State and Local Nuclear Transportation Permit and Fee Requirements

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A. Introduction

The purpose of this paper is to address the legality of state and local nuclear transportation permit and fee requirements. To place this subject in perspective, the statutory and regulatory scheme governing nuclear transportation, including the operative constitutional, judicial and administrative principles, is also discussed.

Federal nuclear transportation jurisdiction is shared primarily by the Nuclear Regulatory Commission (NRC) and the Department of Transportation (DOT). The NRC derives its authority pursuant to the Atomic Energy Act (AEA) and implementing regulations. The DOT's authority is derived pursuant to the Hazardous Materials Transportation Act (HMTA) and implementing regulations (all transport modes) as well as the Federal Railroad Safety Act (FRSA) and implementing regulations (railroad mode). This paper will discuss and explain the statutory and regulatory framework embodied in the above authorities, both generally and in relation to state and local permit and fee requirements. Also examined are the relative roles and responsibilities of the federal, state and local governments in the nuclear transportation area. By its express terms, the Nuclear Waste Policy Act (NWPA) does not alter the preexisting nuclear transportation statutory and regulatory scheme.

As a background matter, the paper identifies certain underlying constitutional principles that generally serve to restrict state and local nuclear transportation regulation in interstate commerce given the extensive nature of federal authority and regulation in the area. The constitutional principles in question derive from the Supremacy Clause (preemption and sovereign immunity) and the Commerce Clause of the Constitution.

Judicial decisions interpretive of the preemptive effect of the AEA in the area of nuclear safety, generally, and nuclear transportation, specifically, are discussed. State and local permit and fee requirements are less likely to be legally challenged on AEA preemption grounds than might be the case for other types of state and local nuclear transportation requirements since the matter of nuclear transportation routing, to which they most logically relate, falls primarily within the scope of DOT jurisdiction and regulation. Federal decisions in which state and local permit and fee requirements have been considered are included in this discussion.

Also relevant to the matter under review, the HMTA contains an express provision to the effect that any state or local requirement which is

inconsistent with any HMTA requirement (or implementing regulation) is preempted. HMTA regulations establish the criteria to be employed in making such preemption determinations as well as a mechanism by which an advisory opinion on HMTA statutory preemption, known as an inconsistency ruling, can be obtained from DOT. An inconsistency ruling adverse to a state or locality can, in turn, provide the basis for an application to DOT for a discretionary waiver of preemption under certain statutorily prescribed conditions. This process is discussed more fully below and the DOT inconsistency rulings involving state and local permit and fee requirements are specifically addressed.

In light of the relevant legal principles and process outlined above and discussed below, certain observations and conclusions concerning the legality of state and local permit and fee requirements can be drawn. These are enumerated in the final section of the paper.

B. Relevant Constitutional Principles

Three constitutional principles relevant to an understanding of the federal-state regulatory relationship in the nuclear transportation field are: preemption, sovereign immunity and interstate commerce. The first two concepts derive from the Supremacy Clause and the third from the Commerce Clause of the Constitution.

Under the Supremacy Clause of the Constitution, the laws of the federal government enacted pursuant to constitutional authority are the "supreme law of the land" to the exclusion of any state law that "interfere[s] with" or is "contrary" thereto. (Art. VI, cl. 2). Under the preemption doctrine, federal law precludes state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority.[1] Even in the absence of exclusive federal authority, any state law that conflicts with federal requirements is similarly preempted. State law is thus preempted when compliance with both federal and state regulation is a physical impossibility or where the state law poses an obstacle to the accomplishment of federal objectives.[2]

Under the related doctrine of sovereign immunity, federal entities are immune from state and local taxation and regulatory laws that interfere with federal governmental purposes. State regulation is permissible only if there has been a Congressional waiver of federal immunity.[3] State and local laws that interfere with or pose an undue burden on interstate commerce are similarly prohibited under the Commerce Clause of the Consti-

1. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm., 461 U.S. 190, 203-204 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

2. *Pacific Gas; Ray, supra* note 1.

3. *See* McCulloch v. Maryland, 4 Wheat. 316, 382, 406 (1819); Johnson v. Maryland, 254 U.S. 51, 57 (1920).

tution (Art. I, Sec. 8, cl. 3). As a general matter, the validity of a state or local law affecting interstate commerce depends on: (1) whether it is applied in a non-discriminatory manner with only an incidental effect on interstate commerce; (2) whether it serves a legitimate local purpose and, if so; (3) whether alternative means could promote such local purpose as well without discriminating against interstate commerce.[4]

C. *Nuclear Transportation Statutory and Regulatory Scheme*

1. *Nuclear Waste Policy Act (NWPA)*[5]

Implementation of the NWPA will eventually result in large scale Department of Energy (DOE) shipments of nuclear materials to a federal repository required to be operational by the end of the century. The NWPA contains no prescriptive criteria regarding nuclear transportation. Section 9 of the NWPA provides that: "[n]othing in this chapter shall be construed to affect federal, state or local laws pertaining to transportation of spent nuclear fuel or high-level radioactive waste."[6] The NWPA does not alter the preexisting statutory or regulatory framework in the nuclear transportation area.

Section 137 of the NWPA states that DOE spent fuel transportation must be in full compliance with NRC and DOT regulations.[7] This section further provides that DOE take title to nuclear material destined for repository disposal prior to shipment and that private industry be utilized for transportation to the fullest extent possible.

2. *Atomic Energy Act (AEA)*[8]

The AEA, as amended, grants to the NRC the authority to regulate and license the receipt, possession, use and transfer of source, by-product and special nuclear material.[9] NRC nuclear transportation regulation, with the exception of physical security and prenotification requirements during transit, is confined primarily to onsite transportation preparation, such as packaging.[10]

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4. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
5. 42 U.S.C. §§ 10101-10226 (1982).
6. *Id.* at § 10108.
7. *Id.* at § 10157. DOT and DOE have entered into a Memorandum of Understanding (MOU) delineating their respective responsibilities in nuclear transportation under the NWPA. 50 Fed. Reg. 47421 (1985). It was agreed that the management of nuclear materials transportation would rest with DOE and conform with all applicable DOT regulations. *Id.* State and local laws will be assertedly complied with if not inconsistent with the HMTA. *Id.* at 47422.
8. 42 U.S.C. §§ 2011-2296 (1982 and Supp. III 1985).
9. *Id.* at §§ 2073, 2093, 2011.
10. NRC and DOT have entered into a MOU delineating their respective responsibilities in nuclear transportation under the AEA and HMTA, respectively. 44 Fed. Reg. 38,690 (1979). Under the MOU, the NRC is responsible for the adoption of safety standards for the package

3. HAZARDOUS MATERIALS TRANSPORTATION ACT (HMTA) [11]

The HMTA authorizes DOT to promulgate a comprehensive set of regulations for the safe transport in commerce of hazardous materials, including radioactive materials. The HMTA contains an express provision concerning federal preemption of state and local law. Specifically, section 112(a) preempts "any requirement of the state, or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or implementing regulations (commonly termed Hazardous Materials Regulations (HMRs) and codified at 49 CFR Parts 170-179).

The following two-stage test for determining whether a state requirement is inconsistent is set forth:

> (1) whether compliance with both the state or political subdivision requirement and the [HMTA] or the regulation issued under the [HMTA] is possible (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 regulations issued [thereunder] (obstacle test).[12]

DOT is authorized to render inconsistency rulings *sua sponte* or on the request of an outside party.[13] This provides a mechanism for obtaining an administrative opinion on statutory or regulatory inconsistency without resort to litigation. An inconsistency ruling is advisory in nature. It is not judicially reviewable or legally enforceable. A court could be expected, nonetheless, to show considerable deference to a DOT inconsistency interpretation should litigation be initiated on the matter.

If a state or local requirement is found by DOT to be inconsistent with the HMTA or implementing regulations under HMTA section 112(a), such a finding provides the basis for application to DOT for a discretionary waiver of preemption under HMTA section 112(b). In this regard, HMTA section 112(b) requires a waiver applicant to demonstrate the following:

> (1) that the preempted state or local requirement affords an equal or greater level of protection to the public as compared with the federal standards; and
>
> (2) that it does not unreasonably burden commerce.[14]

Based on language in the legislative record underlying passage of the HMTA, DOT further requires a waiver applicant to make a threshold show-

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design of highway route-controlled quantities of radioactive materials exceeding designated limits. DOT is responsible for the adoption of radioactive material transportation safety standards, including requirements for labelling and marking of all packages and vehicles, carrier equipment conditions, carrier qualification and transportation mode and routes. Package design for radioactive material in quantities less than designated limits are promulgated by DOT. *Id.*

11. 49 U.S.C. §§ 1801-1812 (1982 and Supp. III 1985).
12. 49 C.F.R. § 107.209(c) (1986).
13. *Id.* at § 107.209(b).
14. *See also*, 49 C.F.R. 107.215(b)(6), (7) (1986).

ing of "exceptional circumstances necessitating immediate action to secure more stringent regulations."[15]

DOT has rendered over a dozen inconsistency rulings and one non-preemption determination to date. In the procedural requirements governing issuance of non-preemption determinations,[16] DOT has adopted case law criteria[17] for determining whether an inconsistent state or local requirement poses an unreasonable burden on interstate commerce pursuant to HMTA section 112(b)(2). Accordingly, 49 C.F.R. section 107.221(b) provides the following criteria:

> (1) the extent to which increased costs and impairment of efficiency result from the state or political subdivision requirement;
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> (2) whether the state or political subdivision requirement has a rational basis;
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> (3) whether the state or political subdivision requirement achieves its stated purpose; or
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> (4) whether there is need for uniformity with regard to the subject concern and, if so, whether the state or political subdivision requirement competes or conflicts with those of other states and political subdivisions.

DOT has promulgated a comprehensive set of regulations (commonly referred to by its rulemaking docket number HM-164) pertaining to highway routing for nuclear material.[18] There are no corollary routing regulations for other transport modes.

HM-164 applies general routing requirements to carriers and shippers of low-level radioactive waste where radioactive levels or quantities require placarding under DOT regulations[19] and specific routing requirements for highway route-controlled quantities of radioactive materials, including spent fuel.[20] This rule is predicated on DOT findings that "the public risks in transporting radioactive materials by highway are too low to justify the unilateral imposition by local governments of bans and other severe restrictions on the highway mode of transportation" and that "other modes of transport generally do not appear to offer alternatives that clearly lower public risks to the extent that use of the highway mode should be substantially restricted."[21] DOT further determined that "the impact of piecemeal state and local restrictions on the transportation of all radioactive materials. . .signifies a need for nationally consistent routing rules" and that "public safety can be improved through a nationally uni-

15. *See* 50 Fed. Reg. 37,308 at 37,309, 37,312 (1985); *see also*, 51 Fed. Reg. 47,181 (1987) (NPD-1 on appeal).

16. 49 C.F.R. §§ 107.215-107.225 (1986).

17. *See* decisions cited in 50 Fed. Reg. 37,308, *supra* note 15.

18. See 46 Fed. Reg. 5,298 (1981) (to be codified at 49 C.F.R. § 177).

19. 49 C.F.R. § 177.825(a) (1986).

20. *Id.* at § 177.825(b).

21. 46 Fed. Reg. 5,298, 5,299 (1981) (to be codified at 49 C.F.R. § 171, 172, 173).

form rule that ensures the use of available highway routes that are known to be safe for [highway route-controlled quantities] of radioactive materials."[22]

Pursuant to 49 C.F.R. Part 177, carriers of highway route-controlled quantities of radioactive materials are required to use "preferred routes," defined as interstate system highways or alternative highway routes designated by the states, with supporting safety analysis, that provide an equal or greater level of safety.[23]

Accompanying 49 C.F.R. Part 177 is a policy statement appendix which identifies those areas of state and local regulation that DOT deems inconsistent with federal regulation. This appendix provides that a state or local transportation rule is inconsistent with Part 177 if it:

(1) conflicts with [NRC] physical security requirements;
(2) requires additional or special personnel, equipment or escort;
(3) requires additional or different shipping paper entries, placards or other hazard warning devices;
(4) requires filing route plans or other documents containing information specific to individual shipments;
(5) requires prenotification;
(6) requires accident or incident reporting other than that immediately necessary for emergency assistance; or
(7) unnecessarily delays transportation.[24]

It is further provided therein that any state or local routing rule that significantly restricts or delays highway movement due to the hazardous nature of the cargo and that involves highway route-controlled quantities of radioactive material is inconsistent if it: (1) prohibits transport by highway between two points without providing an alternative route; or (2) is not adopted with a proper safety analysis.[25]

The term "routing rule" is defined 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.* . . .[26] (emphasis added).

The validity of these DOT routing regulations has been upheld against state challenge.[27] A similar challenge to the validity of the HM-164 ap-

22. *Id.* at 5,299.
23. 49 C.F.R. § 177.825(b) (1986).
24. 46 Fed. Reg. *supra* note 21, at 5,317.
25. *Id.*
26. *Id.*
27. New York City v. United States Department of Transp., 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

pendix is pending in a Federal District court in Ohio.[28]

4. FEDERAL RAILROAD SAFETY ACT (FRSA)[29]

In addition to the HMTA and AEA, rail transportation is also subject to the FRSA. In terms of the relative preemptive effect of federal railroad safety regulation over state and local requirements, DOT has stated that railroad transport is "more thoroughly imbued [than motor vehicle transport] with a federal interest" so as to render state and local rail routing requirements more susceptible to federal preemption.[30]

All facets of railroad safety are subject to DOT regulation under the FRSA. The FRSA contains the following preemption provision:

> *The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable.* A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.[31]

D. JUDICIAL DECISIONS

1. AEA

A. GENERAL

State and local nuclear regulation has been generally found preempted under the AEA if its objective is nuclear safety regulation.[32] Although there is no express preemption clause in the AEA, like the HMTA or FRSA, the Supreme Court has found a Congressional intention in passage of the AEA to establish a comprehensive federal regulatory scheme regarding the possession, use, and transfer of nuclear materials and that "[u]pon these subjects, no role was left for the states."[33]

Section 274 of the AEA[34] authorizes the NRC to enter into agree-

28. Ohio Ex Rel. Celebrezze v. United States Department of Transp., 776 F.2d 228 (6th Cir. 1985) (reversed and remanded District Court dismissal on standing grounds).

29. 45 U.S.C. §§ 421-441 (1982 and Supp. III 1985).

30. See Inconsistency Ruling IR-1, 43 Fed. Reg. 16,954 (1978).

31. 45 U.S.C. § 434 (1982) (emphasis added).

32. *Pacific Gas, supra* note 1; Pacific Legal Foundation v. State Energy Resources Conserv., 659 F.2d 903, 921 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

33. *Pacific Gas, supra* note 1 at 203.

34. 42 U.S.C. § 2021(b), (c)(4) (1982). The Commission still "retain[s] authority and responsibility with respect to the regulation of. . .(4) the disposal of such. . .[nuclear materials] as

ments with states to transfer certain regulatory authority over limited quantities of nuclear materials under certain conditions. It has generally been held that Congress intended to wholly preclude any state regulation of radiological aspects of nuclear power except when authorized by a state turnover agreement pursuant to AEA section 274.[35]

In the case of *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*,[36] the Supreme Court held that a California statute conditioning state nuclear power plant construction authorization on the availability of long-term waste disposal was enacted for "avowed economic purpose[s]", rather than safety reasons, and therefore, was "outside the [otherwise NRC] occupied field of nuclear safety regulation" and not preempted thereby.[37] The Court emphasized that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation, the states exercise their traditional statutory authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making, and the like."[38] In the case of *Northern States Power Co. v. Minnesota*,[39] the Eighth Circuit held that state conditions imposed on a waste disposal permit regulating radiological release levels and monitoring was preempted.

B. TRANSPORTATION

The case of *Jersey Central Power and Light Co. v. Township of Lacey*,[40] involved a challenge to the legality of a local ordinance prohibiting spent fuel shipment. The Third Circuit observed that it is "beyond dispute" that Congress intended "federal law [to] regulate the radiological safety aspects of. . .nuclear power. . .including the storage and shipment of spent fuel."[41] The court thus found the ordinances in question preempted by the AEA and thereby invalid under the Supremacy Clause. The court alternatively found the ordinances preempted by the HMTA and

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the Commission determines. . .should, because of the hazards or potential hazards thereof not be so disposed of without a license from the Commission."

35. Northern States Power Co. v. Minn., 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

36. *Supra* note 1.

37. *Id.* at 216.

38. *Id.* at 212; *Pacific Legal Foundation, supra* note 32 (state nuclear plant construction moratorium economically based); *see also* South Dakota Public Util. Comm'n v. FERC, 690 F.2d 674, 678 (8th Cir. 1982) (state denial of nuclear power plant permit on lack of electricity need, alternative energy, and economic [as distinct from nuclear safety] grounds upheld); United States v. New York City, 463 F. Supp. 604, 614 (S.D.N.Y. 1978) (city nuclear reactor licensing requirement preempted when license pertained to health and safety matters).

39. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

40. 772 F.2d 1103 (3rd Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 1190 (1986).

41. *Id.* at 1112.

implementing regulations in the event Supreme Court review was granted and it disagreed with the court's AEA preemption analysis.[42]

Two significant recent federal decisions have interpreted the AEA to preempt state rules prohibiting the transportation and storage within the state of spent fuel generated outside the state. In the first case, *Illinois v. G.E.*,[43] the Seventh Circuit invalidated an Illinois statute along the above lines on the grounds that it was preempted by the pervasive AEA regulatory scheme whose legislative history "compels the conclusion that the [AEA] equally preempts state regulation of the storage and shipment for storage, interstate and intrastate alike, of spent nuclear fuel."[44] The Ninth Circuit found a similar Washington prohibition on low-level radioactive waste storage and transportation violative of the Supremacy Clause "because it [sought] to regulate legitimate federal activity and to avoid the preemption of the AEA" in the case of *Washington State Building and Construction Trades Council v. Spellman*.[45] Both cases also found the state requirements in contravention of the Commerce Clause.

2. *HMTA*

A. *General*

The primary congressional purpose intended to be achieved through the HMTA was to secure a "general pattern of uniform, national regulations, and thus 'to preclude a multiplicity of state and local regulations and potential for varying as well as conflicting regulations in the area of hazardous materials transportation' ".[46]

B. *Permits and Fees*

The issue of state transportation permitting and fee requirements has received limited judicial scrutiny. In the case of *National Tank Truck Carriers, Inc. v. Burke*,[47] a state permit system requiring submission of a written application at least four hours prior to state transport was found inconsistent with the HMTA requirement to avoid unnecessary delay in transport.

In the case of *New Hampshire Motor Transport Association v. Flynn*,[48] a state licensing requirement and associated fee for hazardous materials waste transporters was at issue. The proceeds from the license

42. *Id.* at 1113.
43. Illinois v. G.E., 683 F.2d 206, 215 (7th Cir. 1982), *cert. denied sub nom*; Hartigan v. G.E., 461 U.S. 913 (1983).
44. *Id.* at 215.
45. 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).
46. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 824 (1st Cir. 1979).
47. 698 F.2d 559 (1st Cir. 1983).
48. 751 F.2d 43 (1st Cir. 1984).

fee were to benefit several state programs, including accident response, regulatory enforcement, and hazardous waste cleanup.

The First Circuit concluded that the license-fee system was not violative of the Commerce Clause or inconsistent with the HMTA so as to be preempted thereby.[49] The court stated that the central question for commerce clause analysis purposes was whether the license fee qualified as a "user fee".[50] Citing approvingly from the Supreme Court decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[51] the court held that states can impose a "reasonable fee to help defray the costs" of state services (users fee) upon "interstate and domestic users alike."[52]

The court rejected plaintiff's claim of HMTA preemption. It stated that the transportation delay occasioned by the license requirement was not significant enough to interfere with DOT's "speedy-transport mandate".[53] The court pointed out that individual licenses were obtainable during normal business hours and that an annual license could be obtained if shipments were anticipated at other times. Additionally, it cited the DOT statement in IR-3 (see discussion below) that a "bare" license or permit requirement is consistent with the HMTA and considered the New Hampshire system at issue to fall in that category.[54]

3. FRSA

A. GENERAL

In the case of *National Association of Regulatory Utility*[55] *Commissioners v. Coleman*,[56] Federal Railroad Administration authority to issue preemptive accident reporting regulations was contested. The Third Circuit concluded that FRSA section 434 evidenced a "total preemptive intent"[57] and that the legislative history disclosed an "overwhelming expression of congressional intent to preempt state rail safety standards once federal standards have been adopted. . . ."[58]

The Third Circuit rejected plaintiff's argument that the FRSA applied only to state substantive safety requirements that were inconsistent with federal regulations, and not to nonsubstantive requirements such as acci-

49. *Id.* at 46.
50. *Id.*
51. 405 U.S. 707 (1972).
52. *Supra* note 48, at 47.
53. *Id.* at 51.
54. *Id.*
55. *Id.* at 50.
56. 542 F.2d 11 (3d Cir. 1976).
57. *Id.* at 13.
58. *Id.* at 14.

dent reporting.[59] The court further concluded that the state accident reporting requirements did not fall within the "local hazard" exception to federal statutory preemption under FRSA section 434 since the state requirements were "largely duplicative of federal reporting requirements and not directed toward the elimination of any unique, local hazard. . . ."[60] Citing the FRSA legislative history, the court indicated that the "local hazard" exception was "not intended 'to permit a state to establish statewide standards superimposed on national standards covering the same subject matter.' "[61]

4. *Decisional Summary*

In light of the above judicial precedent, state or local nuclear transportation requirements that fall within the scope of NRC regulatory jurisdiction would probably be preempted under the AEA if grounded on nuclear safety considerations. Courts do not seem disposed to probe beyond an asserted non-safety rationale for a particular state or local requirement if such explanation is reasonable.

While state or local spent fuel transportation prohibitions are clearly proscribed on AEA preemption rounds, state and local nuclear transportation and fee requirements have not been challenged on this basis to date. Invalidation of such requirements on federal preemption rounds would more likely arise under the HMTA than the AEA.

State and local nuclear transportation permit and fee requirements have not been held categorically invalid under the Commerce Clause or preempted under the HMTA. Whether any such requirement is invalid or preempted depends on its purpose and effect with particular regard to the legitimacy of the state basis for such requirement and the inconsistency presented with the uniform and expeditious transportation objectives of the HMTA. FRSA judicial precedent suggests a disposition to give the maximum preemptive effect to federal railroad safety requirements and to circumscribe the scope of the "local hazard" statutory exception thereto. However, the FRSA does not prescribe federal railroad permit or fee requirements, and the legality of state and local railroad permit and fee requirements relative to the FRSA has not been litigated to date.

E. Relevant DOT Inconsistency Rulings

1. *Permits and Fees*

DOT has rendered a number of inconsistency rulings regarding state and local permit and fee requirements. DOT has stressed that, since its

59. *Id.*
60. *Id.* at 14-15.
61. *Id.* at 14 (quotation to legislative authority omitted).

inconsistency proceedings are conducted pursuant to the HMTA, it considers only statutory preemption. It has noted that a federal court could find a non-federal requirement preempted on interstate commerce grounds even if not statutorily preempted. DOT does not make such determinations.[62]

IR-2 concerned the validity of certain Rhode Island regulations concerning motor vehicle transport of liquified propane gas and natural gas, including a permit requirement for such operation.[63] The relevant Rhode Island rule required receipt of a state permit prior to each movement to be obtained by written application no less than four hours or more than two weeks prior to transportation. DOT found this permit requirement inconsistent with the HMRs and therefore, preempted. It reasoned that the permitting process carried the high probability of transport delay and that any state or local rule that sought "an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper" is patently inconsistent with HMTA regulations.[64] DOT noted, however, that "a permit may serve several legitimate state police power purposes, and the bare requirement. . .that a permit be applied for and obtained is not inconsistent with the federal requirements."[65] At the same time, DOT cautioned that a permit is "inextricably tied" to the requirements for its receipt and its permissibility so evaluated.[66] IR-2 was upheld on judicial review.[67]

IR-3 involved a city regulation restricting certain hazardous materials transportation within Boston, including a permit requirement for transportation outside a specified city area.[68] In light of the ill-defined permit conditions and scope, DOT concluded that their consistency with HMTA requirements was indeterminable.[69] DOT restated its opinion in IR-2 that a "bare" permit requirement is not necessarily inconsistent with the HMTA.[70]

In 1984, DOT issued several consolidated rulings(IR-7 through IR-15) upon application by the Nuclear Assurance Council respecting several state and local transportation restrictions.[71] In these rulings, DOT articulated criteria for determining permissible state and local permits.

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62. See discussions in inconsistency rulings IR-7 through IR-15. 49 Fed. Reg. 46,632, 46,633 (1984).
63. 44 Fed. Reg. 75,566 (1979).
64. *Id.* at 75,571.
65. *Id.* at 75,570.
66. *Id.*
67. *Supra* note 47.
68. 46 Fed. Reg. 18,918 (1981); *see also* 47 Fed. Reg. 18,457 (1982) (IR-3 on appeal).
69. 46 Fed. Reg. at 18,923; *see also* 47 Fed. Reg. at 18,457.
70. 46 Fed. Reg. at 18,923.
71. 49 Fed. Reg. 46,632 (1985).

IR-8 involved a Michigan permit requirement that required, among other things, the submission of a written application by radioactive materials carriers at least 15 days in advance of the scheduled in-state shipment. The application contents included the proposed truck route and a written emergency plan. Prior written approval for shipment was required subject to any conditions or limitations deemed necessary. Michigan contended that the permitting system was a permissible exercise of its public safety power and that radioactive materials transportation posed a greater risk in Michigan than in other states. It, therefore, assertedly had a corresponding duty to protect its citizens. DOT rejected this argument and concluded that federal regulation of radioactive materials transportation safety pursuant to the HMTA and implementing regulations was so thorough and pervasive that it effectively precluded any such state and local requirements. DOT stated:

> Generally, in the absence of departmental involvement in a safety issue, states can, and, to the extent authorized by state law, local governments may regulate to protect the public safety. Where, as here, the issue has been thoroughly addressed through rulemaking, the state role is much more circumscribed. The HMR addresses all aspects of radioactive materials transportation. Increasingly stringent requirements are imposed on the basis of increasing nuclear risk. Under the authority of the HMTA, federal regulation of radioactive materials transportation safety has been so detailed and so pervasive as to preclude independent state or local action. The extent to which state and local government may regulate the interstate transportation of radioactive materials is limited to:
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> (1) traffic control or emergency restrictions which affect all transportation without regard to cargo;
>
> (2) designation of alternate preferred routes in accordance with 49 C.F.R. 177.825;
>
> (3) adoption of federal regulations or consistent state/local regulations; or
>
> (4) enforcement of consistent regulations or those for which a waiver of preemption has been granted pursuant to 49 C.F.R. 107.221. Thus, in the absence of an express waiver of preemption, no authority exists, for state of [sic] local government to impose a permit requirement on shipments of radioactive materials which applies because of the hazardous nature of the cargo.[72]

DOT stated that a state requirement that operators obtain a permit when they intend to transport loads that exceed certain size or weight limits, irrespective of the nature of the cargo, was an example of an acceptable permit requirement adopted pursuant to state police power. The Michigan permit was not such a case and was found inconsistent with the HMTA and implementing regulations. Michigan has filed an administrative appeal to the ruling.

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72. *Id.* at 46,643.

A similar state permit system in Vermont was ruled inconsistent with federal law in IR-15.[73] DOT found that this constituted a routing rule in the form of a permit.[74] Vermont has filed an administrative appeal to this ruling. It had imposed a permit fee upon the shipment of highway route-controlled material. The fee was imposed to reimburse the state for the expense of providing state escorts and emergency response. DOT found that spent fuel shipment posed an historically lower risk of transportation accident necessitating emergency response than other hazardous materials, and that the permit fee was hence discriminatory in its selective application.[75]

DOT observed that spent fuel transportation in Vermont posed no unique safety risk and it was only its "limited capacity for emergency response which is alleged to be unique."[76] DOT, however, found this circumstance resulted from the state's decision to assemble an independent response team rather than rely on available federal resources in this area.[77] It also found Vermont's transport approval fee had the direct effect of redirecting shipments away from Vermont whenever possible. The foreseeable indirect effect was to encourage other states to take similar action which "would amount to a system of internal tariff barriers which would completely undermine HM-164 by forcing transporters to select routes on the commercial basis of reduced cost rather than the safety basis of reduced time in transit."[78] In view of these impacts, DOT concluded that the Vermont fee presented an "obstacle to the accomplishment and execution" of the HMTA as implemented by HM-164 and was therefore inconsistent.[79]

IR-11 involved a local rule prohibiting highway transportation of radioactive materials without a permit. DOT found that this constituted a routing rule in the form of a permit requirement. It reasoned: "If the [local authority] could impose such restrictions on the availability of highway routes to vehicles engaged in the transportation of radioactive materials, then any political subdivision of the state could do so. . .[T]he proliferation of independently enacted restrictions would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA. . . ."[80]

Local transportation permit requirements were also deemed to con-

73. *Id.* at 46,660.
74. *Id.* at 46,664.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 46,649.

stitute inconsistent routing rules in IR-12[81] and IR-13.[82] Under the same rationale espoused in IR-8, DOT noted that "radioactive materials routing rules in the form of shipment-specific permit requirements were. . .inconsistent *per se*."[83]

Another DOT inconsistency ruling on the subject (IR-17) was rendered on June 4, 1986.[84] IR-17 involved an Illinois fee on spent fuel transportation to finance a state transportation emergency preparedness program. The ruling had been requested by the Wisconsin Electric Power Company (WEPCO). DOT concluded that the fee was not inconsistent with, nor preempted by, the HMTA and implementing regulations. WEPCO contended that the transport fee was a prohibited routing rule under HMTA and inconsistent therewith. WEPCO cited the DOT policy statement on inconsistency in Appendix A to 40 C.F.R. Part 177, which provides that a transit fee constitutes a "routing rule" if it "effectively redirects or otherwise significantly restricts or delays the movement of public highway of motor vehicles containing [spent fuel] and applies because of the hazardous nature of the cargo." DOT ruled that the Illinois transport fee was not a prohibited routing rule on the grounds that it did not significantly restrict the transport of spent fuel in Illinois, redirect shipments away from preferred routes, or significantly delay spent fuel shipments.

In its challenge, WEPCO cited approvingly from IR-15 involving the Vermont spent fuel transport fee. DOT distinguished the Vermont and Illinois fee requirements on the grounds that the latter did not require advance state transit approval, did not deny entry to any shipment for failure to pay the required fee in advance, and did not purport to deny entry to any shipment in compliance with DOT standards. It noted that shipments had been diverted as a result of Vermont's transport approval fee and, to date, no shipment had been similarly delayed or denied entry into Illinois for non-payment of the fee.

DOT found that the nature of spent fuel transportation was such that there was adequate time between identification of a shipment and start of transportation to enable transporters to pay the requisite fee prior to movement of a shipment in Illinois. This militated against a finding of a potential of delay.

DOT likened the situation to that which it found prevalent in *Flynn*,[85] where, despite the fact that the transport license at issue there could only be obtained during ordinary business hours, carriers anticipating evening or weekend shipments could obtain the annual license and thereby avoid

81. *Id.* at 46,650.
82. *Id.* at 46,653.
83. *Id.* at 46,652.
84. 51 Fed. Reg. 20,926 (1986).
85. *Supra* note 48.

the potential for delay. DOT did not rely on the primary holding in *Flynn* to the effect that the license fee therein was a valid "user fee" under the Commerce Clause of the Constitution since interpretations of that constitutional provision are beyond the scope of the inconsistency ruling process.

DOT further ruled that the regulatory program, of which the transit fee is a part, was itself not inconsistent with the HMTA. It explained that transportation emergency preparedness is not the sole province of any single level of government, that governmental entities may statutorily require payment for the provision of governmental services, and that Illinois has by statute created an emergency preparedness program which coordinates federal, state, and local responsibilities and properly provides for financing of related state and local expenditures through means of the transit fee.

Finally, DOT found that the potential for encouragement of a multiplicity of similar transit fees in other jurisdictions was not the type of prospect that would lead to an inconsistency finding under the HMTA. In this regard, DOT stated that, while DOT may require transporters to maintain such strict compliance with federal transportation regulations that few additional requirements could withstand the HMTA regulatory inconsistency standards, such regulations would have to serve a legitimate safety purpose. DOT noted that it has no current regulation that preempts state fees *per se*. An appeal from IR-17 filed by WEPCO, a nuclear utility transportation group, and DOE is pending.

In recent developments, DOT has elicited public comment on an inconsistency ruling application (IRA-39) submitted by the Southern Pacific Transportation Company regarding Nevada Public Service Commission (NPSC) permit and fee regulations.[86] The regulations in question require railroads to obtain permits before they may load or unload certain hazardous (including radioactive) materials on railroad property, transfer defined materials from railroad property to another means of transportation, and store defined materials on railroad property. The regulatory provisions contain permit application requirements, application evaluation criteria, permit expiration and renewal procedures, suspension or revocation criteria and notice procedures. The application requirements include the provision of proposed loading, unloading, storage or transfer location maps, operational procedures, track inspection reports, a track construction summary, a summary of previously carried hazardous materials, a summary of unintended past material releases, sabotage prevention procedures, and accident plans. A permit is issued for one year, carries a $200 fee, and is renewable subject to certain specified findings. The

86. 51 Fed. Reg. 42,808 (1986).

Southern Pacific Transportation Company contends that the Nevada provisions are inconsistent for five reasons:

(1) They require different treatment and handling of certain commodities because of their DOT classifications as hazardous materials.
(2) They require the preparation of lengthy, cumbersome permit applications, replete with irrelevant and extraneous detail, before the defined hazardous materials may be loaded, unloaded, transferred, stored or temporarily held in transit.
(3) They involve extensive delays and require hazardous materials to be held in other states pending admission into Nevada.
(4) The required application information goes far beyond that required on DOT papers.
(5) Permit processing delays result in the [NPSC] having uncontrolled discretion over the transportation of hazardous materials in Nevada.[87]

On January 2, 1987, DOT issued an inconsistency ruling (IR-18) which found certain permit requirements promulgated by Prince George's County, Maryland inconsistent with the HMTA and implementing regulations.[88] The ruling had been sought by the county. The permit provisions in question included several advance notification and informational requirements regarding shipment date and time, starting point, route, stops destination, and other "reasonably related" information requested by the county. A showing was also required that containers, packaging, labeling, operation and equipment were in conformance with relevant federal or county regulations.[89]

Citing past inconsistency rulings, DOT found that these particular provisions exceeded federal requirements, created an additional burden or delay and were, consequently, inconsistent with HMTA and related regulations.[90] DOT found further that the required notification information violated the prohibition (in 10 C.F.R. section 73.21 and 49 C.F.R. section 173.22(c)) against disclosure to non-law enforcement local authorities of schedules and itineraries for specified radioactive shipments and thereby failed the "dual compliance" test and were inconsistent.[91] DOT found that the balance of the information requirements constituted an impermissible local packaging requirement and noted that state and local governments may not issue different or additional packaging requirements.[92]

The permit process took three business days, permitted the county to change transport dates, routes and times, precluded transport absent a finding that an adequate emergency response capability was present "in

87. *Id.*
88. 52 Fed. Reg. 200 (1987).
89. *Id.* at 203.
90. *Id.*
91. *Id.*
92. *Id.*

a manner necessary to protect public health and safety," and contained discretionary escort requirements.[93] DOT found that the three-day processing time period was inconsistent with the 49 C.F.R. Part 177, Appendix A policy statement provisions against unnecessary transportation delays.[94] The provisions authorizing date, route and time changes and the "vague" transport prohibition absent an emergency response adequacy finding were similarly found to be in conflict with the federal regulatory scheme, an obstacle to the achievement of the HMTA and inconsistent. On the matter of emergency response, DOT further stated that the county could neither shift its own responsibilities to carriers nor hold carriers "hostage" to a case-by-case county determination of emergency response adequacy.[95]

Finally, DOT found that the "open-ended" authority to require escorts is a prohibited obstacle to transportation, exceeded NRC's escort provisions and was to be inconsistent with the HMTA and regulations.[96] It noted that state or local escort requirements which were identical to or "facilitated" NRC escort requirements were consistent.[97]

A. *Tax Immunity*

The Supremacy Clause prohibits states from taxing the federal government directly.[98] A valid argument can be made that any fee assessment against a federal agency nuclear materials owner (such as DOE pursuant to its NWPA responsibilities) would be the functional equivalent of a proscribed state tax on the federal government. The validity of a fee assessment against a private carrier with whom the federal agency might contract to transport nuclear material is less clear. Government contractors are not categorically considered federal instrumentalities for purposes of tax immunity.

In the case of *Washington v. United States*,[99] the Supreme Court ruled that a Washington state taxing scheme, which imposed a sales tax for construction materials on a private landowner but imposed the tax for construction materials on the contractor in the case of federal government land ownership, was not invalid. The Court held that the federal government's constitutional immunity from state taxation may not be conferred on a third party simply because the tax has an effect on the United States, or even if the federal government bears the economic burden of the as-

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. United States v. New Mexico, 455 U.S. 720 (1982); McCulloch v. Maryland, *supra* note 3, at 436.
99. 460 U.S. 536 (1983).

sessment. Quoting its opinion in *United States v. County of Fresno*,[100] the Court reasoned: "so long as the tax is not directly laid on the federal government, it is valid if nondiscriminatory. . .or until Congress declares otherwise."[101] At the same time, the Court observed that "[a] state cannot single out the federal government and those with whom it deals for special tax."[102]

In the case of *United States v. New Mexico*,[103] the Supreme Court held that contractors having contracts with the federal government to manage certain government-owned atomic laboratories in New Mexico were not "constituent parts" of the federal government, and the imposition of a state tax upon property purchased by them under that contract was not violative of the federal immunity from state taxation. At issue in the case was a New Mexico sales tax on goods and services (gross receipts tax) and a compensating use tax on property acquired out-of-state in a transaction that would have been subject to the gross receipts tax if it had occurred within the state.

In arriving at its holding in the case, the Court stated that federal tax immunity is only appropriate "when the levy falls directly on the United States itself or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned."[104] The Court continued: "[a] finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the state's taxing power, a private taxpayer must actually 'stand in the Government's shoes.' "[105]

The Court further observed that "immunity cannot be conferred simply because the state tax falls in the earnings of a contractor providing services to the government"[106] or "simply because the tax is paid with government funds."[107] In applying these principles to the circumstances at issue, the Court questioned "whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself."[108]

Regarding the property use tax, the Court deemed its decision in *United States v. Boyd* controlling.[109] The *Boyd* case involved Atomic En-

100. 429 U.S. 452 (1976).
101. *Supra* note 99, at 540.
102. *Id.* at 541.
103. *Supra* note 98.
104. *Id.* at 735.
105. *Id.* at 737 (citation omitted).
106. *Id.* at 734.
107. *Id.* at 735.
108. *Id.* at 738.
109. 378 U.S. 39 (1964).

ergy Commission (now NRC) contractors performing nuclear reactor maintenance and construction work under the general direction of the government. They purchased goods and materials using government funds, but retained no ownership interest in the same.

The Court in *New Mexico* noted that it had upheld the state property use tax at issue in *Boyd* reasoning that "[t]he vital thing is that [the contractors are] 'using the property in connection with [their] own commercial activities.' "[110] The Court continued: "That the federal property was being used for the Government's benefit. . .was irrelevant, for the contractors remained distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.' "[111] The *Boyd* contractors were held not to be instrumentalities of the United States.

The Court in *New Mexico* noted that the contractors before it were "privately owned corporations" in which government officials had no "day-to-day operation [al]" role nor any "ownership interest."[112] The Court contrasted the contractor personnel with federal employees, terming the differences between the two "crucial".[113] It stated: "The congruence of professional interests between the contractors and the federal government is not complete; their relationships with the government have been created for limited and carefully defined purposes."[114] The Court, therefore, concluded that the imposition of a state tax on such entities did not contravene federal supremacy concepts. In *dictum*, the Court suggested that a state tax on contractors would also be constitutionally barred if it "substantially interfered with [federal government] activities."[115]

Applying the above authorities to the issue of transportation permit fees, it is probably reasonable to conclude that a private nuclear transportation contractor would not be immune from state tax (fee) on activities within their scope of effort notwithstanding their federal contractor status unless such tax (fee) was imposed discriminatorily upon federal activities. A valid argument can probably be made that such a fee is impermissible if its purpose or effect would be substantially to interfere with federal agency statutory responsibilities.

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110. *Supra* note 98, at 739 (citation omitted).

111. *Id.*

112. *Id.* at 740.

113. *Id.*

114. *Id.* at 740-741.

115. *Id.* at 736; *see also* Detroit v. Murray, 355 U.S. 489, 495 (1958) ("[t]here was no crippling obstruction of any of the Government's functions, no sinister effect to hamstring its power, not even the slightest interference with its property").

F. CONCLUSION

In light of the foregoing, the following general observations and conclusions can be drawn:

1. State and local transportation permit and fee requirements may or may not be preempted under the AEA, depending on their objective. If the requirement is based on nuclear safety concerns, it will be preempted by the AEA. If not, preemption may not be present.
2. State and local transportation permit and fee requirements could pose an undue burden on interstate commerce and therefore, contravene the Commerce Clause of the Constitution. The extent of the interstate commercial impediment posed by such requirements would be balanced by a reviewing court against any state and local purpose that were intended.
3. A federal agency could decline to abide by state and local permit and fee requirements imposed directly upon it (as nuclear materials owner) on sovereign immunity grounds. The federal agency could take the position that compliance with such requirements would seriously interfere with its statutory responsibilities. If such requirements are imposed on a private transportation government contractor, rather than a federal agency, such immunity would probably not be found unless imposition of the requirement would substantially interfere with the contracting agency's statutory responsibilities.
4. The HMTA could foreclose state and local permit and fee requirements. Some court decisions accord more latitude to state and local regulation in this regard than DOT's inconsistency rulings. While each such requirement must be evaluated on an individual basis, DOT's inconsistency rulings have generally found each state rule considered to be inconsistent with, and preempted by, the HMTA and implementing regulations. DOT has generally determined that such requirements constitute "routing rules" within the meaning of HM-164 and that, depending on their terms, they have an impermissible and adverse effect on nuclear waste transportation, including, among other things, undue delay and incentive to reroute transportation to non-permit and fee states.