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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2016-0163; PDA-39(R)]

Hazardous Materials: Oregon Hazardous Waste Management Regulation

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT).

ACTION: Notice of rejection of application for an administrative determination of preemption.

SUMMARY: NORA, An Association of Responsible Recyclers, has petitioned for an administrative determination that the Hazardous Materials Transportation Act (HMTA) preempts an Oregon hazardous waste regulation to the extent that Oregon interprets the regulation as imposing a strict liability standard on transporters of hazardous waste. Because the HMTA's preemption provisions – including the provision granting the Department the authority to make administrative preemption determinations – expressly do not apply to a "mental state . . . utilized by a State . . . to enforce a requirement applicable to the transportation of hazardous material," PHMSA lacks authority to act on NORA's petition. PHMSA therefore rejects the petition.

FOR FURTHER INFORMATION CONTACT: Vincent Lopez, Office of Chief Counsel (PHC-10), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590; telephone No. 202-366-4400; facsimile No. 202-366-7041.

SUPPLEMENTARY INFORMATION:

I. Background

NORA, An Association of Responsible Recyclers (NORA) has applied to PHMSA for a determination that the federal Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5101 et seq., preempts Oregon Administrative Rule (OAR) 340-100-0002(1), as applied to transporters of hazardous waste. Specifically, NORA states that the Oregon Environmental Quality Commission (OEQC) interprets the Oregon regulation – which adopts certain regulations of the United States Environmental Protection Agency (EPA), including EPA's regulation requiring transporters to receive a manifest before transporting hazardous waste, 40 CFR 263.20(a)(1) – as imposing a strict liability standard on transporters of hazardous waste. According to NORA, under Oregon law, "the transporter exercising reasonable care may not rely on the information provided by the generator and instead must be held to a strict liability standard" (emphasis omitted). PHMSA invited public comment on NORA's application on January 24, 2017, *see* 82 FR 8257. For the reasons set forth below, PHMSA has concluded that it lacks authority with respect to NORA's application, and therefore rejects it.

II. Oregon Law

The legal framework that governs hazardous waste consists of overlapping federal and state authority. At the federal level, EPA, under authority granted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 321 et seq., has promulgated regulations to control hazardous waste. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. Any state may seek EPA authorization to administer and enforce a hazardous waste program. In Oregon, EPA has authorized the state to administer its own hazardous waste program, which it does through the Department of Environmental Quality and the OEQC.

The relevant Oregon regulation, OAR 340-100-0002 Adoption of United States Environmental Protection Agency Hazardous Waste and Used Oil Management Regulations, states in part, "[e]xcept as otherwise modified or specified by OAR 340, divisions 100 to 106, 109, 111, 113, 120, 124 and 142, the Commission adopts by reference, and requires every person subject to ORS 466.005 to 466.080 and 466.090 to 466.215, to comply with the rules and regulations governing the management of hazardous waste, including its generation, transportation, treatment, storage, recycling and disposal, as the United States Environmental Protection Agency prescribes in 40 C.F.R. Parts 260 to 268, 270, 273 and Subpart A and Subpart B of Part 124, ..." OAR 340-100-0002(1).

The EPA manifest requirement, 40 CFR 263.20(a)(1), which is one of the regulations that Oregon has adopted, reads in part, "[a] transporter may not accept hazardous waste from a generator unless the transporter is also provided with a manifest . . . signed in accordance with the requirement of § 263.23 . . . ." 40 CFR 263.20(a)(1).

As noted above, NORA states that under OEQC's interpretation of this requirement, a "transporter exercising reasonable care may not rely on the information provided by the generator and instead must be held to a strict liability standard." The Oregon Supreme Court has recently upheld OEQC's interpretation. *See Oil Re-Refining Co. v. Envtl. Quality Comm'n*, 388 P.3d 1071 (Or. 2017).

III. Federal Preemption

PHMSA has the authority under the HMTA to preempt state law. Generally, the HMTA preemption standards preclude non-federal governments from imposing requirements applicable to hazardous materials transportation if (1) complying with the non-Federal requirement and the

Federal requirement is not possible; or (2) the non-Federal requirement, as applied and enforced, is an obstacle to accomplishing and carrying out the Federal requirement.

Furthermore, unless it is authorized by another federal law or a waiver of preemption from the Secretary of Transportation, a non-federal requirement applicable to any one of several specified covered subjects is preempted if it is not substantively the same as the HMTA, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security. The five subject areas include: the designation, description, and classification of hazardous material; the packing, repacking, handling, labeling, marking, and placarding of hazardous material; the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents; the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident; and 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 in commerce. *See* 49 U.S.C. 5125(a) and (b).

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).

Notwithstanding these preemption standards, Congress limited the applicability of HMTA preemption with respect to non-federal enforcement standards. For the purposes of this proceeding, the relevant portion of the statute is 49 U.S.C. 5125(h), and it reads as follows:

"Non-Federal enforcement standards.—This section does not apply to any procedure, penalty, required mental state, or other standard utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material." 49 U.S.C. 5125(h).

IV. NORA's Application

NORA contends that OEQC's "strict liability" interpretation of the Oregon regulation conflicts with 49 CFR 171.2(f), a provision of the HMR providing that "[e]ach carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect." NORA presents three specific arguments. First, NORA contends that it is not possible to comply with both the Oregon rule and the federal regulation because the "HMTA regulation requires the transporter to exercise reasonable care" while Oregon's strict liability interpretation does not. Next, NORA argues that Oregon's strict liability standard creates an obstacle to carrying out the federal regulation, since it discourages the exercise of reasonable care. Furthermore, NORA opines that the State's inconsistent strict liability standard will encourage the misclassification of hazardous material. Finally, NORA states that "a strict liability standard is not 'substantively the same' as a reasonable care liability standard." NORA notes that "under Oregon's interpretation, a transporter who satisfies the reasonable care standard in section 171.2(f) would nonetheless be strictly liable for the generator's waste mischaracterization."

V. Decision

As noted above, 49 U.S.C. 5125 sets out standards for determining whether state and local laws are preempted, and authorizes the Secretary of Transportation to make administrative preemption determinations. Section 5125, however, expressly "does not apply to any procedure, penalty, required mental state, or other standard utilized by a State . . . to enforce a requirement applicable to the transportation of hazardous material." 49 U.S.C. 5125(h); *see also* H.R. Rep. No. 109-203, at 1083 (2005) (noting that the amendment "clarifies that the Secretary's preemption authority does not apply to a procedure, penalty, required mental state, or other standard used by a State, political subdivision of a State, or Indian tribe to enforce hazardous material transportation requirements."). H.R. Rep. No. 109-203, at 1083 (2005).

NORA's application argues that Oregon's imposition of a "strict liability" standard – a "required mental state" – is preempted by the HMTA. 49 U.S.C. 5125(h) expressly specifies that the HMTA's preemption provision does not apply to such a claim, and that PHMSA lacks authority to make a determination with respect to such a claim. PHMSA therefore rejects NORA's application.

Issued in Washington, DC, on September 20, 2019.

Paul J. Roberti

Chief Counsel, Pipeline and Hazardous Materials Safety Administration.

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