State Nuclear Transportation Routing Laws

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A. INTRODUCTION

The purpose of this paper is to summarize state nuclear transportation routing-related laws and their relationship to the relevant federal law. The compatibility of such laws with federal nuclear transportation law has been, or is being, addressed in several federal court and Department of Transportation (DOT) advisory opinions.

The discussion centers around nuclear transportation permit laws that contain routing-related provisions. Any formal state nuclear transportation route designations are also identified.

B. FEDERAL NUCLEAR TRANSPORTATION ROUTING LAWS

Nuclear materials transportation is primarily subject to federal regulation by DOT under the Hazardous Materials Transportation Act (HMTA)[1] and the Nuclear Regulatory Commission (NRC) under the Atomic Energy Act (AEA).[2] The HMTA authorizes DOT to promulgate regulations for the safe transport in commerce of hazardous materials, including radioactive materials. The HMTA, as discussed in more detail later in this article, expressly preempts inconsistent state and local laws.[3] DOT hazardous materials transportation regulations are contained in 49 C.F.R. Parts 171-177. These regulations include requirements for radioactive materials packaging, marking, labeling, placarding, shipping papers, and highway

1. *See* 49 U.S.C. § 1801-1812 (1982).
2. *See* 42 U.S.C. § 2011-2296 (1982).
3. *See* 49 U.S.C. § 1811(b) and discussion *infra*, at section D of this article.

routing. The AEA authorizes the NRC (then Atomic Energy Commission) to regulate and license the receipt, possession, use and transfer (including transportation) of source, by-product, and special nuclear material. NRC radioactive materials transportation regulations are contained in 10 C.F.R. Parts 71 and 73. These regulations include requirements for packaging and physical security.

As relevant to the present topic, DOT hazardous materials transportation regulations provide that any person who operates a motor vehicle containing highway route-controlled quantity (HRCQ) radioactive material[4] must operate over preferred routes selected to reduce time in transit, except that an interstate system bypass or beltway around a city must be used when available.[5] A preferred route is a state-designated route selected by a state routing agency in accordance with specified DOT routing guidelines,[6] or the state equivalent, and an interstate highway for which an alternative route has not been designated by a state routing agency.[7] State route designations must be preceded by substantive consultations with potentially affected states and localities.[8] State designated routes must be provided to DOT to be effective.[9] Deviations from preferred routes are permitted when necessary along routes selected in accordance with the standards for selection of non-HRCQ (low-level) radioactive materials routes.[10] These standards are discussed below. Preferred route deviations are essentially allowed to the extent necessary to pick up and deliver HRCQ radioactive materials and under emergency conditions.[11] NRC approval of spent fuel shipment routes is required.[12]

Non-HRCQ placarded shipments of radioactive material (low-level radioactive material) must operate on routes that minimize radiological risk.[13] In selecting routes, the carrier must consider available information on accident rates, transit time, and the time of day and day of the week during which the shipment will take place. This requirement does not apply when there is only one practicable highway route available or the motor vehicle is operated on a preferred highway.

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4. Highway route controlled quantity radioactive material refers to a quantity within a single shipping container of high-level radioactive material. *See* 49 C.F.R. § 173.403. (1988).

5. *See* 49 C.F.R. § 177.825(b) (1988).

6. See, Guidelines for Selecting Preferred Highway Routes for Large Quantity Shipments of Radioactive Materials, (June 1981).

7. *See* 49 C.F.R. §§ 171.8 and 177.825(b) (1988).

8. *See* 49 C.F.R. § 171.8 (1988).

9. *See* 49 C.F.R. § 177.825(b) (1988).

10. *See* 49 C.F.R. § 177.825(b)(2) (1988).

11. *Id.* The application of this preferred route deviation exception for HRCQ radioactive materials shipment pickup is addressed in a 1988 DOT enforcement case discussed *infra*. See text at note 70.

12. *See* 10 C.F.R. § 73.37(b)(7) (1989).

13. *See* 49 C.F.R. § 177.825(a) (1988).

To the author's best knowledge, only Arkansas, Colorado, Iowa, Kentucky, Nebraska, Tennessee, and Virginia have notified DOT of preferred alternative routes. A discussion of individual state routing-related laws follows.

C. State Nuclear Transportation Routing Laws

1. *California*. The California Vehicle Code authorizes the California Highway Patrol to adopt regulations specifying nuclear shipment routes.[14] To the best of the author's knowledge, such regulations have not been promulgated.

2. *Colorado*. The Colorado Nuclear Materials Transportation Act authorizes the State Highway Department to adopt regulations that designate highway routes for nuclear materials transportation.[15] To the best of the author's knowledge, such regulations have not been promulgated. This law also establishes a nuclear transportation permit system administered by the Colorado Public Utility Commission. The nuclear transportation permittee is required to give advance notification of each nuclear shipment, including a list of routes to be used.[16]

3. *Connecticut*. The Connecticut Atomic Energy Act establishes a nuclear transportation permit system administered by the State Department of Transportation.[17] The permit application must include the scheduled route. The Department is authorized to require a route change if deemed necessary to protect public health and safety. Implementing regulations provide that the scheduled routes of each permit applicant are expressly confined to limited access highways and the shortest practicable route to and from them.[18] All routes must be expressly determined by the Department.[19]

4. *Delaware*. According to Delaware Department of Public Safety policy, all shipments of high-level nuclear materials must travel over routes designated by the Commission on Hazardous Materials.[20]

5. *Florida*. The Florida Radiation Protection Act authorizes the Department of Health and Rehabilitative Services to designate routes.[21] To the best of the author's knowledge, carrier route selection is permitted.

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14. *See* Cal. Veh. Code § 3000 (1987).

15. *See* Colo. Rev. Stat. § 40-2.2-208 (1988). This statute is the subject of litigation and a DOT inconsistency ruling. See discussion, *infra*, text at notes 64 and 69.

16. *See* Colo. Rev. Stat. § 40-2.2-209 (1988).

17. *See* Conn. Gen. Stat. Ann. § 16a-106 (West 1988).

18. *See* Conn. Agencies Regs. § 19-409d-54.

19. *See* Conn. Agencies Regs. § 19-409d-55.

20. *See* letter from E.J. Steiner, Department of Public Safety and Commission on Hazardous Materials, to S.C. Goldberg, Battelle (May 5, 1988) (on file with the author).

21. *See* Fla. Stat. Ann. § 404.20(2)(c) and (3)(c) (West 1986).

6. *Georgia*. The Georgia Transportation of Hazardous Materials Act establishes a nuclear transportation permit system administered by the Georgia Public Service Commission (PSC).[22] This law authorizes the Georgia PSC to require route changes as a condition of receipt of a nuclear transportation permit.

7. *Idaho, Oregon, Washington, and Wyoming*. These four states are parties to the Pacific States Agreement on Radioactive Materials Transportation Management.[23] This law authorizes the establishment of an interstate committee to propose model regulatory standards and to coordinate decisions by party states regarding radioactive materials routing. The model standards must not conflict with federal requirements and would require a carrier to furnish route information. To the best of the author's knowledge, implementing standards have not yet been issued.

8. *Indiana*. The Indiana Motor Carrier Act authorizes the Indiana Public Service Commission (PSC) to designate public highway routes over which motor carriers may operate and adopts certain specified provisions of DOT hazardous materials and motor carrier safety regulations, including 49 C.F.R. Part 177 which contains the DOT nuclear routing rule.[24] To the best of the author's knowledge, the Indiana PSC has not designated nuclear routes.

9. *Kentucky*. The Kentucky Department of Highways advised DOT in 1988 of Kentucky preferred routes for HRCQ radioactive material.[25]

10. *Louisiana*. The Louisiana Nuclear Energy and Radiation Control Law authorizes the Department of Environmental Quality (DEQ) to promulgate routing regulations.[26] DEQ regulations adopt DOT hazardous materials transportation regulations.

11. *Maryland*. The Maryland Department of Transportation prepared a 1981 routing plan for highway shipments of radioactive materials, including a risk analysis and comparison of interstate and state highways using DOT routing guidelines.[27] The plan identifies preferred routes for Maryland nuclear shipments.

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22. *See* GA. CODE ANN. secs. 46-11-1 *et seq.* (1988). *See* also PSC implementing regulations 1-15-1-.04 and 1-15-1-.05.

23. *See* IDAHO CODE § 39-3029 *et seq.* (1988), OR. REV. STAT. § 466.450 (1988), WASH. REV. CODE ANN. § 43.146.010 (1989), and WYO. STAT. §§ 37-14-101 to 37-14-103 (1989).

24. *See* IND. CODE ANN. § 8-2-7-1 *et seq.* (Burns 1988).

25. *See* letter from M.O. Bryant, Commissioner of Highways, to M.C. Douglas, DOT (October 3, 1988).

26. *See* LA. REV. STAT. ANN. § 30:1101 *et seq.*, reorganized to §§ 30:1201 to 30:1205 and §§ 30:1151 to 30:1159 (West 1989).

27. *See* Maryland Department of Transportation, Highway Routes for Shipment of Radioactive Materials—Corridor Comparison Study I-95 vs. 301 (1981).

12. *Michigan.* Pursuant to the Michigan Radiation Control Act[28] and Michigan Fire Code[29] the Michigan Department of Public Health and Michigan Department of State Police, respectively, have promulgated joint regulations requiring the prior approval of both agencies prior to the transport of radioactive materials in the state.[30] The application for transport approval must identify the proposed routes, including a designation of alternative routes and the reasons for the selection of the proposed route. Approval to transport may include any conditions or limitations either Department determines is necessary. Implicitly, though not explicitly, this could extend to the specification of a different route than that proposed by the permit applicant.

13. *Minnesota.* A Minnesota radioactive waste management statute requires high-level nuclear waste shippers to identify proposed routes to the State Commission of Public Safety (Commission).[31] The Commission is authorized to designate state preferred routes. To the best of the author's knowledge, the Commission follows DOT routing regulations and has not designated any state alternative routes.

14. *Mississippi.* The Mississippi Radiation Protection Act authorizes the State Board of Health to promulgate regulations regarding the designation of nuclear materials transportation routes.[32] The Board's implementing regulations adopt applicable DOT and NRC nuclear transportation regulations. The regulations do not contain specific state route designations.

15. *Nevada.* The Nevada Hazardous Materials Act requires the Nevada Department of Transportation (Department) to develop a routing plan for shipments of controlled quantities of radioactive materials and high-level radioactive waste in Nevada.[33] The Department is required to cooperate with DOT interstate regional transportation commissions, and states contiguous to Nevada, to develop plans for the interstate routing of shipments of HRCQ radioactive materials or high-level waste. The Department is authorized to adopt necessary regulations and to cooperate with federal, state and local governmental agencies that regulate other hazardous materials.[34] To the best of the author's knowledge, no routing regulations or plans have been developed yet.

16. *New Jersey.* A New Jersey nuclear waste transportation law

28. *See* MICH. COMP. LAWS ANN. § 333.13501 et seq. (West 1989).

29. *See* MICH. COMP. LAWS ANN. § 29.1 et seq. (West 1989).

30. *See* Department of Public Health, Division of Radiological Health, regulations R325.5801 et seq. and Department of State Police, State Fire Safety Board, regulations R29.551 et seq. (both effective July 1982).

31. *See* MINN. STAT. ANN. § 116C.731 (West 1987).

32. *See* MISS. CODE ANN. § 45.14-1 (West 1988).

33. *See* NEV. REV. STAT. ANN. § 459.100 (Michie 1988).

34. *See* NEV. REV. STAT. ANN. § 459.503.

authorizes the Department of Environmental Protection and the Department of Transportation to establish criteria for selection of state designated high-level nuclear transportation routes in conformity with federal law and to meet state needs and to designate such routes in the future.[35]

The New Jersey Radiation Protection Act separately establishes a state nuclear transportation permit (certificate of handling) system administered by the Department of Environmental Protection.[36] This law requires the permit applicant to identify the proposed shipment route. The Department's implementing regulations require that the proposed route utilize railways, roadways, or other transport modes deemed safe by the Department and State Police. It requires major highways to be used for road shipments except where the Department judges such routes would place a greater threat to the public health and safety than alternative routing or where secondary roads must be used for minimum distance for egress from the point of origin or ingress to the final destination. The applicant may not transport in any New Jersey county which has a population density exceeding 1,000 persons per square mile. If movement through a densely populated area is unavoidable, the following additional measures must be taken: the transit must be nonstop, primary roads must be used, an armed escort consisting of local police or trained guards must be provided by the shipper, and no spent fuel may be shipped through densely populated areas between 7:00 a.m. and 9:00 a.m. and 4:00 p.m. and 6:00 p.m.[37]

17. *New Mexico*. The New Mexico Radiation Protection Act authorizes the State Environmental Improvement Division (Division) to promulgate regulations for the highway transport of nuclear material, including routing.[38] The Division's implementing regulations require a license to transport nuclear waste on New Mexico highways. The license application must contain proposed transportation routes. In approving routes, the Division is required to consult with affected local subdivisions and the State Transportation Department. To promote the objective of safest possible transport, vehicles carrying nuclear waste are required, to the extent practicable, to travel by interstate highways, use routes that minimize travel time, avoid traveling through or near heavily populated areas, avoid tunnels, narrow streets and alleys, areas adjacent to large numbers of people, populated areas, and hazardous road conditions due to climatic or structural conditions.[39]

18. *North Carolina*. The North Carolina Radiation Protection Act au-

35. *See* N.J. STAT. ANN. § 27:5h-1 *et. seq.* (West 1989).
36. *See* N.J. STAT. ANN. § 26:2d-1 *et seq.* (West 1989)
37. *See* 7 N.J. ADMIN. Code ch. 28 (1987).
38. *See* N.M. STAT. ANN. § 74-3 *et seq.* (West 1989).
39. *See* N.M. Environmental Improvement Division regulations 3-800 (effective Oct. 1981).

thorizes the Department of Human Resources (Department) to promulgate regulations regarding the designation of nuclear materials transportation routes in the state.[40] The Department is authorized to adopt applicable federal rules and regulations governing nuclear materials transportation. To the best of the author's knowledge, the Department has adopted DOT routing regulations and not designated any state alternative routes.

19. *Ohio*. The Ohio Atomic Energy Act requires nuclear materials shippers or carriers to provide advance notification to the state Disaster Services Agency (Agency) including the scheduled route.[41] To the best of the author's knowledge, the Agency follows applicable DOT regulations and has not designated state alternative routes.

The Ohio Hazardous Materials Transportation Act separately requires advance shipment notification of hazardous materials determined by Ohio Public Utilities Commission regulation to present an extraordinary public health and safety risk.[42] Such notification must be accompanied by an elaborate route selection assessment giving due consideration to a number of specified factors, including risk to public health and safety and the environment. Nuclear transportation subject to the prenotification requirements of the Ohio Atomic Energy Act is exempt.

20. *Oregon*. An Oregon nuclear facilities statute establishes a nuclear transportation permit system.[43] The permit application must include an identification of the proposed route.[44] The State Energy Facility Siting Council (Council) is authorized to promulgate associated regulations regarding nuclear materials routing consistent with DOT and NRC rules.[45]

The Council's implementing regulations, accordingly, require that spent nuclear fuel be routed in accordance with NRC regulations in 10 C.F.R. § 73.37 and HRCQ radioactive material shipments in accordance with DOT regulations in 49 C.F.R. § 177.825. These materials are to be transported on interstate highways or railroads.[46]

21. *Pennsylvania*. The Pennsylvania Hazardous Materials Transportation Act authorizes the Department of Transportation (Department) to adopt regulations regarding hazardous (including radioactive) materials routing that do not conflict with federal regulations.[47] The Department regulations adopt the DOT routing transportation regulations and do not

40. *See* N.C. GEN. STAT. ch. 104E (West 1988).
41. *See* OHIO REV. CODE ANN. § 4163.1 (Baldwin 1987).
42. *See* OHIO REV. CODE ANN. § 4905, et seq.
43. *See* OR. REV. STAT. § 469.300 et seq. (West 1989).
44. *See* OR. REV. STAT. § 469.605.
45. *See* OR. REV. STAT. § 469.607.
46. *See* 35 OR. ADMIN. R. DIV. 60 Rule 4.
47. *See* PA. STAT. ANN. tit. 75, § 8301 *et seq.* (West 1989).

contain any additional state routing rules.[48]

22. *Rhode Island*. The Rhode Island public utilities and carriers law authorizes the Rhode Island Public Utilities Commission (PUC) to promulgate regulations regarding motor carrier safety.[49] Rhode Island PUC implementing regulations provide that shipments of large quantity radioactive material and specified placarded radioactive material require a permit from the PUC prior to traveling Rhode Island highways. The permit application must include a detailed description of the routes to be followed. It is not clear what, if any, authority the PUC has to require utilization of a different route than that specified by the carrier. The regulations prohibit transportation of radioactive material over the highways of the state during the hours of 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. Monday through Friday.

23. *South Carolina*. The South Carolina Radioactive Waste Transportation and Disposal Act requires radioactive waste carriers to notify the Department of Health and Environmental Control (Department) of proposed routes.[50] The Department is authorized to promulgate regulations regarding primary routes. Department regulation 61-83 invokes the DOT routing regulation and does not contain any additional state routing rules.

24. *Tennessee*. Tennessee Public Service Commission regulations restrict operation of placarded shipments of hazardous (including radioactive material) on specified highways.[51]

25. *Texas*. The Texas radiation control statute authorizes the Texas Department of Health (Department) to adopt rules and guidelines providing for the transport and routing of radioactive materials in the state.[52] To the best of the author's knowledge, the Department follows applicable DOT regulations and has not promulgated its own.

26. *Vermont*. A Vermont hazardous materials transportation statute authorizes the Agency of Transportation (Agency) to designate any highway as part of a preferred route for the transportation of fissile radioactive materials and DOT defined large quantity packages of radioactive material in order to cause the least risk to persons and property.[53] The Agency is to confer with the municipality in question regarding the establishment of a preferred route within their jurisdiction. Agency implementing regulations adopt applicable DOT routing regulations.

27. *Wyoming*. According to a 1985 policy letter from the former Wyoming Governor to the Wyoming Highway Patrol Director, radioactive

48. *See* 67 PA. CODE ch. 403 (effective May 1982).
49. *See* R.I.. GEN. LAWS § 39-12-1 to 39-12-21 (West 1988).
50. *See* S.C. CODE ANN. § 13-7-110 to 13-7-200 (West 1988).
51. *See* Tenn. PSC reg. 1220-2-1-46..
52. *See* TEX. REV. CIV. STAT. art. 4590f (Vernon, Supp. 1986).
53. *See* VT. STAT. ANN. tit. 5, § 2001 to 2003 (West 1988).

materials shipment must utilize interstate highways only unless otherwise authorized by the Governor.[54]

On the basis of the foregoing, the most prescriptive state routing provisions are in Connecticut (limited access highways and most direct route), Michigan (carrier route selection basis), New Jersey (major highways and avoid heavily populated areas and hazardous road conditions), and Rhode Island (time of day restriction). Other states variously follow DOT routing regulations, authorize interstate or interjurisdictional cooperation in route selection, or permit state review and approval of carrier-selected routes generally as part of the state nuclear transportation permit scheme.

D. DOT Inconsistency Rulings, DOT Enforcement Decision and Federal Court Decisions

1. DOT Inconsistency Rulings

The HMTA contains an express provision concerning federal preemption of state and local law. Specifically, § 112(a) preempts "any requirement of the state, or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or implementing regulations. A state requirement is federally inconsistent if compliance with both the state and HMTA or implementing regulation is not possible ("dual compliance" test) and the state requirement is an obstacle to the accomplishment and execution of the HMTA and implementing regulations ("obstacle" test).[55] DOT is authorized to render advisory opinions on the federal consistency of state or local laws, termed inconsistency rulings.

DOT regulations contain a policy statement[56] which identifies the relationship between the DOT's routing regulation and state and local regulations. The policy statement essentially provides that any radioactive materials routing rule that is not identical to the DOT routing rule is federally inconsistent. The appendix also addresses the federal consistency of routing-related laws, such as those which might require filing route plans or which unnecessarily delay transportation.

The appendix defines the term "routing rule" as

> [a]ny 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 . . . Id.* (emphasis added.)

54. *See* Letter from the Governor E. Herschler to Col. E. Ayers, Director, Wyoming Highway Patrol (March 28, 1985) (on file with author).

55. *See* 49 C.F.R. § 107.209(c) (1988).

56. *See* 49 C.F.R. Part 177 App. A (1988).

DOT has rendered a number of inconsistency rulings regarding state and local nuclear transportation permit and routing laws. DOT has stressed that since its rulings are rendered under the HMTA it considers only statutory preemption. It has noted that a federal court could find such laws preempted on constitutional preemption or interstate commerce grounds even if not statutorily preempted. DOT does not make such determinations.

The Michigan and Connecticut transportation permit laws summarized above were found to be federally inconsistent routing rules in IR-8[57] and IR-21,[58] respectively. County transportation permit laws containing route restrictions in Maryland and New York also were found to constitute federally inconsistent routing rules in IR-18[59] and IR-14,[60] respectively. DOT noted that local routing restrictions are federally inconsistent unless identical to 49 C.F.R. § 177.825(a) (non-HRCQ radioactive material) or 49 C.F.R. § 177.825(b) (HRCQ radioactive material). The same result was reached regarding a Boston ordinance banning the transportation of radioactive materials on city streets unless there was no practical alternative and additional time-of-day restrictions in IR-3.[61] DOT noted additionally in their rulings that only states, not counties or municipalities, were authorized to designate preferred routes for HRCQ shipments.

A New York bridge and port authority transportation permit regulation was found to constitute a federally inconsistent routing rule in IR-11.[62] The same result was reached regarding a New York bridge and tunnel authority regulation banning radioactive materials shipments in IR-20.[63]

Finally, an inconsistency ruling application (IRA-44) is currently pending on the federal consistency of the Colorado Nuclear Transportation Act summarized above.[64]

In arriving at its decisions in the referenced cases, DOT variously found that the subject nuclear transportation permit and other routing law-related laws subjected nuclear shippers or carriers, otherwise in compliance with DOT regulations, to varied and inconsistent state or local requirements that had the potential to redirect or restrict nuclear shipments. These laws were found to pose an obstacle to the accomplishment of the HMTA objectives of creating a uniform, comprehensive federal regulatory program for radioactive materials transportation safety and preventing un-

57. *See* 49 Fed. Reg. 46,637 (1984) and 52 Fed. Reg. 13,000 (1987) (appeal).
58. *See* 52 Fed. Reg. 3,702 (1987) and 53 Fed. Reg. 46,735 (1988) (appeal).
59. *See* 52 Fed. Reg. 200 (1987) and 53 Fed. Reg. 28,850 (1988) (appeal).
60. *See* 49 Fed. Reg. 46,656 (1984).
61. *See* 46 Fed. Reg. 18,418 (1981) and 47 Fed. Reg. 18,457 (1982) (appeal).
62. *See* 49 Fed. Reg. 46,647 (1984).
63. *See* 52 Fed. Reg. 24,396 (1987).
64. *See* 53 Fed. Reg. 30,418 (1988).

necessary delay in nuclear shipments. DOT found that the subject laws thus failed the "obstacle test" for determining federal consistency under HMTA regulations and were thereby preempted.

2. DOT Enforcement Decisions and Federal Court Decisions

There have been no judicial decisions concerning nuclear transportation routing laws. There have been three decisions concerning state nuclear transportation permit laws with routing provisions. There has been one DOT administrative decision concerning nuclear transportation routing. These are described briefly here.

The case of *Jersey Central Power and Light Co. v. New Jersey* involved the validity of a state spent fuel alternative route designation under the HMTA. Under the New Jersey transportation permit law discussed earlier, a spent fuel shipper was required, as a permit condition, to use a route other than that proposed and approved by the NRC. The federal court in New Jersey found that this state route requirement was not a valid state route designation under the HMTA routing regulation since it did not follow the requisite regulatory procedure for such designations and was, therefore, federally inconsistent and preempted. The court enjoined the state from preventing the subject shipment and required it to grant the transportation permit.[65] Although the Third Circuit Court of Appeals found the case moot on appeal, since the subject spent fuel shipment had concluded, *dicta* in its decision indicated it would have agreed with the lower court decision on the merits of the case.[66]

The rail-related provisions of the Ohio Hazardous Materials Transportation Act summarized above, which included requirements for carrier route assessments, were found preempted under the Federal Railroad Safety Act (FRSA) in the case of *CSX Transportation v. Ohio Public Utilities Commission*.[67] The FRSA preempts any state law relating to a DOT-regulated area of railroad safety and permits additional state law only where necessary to address a local safety hazard, an exception the district court found absent in the present case. In deciding the case on FRSA preemption grounds, the court indicated that it did not need to address the plaintiff's additional claim that the Ohio law as further preempted by the HMTA and in violation of the commerce clause of the constitution because it imposed an undue burden on interstate commerce.[68]

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65. *See* Jersey Central Power & Light Co. v. New Jersey, No. 84-4964 (D.N.J., filed Dec. 27, 1984.)

66. *See* Jersey Central Power & Light Co. v. New Jersey, 772 F.2d 35 (3rd Cir. 1985).

67. *See* CSX Transportation v. The Public Utilities Comm'n of Ohio, 701 F. Supp. 608 (D. Ohio 1988), *appeal pending*, No. 88-4185 (6th Cir., filed Dec. 13, 1988).

68. *See* 45 U.S.C. 421.

In the final court case, a federal court in Colorado granted a motion for summary judgment and adjudged the Colorado Nuclear Materials Transportation Act summarized above to be federally consistent and not preempted by the HMTA.[69] This case was prompted by the DOE inconsistency ruling application noted earlier.

A 1988 contested DOT enforcement action contains perhaps the most thorough litigative analysis of the DOT nuclear routing regulation to date.[70] The case involved the efficacy of a Nevada nuclear route designation in the context of overweight fuel shipments from Nevada to Idaho. The DOT staff proposed the imposition of a civil penalty on the subject carrier for not using a route identified for nuclear shipments in a 1982 letter from the Governor of Nevada to DOT. The route identified in the 1982 letter would have taken the shipments at issue through the city of Las Vegas. The Las Vegas route was initially authorized in a Nevada Department of Transportation overweigh permit. In the face of objections from the city of Las Vegas, and following consultations between the shipper, carrier and the Governor's office, the initial overweight permit was revoked and reissued authorizing use of a different route that circumvented Las Vegas which was also 100 miles further from the nearest interstate highway.

Following a hearing before a DOT administrative law judge (ALJ), the proposed penalty was dismissed on the grounds that the route identified in the 1982 letter was not a properly designated preferred state route under the DOT routing regulation in 49 C.F.R. § 177.825(b). Among other things, the ALJ found that the subject letter did not evidence any prior routing analysis, prior consultations with affected jurisdictions, or that the Governor was authorized to act as the state routing agency as each required by the DOT routing regulation.[71] This case arose prior to the regulatory requirement in 49 C.F.R. § 177.825(b) that state designated routes must be provided to DOT to be effective.

The ALJ alternatively found that, even if the 1982 route designation was proper when made, such designation had been effectively revoked by subsequent events, including the consent of the Governor's office to the route identified in the reissued overweight permit. In the absence of an effective state designated preferred route at the time of the subject shipments, the ALJ concluded that the carrier could have selected either the route identified in the 1982 letter or the longer route contained in the overweight permit as "pick up" route deviations from the nearest pre-

69. *See* Colorado v. DOE, No. 88-Z-1524 (D. Colo. June 26, 1989) appeal pending No. 89-1288 (10th Cir., filed Aug. 25, 1989).

70. *See* In the Matter of Tri-State Motor Transit Company, No. 87-22-RMC (DOT, filed Sept. 9, 1988).

71. Id, slip op at 7-11.

ferred route under the DOT routing regulation.[72] As noted earlier, 49 C.F.R. § 177.825(b) permits a deviation from a preferred route to the extent necessary to pick up or deliver HRCQ radioactive material in accordance with the same criteria governing the selection of routes for non-HRCQ radioactive shipments, namely, minimization of radiological risk.[73] The ALJ found that the carrier could have reasonably selected the route actually utilized as minimizing radiological risk by avoiding Las Vegas in favor of a more remote route despite the fact that such route was a less direct access route to the nearest interstate highway. The DOT staff had argued unsuccessfully that only the most direct pickup route to the nearest preferred route could be used if the underlying regulatory objective of reducing transit time for HRCQ radioactive materials shipments was to be met.[74] The ALJ noted that both routes in question were over 300 hundred miles from the nearest interstate highway and that, if a pickup route of 300 hundred miles is acceptable, one of 400 miles is equally acceptable.[75] The ALJ found no language in the DOT routing regulation which imposed a mileage restriction on deviations from a preferred route for pickup or delivery purposes.[76]

E. Conclusions

DOT hazardous materials transportation regulations provide a framework for the designation of nuclear transportation highway routes. There is no comparable regulation governing rail transportation. In accordance with this DOT routing regulation, a number of states have formally selected state routing agencies and designated alternative state routes for nuclear shipments. At the same time, a number of states have nuclear transportation permit laws that confer some route review or approval authority on the state permitting agency. These state permitting agencies may or may not be official state routing agencies, and any routes they might require as a permit condition may or may not be the state designated alternative routes if such routes exist in the state. This could create potential routing conflicts over authorized state routes as it did in the *Jersey Central Power* case. Whether, and to what extent, this has actually occurred in unlitigated cases is beyond the scope of this paper.

State nuclear transportation permit laws with routing provisions have generally been found by DOT, when challenged, to, in effect, constitute

72. Id. at 20.

73. *See* discussion *supra*, text at note 10. On September 29, 1989, DOT issued a notice of proposed rulemaking to amend this regulation to require carriers to use the shortest distance pickup and delivery routes available to preferred routes. *See* 54 Fed. Reg. 40,272.

74. Tri-State, *supra*, slip op at 21-22.

75. Id. at 22.

76. Id.

nuclear routing laws in the guise of transportation permit laws with the potential to unduly delay or redirect nuclear shipments and their authorized selection of nuclear routes by non-routing agencies without adherence to the regulatory routing criteria in 49 C.F.R. § 177.825(b). The only judicial precedent on the issue, the *Jersey Central Power* case, and the *Colorado* case reached different conclusions. The *CSX Transportation* case did not reach the validity of the highway routing provision of the state nuclear transportation law at issue in that case since only the railroad-related provisions of that law were challenged and found impermissible on federal railroad law preemption grounds. As noted earlier, there is no present federal nuclear routing law or regulation for railroad shipments.

There are no judicial decisions concerning actual state nuclear routing laws or designations as distinct from permit laws with routing provisions. The *Tri-State* administrative case does. The *Tri-State* case indicates that, when formally challenged, purported state nuclear route designations must conform to the DOT regulatory requirements for such designation in order to be effective. The case also contains the only litigative interpretation of the bounds of the regulatory exception to the use of preferred routes allowed for shipment pickup. This case is significant in this latter regard since it provides that there is no mileage limit for a pickup route and that the longer of two alternative pickup routes may be acceptable if, on balance, it would minimize the transportation risk in a given situation. The decision in this case must also be understood in the context of the particular facts at hand, namely, that the shorter alternative pickup route went through the city of Las Vegas while the longer route did not. The extent to which a non-preferred route would qualify as a permissible pickup route, and which of several possible alternative pickups might be acceptable, must be determined on a case-by-case basis.

Parties undertaking nuclear materials shipments should become familiar, not only with formal state alternate route designations, if any, but also with state nuclear transportation permit laws with routing provisions. As ongoing federal programs for the permanent disposal of the nation's civilian and defense transuranic and high-level nuclear waste progress, the existence of potentially restrictive and conflicting state routing-related laws will be of particular significance.