. 7:26-3A.10(a) that generators must separate into different containers before transport sharps, fluids (greater than 20 cc), and other regulated medical waste;
2. N.J.A.C. 7:26-3A.11(d) which allows a generator to ship oversized medical waste without placing it in a packaging as required by the HMR;

3. N.J.A.C. 7:26-3A.14 that the words “Medical Waste” or “Infectious Waste” must be labeled on the outside of the package when there is untreated regulated medical waste;

4. N.J.A.C. 7:26-3A:15 that each “generator shall mark each individual container of regulated medical waste in accordance with all applicable Federal regulations….,” and that the markings must include details of the transporter’s name, the date of shipment, the intermediate handler’s name, and other specific information;

5. N.J.A.C. 7:26-3A.19 and those provisions in 7:26-3A.31 which require the use of a specific “tracking form” to accompany shipments of regulated medical waste that are prescribed for either the generator or the transporter;

6. N.J.A.C. 7:26-3A.28 that, when transferring between transporters, each transporter must place a water resistant tag below the generator’s marking on the outer surface of the container with the transporter’s name, solid waste registration number, and date of receipt; and

7. N.J.A.C. 7:26-3A.30 which requires that a vehicle used to transport regulated medical waste must have: 1) the name of the transporter; 2) the New Jersey Department of Environmental Protection (NJDEP) solid waste transporter registration number; and 3) either the words “Medical Waste” or “Infectious Waste” on two sides and the back of the cargo-carrying body.

8. N.J.A.C. 7:26-3A.45, to the extent that it requires rail transporters to comply with the transporter requirements of 7:26-3A.28 and 7:26-3A.30.

9. N.J.A.C. 7:26-3A.46 which requires a specific tracking form to accompany shipments of regulated medical waste for rail transporters.

Federal hazardous material transportation law does not preempt the following requirements because they do not create an obstacle in complying with the HMR.

1. N.J.A.C. 7:26-3A.21(a)(1) to the extent that it requires the generator to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the transporter;
2. N.J.A.C. 7:26-3A.21(a)(2) to the extent that it requires the generator to retain a copy of any exception report for at least three years after the day the exception report was submitted;
3. N.J.A.C. 7:26-3A.22 to the extent that it requires the generator of regulated medical waste to file an exception report with the state when a transporter and/or destination facility notifies the generator of any discrepancy between the shipment as accepted by the initial transporter and delivered to the destination facility;
4. N.J.A.C. 7:26-3A.32 to the extent that it requires the transporter to deliver the entire quantity of regulated medical waste to the proper party listed on the tracking form;
5. N.J.A.C. 7:26-3A.33 to the extent that does not require a particular form to be used to consolidate the multiple shipments;
6. N.J.A.C. 7:26-3A.34 to the extent that it requires that the transporter of regulated medical waste to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the next party; and

7. N.J.A.C. 7:26-3A.41 to the extent that it requires intermediate handlers and destination facilities to certify that they had received the listed regulated medical waste.

FOR FURTHER INFORMATION CONTACT: Alisa Chunephisal, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001 (Tel. No. 202-366-4400).

SUPPLEMENTARY INFORMATION

I. Application

The Healthcare Waste Institute (Institute) has applied to PHMSA for a determination whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts requirements in the N.J.A.C. on the transportation of regulated medical waste in commerce regarding packaging, labeling and marking of containers, use of a specific "tracking form," submission of "exception reports," and marking of transport vehicles.

In summary, the Institute contends that these requirements are preempted because they are (1) not "substantively the same as" requirements in the Federal hazardous material transportation law or the HMR, 49 CFR parts 171-180, on the transportation of regulated medical waste, or (2) otherwise an "obstacle" to accomplishing and carrying out Federal hazardous material transportation law and the HMR, as the NJDEP requirements are enforced and applied.

On November 10, 2011, PHMSA published a notice in the Federal Register inviting interested persons to comment on the Institute's application. 77 FR 39567. The only comment was submitted by the American Trucking Associations, Inc. (ATA). ATA echoes

the position of the Institute that New Jersey's tracking form, marking, and labeling requirements fall within the "enumerated 'covered subjects'" that "requires that the state regulation be 'substantively the same as' the federal requirements." ATA also states that "requiring different labels and marking for hazardous materials packagings and motor vehicles in transportation creates an unworkable situation [and]…motor carriers cannot be expected to modify package and vehicle markings and labels depending upon the states or municipalities they travel through." ATA opines that "New Jersey's use of a unique hazardous materials shipping paper impacts safety by creating potential confusion for motor carriers and emergency responders. Moreover, the use of unique hazardous material shipping papers by states and municipalities creates a compliance nightmare for motor carriers."

In a June 8, 2012 telephone conversation, staff attorneys in the New Jersey Department of Law and Public Safety advised an attorney in my office that the New Jersey regulations dated from 1989 when the U.S. Environmental Protection Agency (EPA) conducted a two-year demonstration program, which expired in 1991. *See* the discussion in Preemption Determination (PD) No. 23(RF), "Morrisville, PA Requirements for Transportation of 'Dangerous Waste,'" 66 FR 37260-61 (July 17, 2001), decision on petition for reconsideration, 67 FR 2948 (Jan. 22, 2002), and PD-29(R), "Massachusetts Requirements on the Storage and Disposal of Infectious or Physically Dangerous Medical or Biological Waste," 69 FR 34715, 34717 (June 22, 2004). As explained in those decisions, DOT regulates the transportation of regulated medical waste as a Division 6.2 hazardous material. PD-23(RF), 66 FR at 37260-61; PD-29(R), 69 FR at 34717. *See also* 49 CFR 173.134(a)(5). However, New Jersey's regulations appear to treat regulated medical waste in a manner similar to hazardous waste subject to the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq*.

I. Federal Preemption

A United States Court of Appeals has found that uniformity was the "linchpin" in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). Section 5125 of Title 49 U.S.C. contains express preemption provisions. Section 5125(a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted -- unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e) – if

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.[1]

Subsection (b)(1) of 49 U.S.C. 5125 further provides that a non-Federal requirement concerning any of the following subjects is preempted -- unless authorized by another Federal law or DOT grants a waiver of preemption -- when the non-Federal requirement is not "substantively the same as" a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security:[2]

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[1] These two paragraphs set forth the "dual compliance" and "obstacle" criteria which are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc*. v. *Paul*, 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

[2] To be "substantively the same," the non-Federal requirement must conform "in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d). Additional standards apply to preemption of non-Federal requirements on highway routes over which hazardous

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

Under 49 U.S.C. § 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.53(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. *See* 49 CFR 107.209(c).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in

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materials may or may not be transported and fees related to transporting hazardous material. *See* 49 U.S.C. 5125(c) and (f).

order to determine whether a requirement is authorized by another Federal law, or whether a fee is "fair" within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d at 1581.

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations and which PHMSA applies in making administrative preemption determinations.

## III. Discussion

### A. Packaging and Segregation Requirements

The Institute raises concerns with two provisions which (1) allow generators to ship oversized medical waste without a packaging or container and (2) require generators to separate sharps, fluids (greater than 20 cc), and other regulated medical waste.

The HMR authorize the following packagings for the transportation of regulated medical waste: (1) UN standard non-bulk packagings conforming to the requirements of 49

CFR part 178 at the Packing Group II performance level; (2) large packagings constructed, tested, and marked in accordance with the requirements of part 178 provided the waste is contained in inner packagings conforming to the requirements of paragraph (e) of § 173.197; and (3) non-specification bulk packaging such as a wheeled cart or bulk outer packaging (BOP) provided the waste is contained in inner packagings conforming to the requirements of paragraph (e) of § 173.197. In addition, regulated medical waste transported by a private or contract carrier is excepted from the specific packaging requirements of § 173.197, if packaged in a rigid non-bulk packaging conforming to the general packaging requirements of §§ 173.24 and 173.24a and packaging requirements specified in 29 CFR 1910.1030, provided the material does not include a waste concentrated stock culture of an infectious substance. Sharps containers must be securely closed to prevent leaks or punctures. Thus, in all cases, the HMR require that, regardless of size, regulated medical waste may be transported only in a closed packaging or container.[3]

In comparison, New Jersey's regulations are less prescriptive than the HMR. First, N.J.A.C. 7:26-3A.5 defines "oversized regulated medical waste" as "medical waste that is too large to be placed in a plastic bag or standard container," without defining the term "standard container." More importantly, N.J.A.C. 7:26-3A.11(d) explicitly allows "oversized regulated medical waste" to be transported without any form of packaging or containment, in stark contrast to the authorized bulk packagings required in § 173.197.

The HMR also contain specific packaging requirements for sharps and liquids. 49 CFR 173.197(b) and (e)(3), respectively, provide that: "A non-bulk packaging used as a

[3] In the preamble to its August 14, 2002 final rule making "Revisions to Standards for Infectious Substances," PHMSA's predecessor agency, the Research and Special Programs Administration, responded to a comment that it had proposed to "permit regulated medical waste to be transported in large open-top, roll-off containers. This is not the case. The non-specification bulk packagings authorized for the transportation of RMS must be closed with a lid or closure to prevent intrusion of water into the packaging or release of contents from the packaging." 67 FR 53118, 53125.

sharps container must be puncture-resistant for sharps and sharps with residual fluid as demonstrated by conducting the performance tests in part 178.… Sharps containers must be securely closed to prevent leaks or puncture in conformance with the instructions provided by the packaging manufacturer." Moreover, "[s]harps transported in a Large Packaging, Cart, or BOP must be packaged in a puncture-resistant inner packaging (sharps container)." As for liquids, § 173.197(e)(2) requires that:

> Liquid regulated medical waste or clinical waste or (bio) medical waste transported in a Large Packaging, Cart, or BOP must be packaged in a rigid inner packaging conforming to the provisions of subpart B of this part. Liquid materials are not authorized for transportation in inner packagings having a capacity of greater than 19 L (5 gallons).

The HMR do not provide a quantity exception. In contrast, the N.J.A.C. 7:26-3A.10(a) "requires generators to separate regulated medical waste into different containers before transport, i.e., sharps, fluids (greater than 20 cc), and other regulated medical waste." Moreover, N.J.A.C. 7.26-3A.11(d) provides that the packages or containers for sharps must be puncture resistant while the packages for fluids (quantities greater than 20 cubic centimeters) in packaging or containers must be break-resistant and tightly lidded or stoppered.

Because N.J.A.C. 7:26-3A.10(a) and N.J.A.C. 7:26-3A.11(d) cover "the packing, repacking, [and] handling . . . of hazardous material" and they are not substantively the same as the HMR, these regulations are preempted.

B. Labeling and Marking Requirements

The HMR require that an "INFECTIOUS SUBSTANCE" label must be affixed on packages that contain regulated medical waste unless the packaging is marked with the "BIOHAZARD" marking and is being transported by a private or contract carrier. 49 CFR 172.400(a), 172.432, and 173.134(c)(1)(i). The "INFECTIOUS SUBSTANCE" label is a

white panel with black text. 49 CFR 172.432. The HMR do not differentiate when a label is needed based on whether there is treated or untreated medical waste nor do they define untreated medical waste. N.J.A.C. 7:26-3A.5, however, defines "untreated regulated medical waste" as waste "that has not been treated to substantially reduce or eliminate its potential for causing disease." N.J.A.C. 7:26-3A:14 requires that only a container of *untreated* regulated medical waste must have the label "Medical Waste," "Infectious Waste," or display the universal biohazard symbol on the outside of the container. The N.J.A.C. 7:26-3A.14 requirement is not substantively the same as the HMR and therefore is preempted.

Additionally, the HMR require that the inner packagings authorized for large packagings, carts, and bulk outer packagings containing regulated medical waste "must be durably marked or tagged with the name and location (city and state) of the offeror, except when the entire contents of the Large Packaging, Cart, or BOP originates at a single location and is delivered to a single location." 49 CFR 173.197(e). Moreover, the markings for the outer packaging for regulated medical waste of non-bulk packages and bulk packages require only the proper shipping name and UN identification number while the inner packaging for non-bulk packages is required to only be marked with the "BIOHAZARD" symbol. 49 CFR 172.301 and 172.304. Bulk packagings that contain infectious substances must be marked with an orange panel containing the UN identification number and the "BIOHAZARD" symbol. 49 CFR 172.323 and 172.332.

However, New Jersey requires that all packages containing treated regulated medical waste must to be marked in accordance with N.J.A.C. 7:26-3A:15. According to N.J.A.C. 7:26-3A.5, "treated regulated medical waste" means "regulated medical waste that has been treated to substantially reduce or eliminate its potential for causing disease, but has not yet been destroyed." New Jersey's 7:26-3A:15 requires that each "generator shall mark each

individual container of regulated medical waste in accordance with all applicable Federal regulations….," and also requires additional markings such as the transporter's name, the date of shipment, the intermediate handler's name. Thus, because 7:26-3A:15 requires additional markings that the HMR does not, it is not substantively the same and therefore preempted.

Further, N.J.A.C. 7:26-3A.28 requires that each transporter place a water resistant tag below the generator's marking on the outer surface of the container when transferring between transporters with the transporter's name, solid waste registration number, and date of receipt. The HMR do not require such markings or labels; therefore, N.J.A.C. 7:26-3A.28 is preempted.

C. Tracking Form Requirements

The HMR require that any person offering a hazardous material must provide a shipping paper describing the material by:

- The identification number, the proper shipping name, the hazard class, and the packing group of the material, 49 CFR 172.202(a)(1)-(4);
- Total quantity of the material covered by one description, 49 CFR 172.202(c);
- Emergency response telephone number, 49 CFR 172.604; and
- Shipper's certification that the material is "properly classified, described, packaged, marked and labeled and are in proper condition for transportation…." 49 CFR 172.204(a)(1).

However, except for shipments of hazardous waste for which the EPA hazardous waste manifest is required (*see* 49 CFR 172.205), a hazardous material shipping paper need not be in any specific form or format, nor must it be signed by the transporter or recipient of the shipment. In contrast, N.J.A.C. 7:26-3A.19 and 7:26-3A.31 require the use of a specific

"tracking form" for shipments of regulated medical waste, which must be prepared in accordance with the instructions found in these regulations. These regulations for use of the tracking form also differentiate between "NJ Treated" versus "NJ Untreated" medical waste (which the HMR do not) and further require that the transporter and destination facility sign the tracking document.

As explained in "Massachusetts Requirements on the Storage and Disposal of Infectious or Physically Dangerous Medical or Biological Waste," a requirement that the transporter sign the shipping paper is preempted since it is not substantively the same as the federal requirement. Because New Jersey's tracking form requires a signature not required by the HMR, it is not substantively the same as the requirements of the HMR, and is preempted. [4]

Additionally, N.J.A.C. 7:26-3A.33 allows a transporter to consolidate multiple shipments of waste to a new tracking form. The HMR does not have a specific regulation about consolidation of shipments onto a new tracking form. Insofar as N.J.A.C. 7:26-3A.33 does not require a particular form to be used to consolidate the multiple shipments, it is not preempted by the HMR.

N.J.A.C. 7:26-3A.21(a)(1) requires that the generator of the regulated medical waste keep a copy of the tracking form for at least three years from the date waste is accepted by the transporter and 7:26-3A.34 requires the same of the transporter from the date the waste is accepted by the next party. On the other hand, Federal hazardous material transportation law and the HMR require an offeror of a hazardous material to retain a copy of the shipping

[4] The Institute takes issue with N.J.A.C. 7:26-3A.45 and 7:26-3A.47 in its application. We believe that the Institute meant to cite 7:26-3A.45 and 7:26-3A.46 since those both relate to rail transporters while 7:26-3A.47 pertains to alternative or innovative technology authorization. Since N.J.A.C. 7:26-3A.45 and 7:26-3A.46 are similar in substance to the regulations pertaining to highway transporters discussed in this section, they are also preempted. Additionally, we read the intent of N.J.A.C. 7:26-3A.32 and 7:26-3A.41 as ensuring that the hazardous materials reach the intended recipient on the shipping document; to that extent, these provisions are not preempted.

paper for two years, and a carrier to retain a copy of the shipping paper for one year. 49 U.S.C. 5110, 49 CFR 172.201(e), 177.817(f).[5] I do not find that requirements specifying the time period for which an offeror or transporter must retain a copy of the shipping documents to be within the scope of the "preparation, execution, and use of shipping documentation" or "requirements related to the number, contents, and placement of those documents" in 49 U.S.C. 5125(b)(1)(C). Nor is there information to show that the longer retention period in N.J.A.C. 7:26-3A.21(a)(1) and 7:26-3A.34 is any obstacle to accomplishing the shorter retention periods in the HMR. The fact that the State's requirement is more stringent does not, by itself, appear to constitute an obstacle for the offeror and transporter meeting the two-year and one-year retention periods in the HMR, respectively. Therefore, as applied to requirements to retain copies of shipping papers, N.J.A.C. 7:26-3A.21(a)(1) and 7:26-3A.34 are not preempted.

D. Exception Reports

N.J.A.C. 7:26-3A.22 requires the generator of the waste to file an exception report with the state when a transporter and/or destination facility fails to return a signed copy of the tracking form to the generator while N.J.A.C. 7:26-3A.21(a)(2) requires the generator to retain a copy of all exception reports submitted for at least three years after the day the exception report was submitted. The Institute asserts that the regulations "create confusion because shippers may think that an exception report relieves them of failure to have a shipping paper on file." The HMR do not provide a parallel requirement. While these requirements relate to transportation of the regulated medical waste, they apply to the generator of the waste and not the transporter. There is not sufficient basis to show that New Jersey's regulations confuse shippers into thinking that they are not required to retain a copy

[5] A person who offers a hazardous waste for transportation must retain a copy of the shipping paper for three years. 49 CFR 172.201(e).

of the shipping paper as required by 49 CFR 172.201(e). The HMR clearly describe the recordkeeping requirements of the shipping papers without any contingencies. New Jersey cannot require a specific tracking form as discussed above, but the requirements to submit and retain the exception report in 7:26-3A.21(a)(2) and 7:26-3A.22 do not appear to create an obstacle in complying with the HMR. Therefore, these requirements are not preempted.

E. Marking a Motor Vehicle with Additional Information

The HMR require that each self-propelled commercial motor vehicle (CMV) be marked with the legal name or a single trade name of the motor carrier operating the self-propelled CMV. 49 CFR 390.21 (as incorporated in the HMR by 49 CFR 177.804(a)). Additionally, the HMR require two types of markings for the outside of a vehicle depending on whether the regulated medical waste is contained in packaging which is bulk or non-bulk. 49 CFR 172.332 and 172.336 require that vehicles containing non-bulk packages of a single hazardous materials with an aggregate gross weight of the hazardous material is 4,000 kg (8,820 pounds) or more to be marked with the identification number on either orange panels or on a plain white square-on-point display configuration having the same outside dimensions as a placard. In accordance with 49 CFR 172.323(b), when a bulk packaging contained in or on a transport vehicle or freight container is marked with a "BIOHAZARD" marking which is not visible, then the transport vehicle or freight container must be marked on each side and each end with a "BIOHAZARD" marking.

In contrast, N.J.A.C. 7:26-3A.30 requires that the vehicles that transport regulated medical waste have: (1) The name of the transporter; (2) the NJDEP solid waste transporter registration number; and (3) either the words "Medical Waste" or "Infectious Waste" on two sides and the back of the cargo-carrying body. The N.J.A.C. marking requirement is not substantively the same as the HMR and is therefore preempted.

IV. Ruling

Federal hazardous material transportation law preempts the following requirements in the New Jersey Administrative Code (N.J.A.C.) because the requirements are not substantively the same as the requirements in the HMR:

1. N.J.A.C. 7:26-3A.10(a) that generators must separate into different containers before transport sharps, fluids (greater than 20 cc), and other regulated medical waste;
2. N.J.A.C. 7:26-3A.11(d) which allows a generator to ship oversized medical waste without placing it in a packaging as required by the HMR;
3. N.J.A.C. 7:26-3A.14 that the words "Medical Waste" or "Infectious Waste" must be labeled on the outside of the package when there is untreated regulated medical waste;
4. N.J.A.C. 7:26-3A.15 that each "generator shall mark each individual container of regulated medical waste in accordance with all applicable Federal regulations…." and that the markings must include details of the transporter's name, the date of shipment, the intermediate handler's name, and other specific information;
5. N.J.A.C. 7:26-3A.19 and those provisions of 7:26-3A.31 which require the use of a specific "tracking form" to accompany shipments of regulated medical waste that are prescribed for either the generator or the transporter;
6. N.J.A.C. 7:26-3A.28 that, when transferring between transporters, each transporter must place a water resistant tag below the generator's marking on the outer surface of the container with the transporter's name, solid waste registration number, and date of receipt; and

7. N.J.A.C. 7:26-3A.30 which requires that a vehicle used to transport regulated medical waste must have: (1) The name of the transporter; (2) the NJDEP solid waste transporter registration number; and (3) either the words "Medical Waste" or "Infectious Waste" on two sides and the back of the cargo-carrying body.

8. N.J.A.C. 7:26-3A.45 to the extent that it requires rail transporters to comply with the transporter requirements of 7:26-3A.28 and 7:26-3A.30.

9. N.J.A.C. 7:26-3A.46 which requires a specific tracking form to accompany shipments of regulated medical waste for rail transporters.

Federal hazardous material transportation law does not preempt the following requirements because they do not create an obstacle in complying with the HMR.

1. N.J.A.C. 7:26-3A.21(a)(1) to the extent that it requires the generator to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the transporter;

2. N.J.A.C. 7:26-3A.21(a)(2) to the extent that it requires the generator to retain a copy of any exception report for at least three years after the day the exception report was submitted;

3. N.J.A.C. 7:26-3A.22 to the extent that it requires the generator of the regulated medical waste to file an exception report with the state when a transporter and/or destination facility notifies the generator of any discrepancy between the shipment as accepted by the initial transporter and delivered to the destination facility;

4. N.J.A.C. 7:26-3A.32 to the extent that it requires the transporter to deliver the entire quantity of regulated medical waste to the proper party listed on the tracking form;
5. N.J.A.C. 7:26-3A.33 to the extent that does not require a particular form to be used to consolidate the multiple shipments;
6. N.J.A.C. 7:26-3A.34 to the extent that it requires that the transporter of the regulated medical waste to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the next party; and
7. N.J.A.C. 7:26-3A.41 to the extent that it requires intermediate handlers and destination facilities to certify that they had received the listed regulated medical waste.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the Federal Register. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the Federal Register if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the Federal Register, the action by PHMSA's Chief Counsel on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

Issued in Washington, DC on December 2, 2013.

Vanessa L. Allen Sutherland,
Chief Counsel.

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