HAROLD A. SHERTZ ESSAY

Regulating the Transportation of Hazardous Materials Over The Nation's Roadways

CAROLINE J. HOGUE, Esq.*

INDEX

I. INTRODUCTION

As our society becomes increasingly dependent on chemicals and

* Ms. Hogue is a June 1986 graduate of the Delaware Law School and is currently employed in the Environmental Litigation Division of the City of Philadelphia Law Department.

chemical by-products, a tremendous volume and array of chemicals must, of necessity, be shipped to their destinations via the nation's roadways. A substantial volume of these chemicals can be classified as hazardous materials,[1] which pose risks of injury and death if released during a highway accident.

The Department of Transportation (DOT) estimates that between 100,000 and 250,000 shipments of hazardous materials are transported daily over the nation's roadways, amounting to 4 billion tons of hazardous cargo shipped annually.[2] In large part, public awareness of the frequency and volume of hazardous materials being transported by roadway has come about through media reporting of accidents involving hazardous materials shipments. According to DOT statistics, 4,486 accidents involving the shipment of hazardous materials were reported in 1984.[3] Although 1985 statistics have not been published as of this writing, a number of major accidents have been reported in front-page headlines in newspapers around the country. Within a one-month span in 1985, a number of these accidents caused widespread evacuation and panic in the affected vicinities. On August 12, 1985, a major chemical spill necessitated the closing of the Capitol Beltway that surrounds Washington, D.C. and the evacuation of over 600 nearby residents.[4] In Camden, New Jersey, a truck spilled 2,500 gallons of a highly toxic chemical, analin, into a Camden city sewer.[5]

Despite the excellent safety records of most major companies that ship hazardous materials and the comprehensive controls established in this area through enacted federal legislation, the public views shipments of hazardous materials over roadways in their communities with concern and alarm.[6] This concern has resulted in a proliferation of additional legislation that has been enacted at both the state and local levels. This paper will serve to discuss the controls that have been placed upon the transportation of hazardous materials through federal, state and local legislation, will formulate a number of beneficial goals that might be accom-

---

1. For transportation purposes, federal legislation designates as "hazardous" any material shipped in commerce which poses an unreasonable risk to health, safety and property. Included within the defined hazard class are, *inter alia*, radioactive materials, etiologic agents, flammable and combustible liquids or solids, oxidizing or corrosive materials, compressed gases, poisons and explosives. *Hazardous Materials Transportation Act § 1803, 49 U.S.C. § 1801-1812 (1976 & Supp. V 1981).*
2. Christian Science Monitor, Aug. 15, 1985, at 1, col. 3.
3. Wash. Post, Aug. 14, 1985, at B1, col. 1.
4. *Id.*
5. Christian Science Monitor, *supra* note 2.
6. Fred Millar of the Environmental Policy Institute, a Washington-based private watchdog group, in publicly commenting on public concern, has stated, "The public is clearly alarmed by the prospect of Bhopal kind of chemicals coming through cities, small towns and rural communities." Reuters, Ltd., Aug. 26, 1985, v. at Wash. Dateline.

plished through legislation, and will analyze existing legislation in light of those proposed goals.

II. DISCUSSION

A. EXISTING FEDERAL LEGISLATION

1. THE HAZARDOUS MATERIALS TRANSPORTATION ACT

Recognizing the need for comprehensive federal legislation in this area in the early 1970's, Congress enacted the Hazardous Materials Transportation Act (HMTA)[7] with the express purpose of ". . . protect(ing) the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials."[8] Prior to the passage of the HMTA in 1974, a number of federal agencies, including the Federal Highway Administration, the Federal Railway Administration and the Federal Aviation Administration supervised the transportation of hazardous materials. Although the Secretary of Transportation maintained a small technical staff to advise these agencies, DOT possessed only a minimal degree of substantive control over the various modes of transportation.[9] As such, regulation and enforcement of hazardous materials transportation was fragmented among various agencies, with little or no coordination of effort. The legislative history of the HMTA evidences Congressional concern over this fragmentary approach, which was sought to be remedied by unifying the government's regulatory and enforcement powers in the Department of Transportation, which would be empowered to issue comprehensive, efficient and non-duplicative regulations for the transportation of hazardous materials over the nation's roadways.[10]

Under the HMTA, the Secretary of Transportation is afforded a broad grant of authority to:

1. designate as hazardous any material shipped in commerce which poses an unreasonable risk to health and safety and property. The materials so designated may include, *inter alia,* radioactive materials, etiologic agents, flammable and combustible liquids or solids, oxidizing or corrosive materials, compressed gases, poisons and explosives;[11]

2. promulgate regulations governing any safety aspect of the transportation of hazardous materials which are deemed necessary and ap-

7. Hazardous Materials Transportation Act, Pub. L. No. 93-633 (codified at 49 U.S.C. § 1801-1812 (1976 & Supp. V 1981)).

8. *Id.* at § 1801.

9. *See* generally, Hazardous Materials Transportation Control Act of 1970, Pub.L. No. 91-458, § 301-303, 84 Stat. 971, 977 (*repealed* 1974).

10. H.R. REP. No. 1083, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7669.

11. Hazardous Materials Transportation Act, 49 U.S.C. § 1803 (1976).

propriate, involving not only the control of routing hazardous materials shipments over designated roadways, but the packaging, handling and testing of containers used for hazardous materials, as well as the placarding or labelling and inspection of vehicles carrying hazardous materials shipments;[12] and

3. enforce such regulations as against shippers, carriers, and those who manufacture, test and certify containers intended for use in the transportation of hazardous materials in commerce.[13]

2. *Department of Transportation Regulations*

The Department of Transportation (DOT) has been active in promulgating extensive regulations in the area of hazardous materials transportation. A number of substantive regulations predating the enactment of the HMTA (which were previously authorized by other federal legislation) have been reissued and incorporated into the growing body of regulations issued under the authority of the HMTA.[14]

The Hazardous Materials Regulations[15] define and list those materials deemed hazardous in transport,[16] and include specific and detailed provisions for the carriage of hazardous materials by roadway.[17] Requirements for the testing of containers used in shipment,[18] obtaining shipping papers and certification,[19] the marking and placarding of vehicles,[20] the inspection of vehicles,[21] the training of tank truck drivers transporting flammable liquids,[22] the loading, unloading and storage of hazardous materials,[23] and the immediate reporting of hazardous materials accidents[24] are all set forth in great detail and specificity. The transporting of certain extremely hazardous materials by common carrier is prohibited altogether.[25] The hazardous materials regulations establish a system of preferred routes for the carriage of radioactive materials, comprising the interstate highway system or state-designated routes, which consist of alternate routes designated by state routing agencies.[26] Hazardous materi-

12. *Id.* at § 1804.
13. *Id.*
14. 49 Fed. Reg. 46, 632 (1984).
15. Hazardous Materials Regulations, 49 C.F.R. § 171.1-177.870 and app. A.
16. *Id.* at § 172.1-172.102 and app. A.
17. *Id.* at § 177.800-177.870 and app. A.
18. *Id.* at §§ 177.812, 177.813.
19. *Id.* at § 177.817.
20. *Id.* at § 177.823.
21. *Id.* at § 177.824.
22. *Id.* at § 177.816.
23. *Id.* at § 177.834-177.861.
24. *Id.* at § 177.807.
25. *Id.* at § 177.821.
26. *Id.* at § 177.825.

als regulations additionally specify that all shipments must be transported and delivered without unnecessary delay, from and including the time of commencement of the loading of cargo until its final discharge at destination.[27] Recognizing the special needs of local emergency response personnel, DOT has published and distributed nationally copies of emergency response guidebooks, providing instructions based upon DOT hazard warning systems of initial actions to be taken in event of a roadway accident.[28]

B. Legislation at State and Local Levels

1. Role of State and Local Governments

Despite the comprehensive scope and reach of the HMTA and DOT regulations promulgated thereunder, an increasing number of states and local governments have sought to enact additional legislation regulating the transportation of hazardous materials through their jurisdictions. Notwithstanding the framers' intent of creating a predominant role for the federal government (as further evidenced by the inclusion of an express preemption provision[29]), Congress has recognized the need for state and local government action in certain circumstances, even where such action impacts upon interstate commerce.[30] As such, the HMTA and DOT regulations have attempted to carve out a limited role for both state and local governments in the routing and traffic controls of hazardous materials shipments over state and local roadways.[31] In acknowledging this role, DOT has noted that:

> Despite the dominant role that Congress contemplated for Departmental standards, there are certain aspects of hazardous materials transportation that are not amenable to exclusive nationwide regulation. One example is traffic control. Although the Federal Government can regulate in order to establish certain national standards promoting the safe, smooth flow of highway traffic, maintaining this in the face of short-term disruptions is necessarily a predominantly local responsibility. Another aspect of hazardous materials transportation that is not amenable to effective nationwide regulation is the problem of safety hazards which are peculiar to a local area. To the extent that nationwide regulations do not adequately address an identified safety hazard because of unique local conditions, State or local government can regulate narrowly for the purpose of eliminating or reducing the hazard.[32]

Perhaps the most obvious role relegated to state government is the

27. *Id.* at § 177.853.
28. 49 Fed. Reg. 46,633 (1984).
29. See *infra*, pp. 606-608.
30. 49 Fed. Reg. 46,633 (1984).
31. *Id.*
32. *Id.*

designation of certain roadways within its state as a preferred route of travel. That such a role was not envisioned as purely a state function is evidenced by the caveat contained in DOT's definition of "state-designated route" advising that "Designation must have been preceded by substantive consultation with affected local jurisdiction . . . to ensure consideration of all impacts and continuity of designated routes."[33] Accordingly, some states, while retaining the power to control routing within the jurisdiction, have expressly delegated to local government the authority to enact their own ordinances concerning routing when particular local factors or risks are involved. An example of such legislation is Pennsylvania's Hazardous Materials Transportation Act,[34] which provides, in pertinent part:

> The Department shall have the power to . . . adopt regulations . . . pertaining to routing and parking of vehicles, except that such regulations may not supersede ordinances of local authorities and all other factors which affect the nature or degree of risk involved in the transportation of hazardous materials.[35]

As such, it seems clear that both federal and state governments authorize and approve of narrowly drafted local ordinances governing the routing of hazardous materials shipments when certain local roadways are considered patently unsafe, or when other obstacles, such as badly constructed tunnels or bridges, make transportation of hazardous materials extremely dangerous.

2. *Preemption under the HMTA*

State and local legislation which exceeds the designated roles envisioned by the HMTA and DOT regulations is subject to strict scrutiny based upon the express preemption provision contained in the HMTA. Congress purposely included a preemption provision in the Act ". . . to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation."[36] Under the terms of the preemption provision, inconsistent state and local regulations are preempted, with the exception of those which afford an equal or greater level of protection to the public than is afforded through the HMTA and do not unreasonably burden interstate commerce.[37]

In implementing the preemption language of the HMTA, an adminis-

---

33. 49 C.F.R. § 171.8.

34. Hazardous Materials Transportation Act, 75 Pa. Cons. Stat. Ann. § 8301-8308 (Purdon 1984).

35. *Id.* at § 8302(3).

36. S. Rep. No. 1192, 93d Cong., 2d Sess. 37 (1974).

37. Hazardous Materials Transportation Act, 49 U.S.C. § 1811 (1976).

trative forum was established in 1976 whereby state and local governments may apply to DOT for the issuance of a non-binding and appealable determination regarding the consistency of proposed legislation.[38] DOT inconsistency rulings are effective in providing a viable alternative to litigation for a determination of the relationship between Federal requirements and those of a State or political subdivision thereof. Additionally, if proposed state or local legislation is deemed inconsistent, such a finding provides the basis for application to the Secretary of Transportation for a determination as to whether preemption will be waived under Section 1811 (b) of the Act.[39]

Although DOT inconsistency rulings do not have the binding effect of judicial judgments, the inconsistency ruling proceedings do possess a judicial character, and case law criteria have been incorporated into the process for determining the existence of conflicts, as follows:

(1) Whether compliance with both the (non-Federal) requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the (non-Federal) requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.[40] In further construing the inconsistency test, DOT has noted that:

> The first criterion, commonly called the "dual compliance" test, concerns those non-Federal requirements which are incongruous with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or vice versa. The second criterion, the "obstacle" test, in a sense, subsumes the first and concerns those non-Federal rules that, regardless of conflict with a Federal requirement, stand as "an obstacle to the accomplishment and execution of the (HMTA) and the regulations issued under the (HMTA). In determining whether a non-Federal requirement presents such an obstacle, it is necessary to look at the full purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through . . . the regulatory program.[41]

Faced with a deluge of proposed rule-making, DOT regulations were amended in 1981 to include an appendix intended to advise state and local governments contemplating rule-making activity as to the likelihood of preemption due to inconsistency with federal regulations. Under those guidelines, state and local regulations will be deemed inconsistent, and preempted, if they:

1) prohibit the highway transport of large quantity radioactive

38. 49 C.F.R. § 107.201.
39. 49 C.F.R. § 107.215-107.225.
40. 49 C.F.R. § 107.209(c) (2).
41. 49 Fed. Reg. 46,633 (1984).

materials without providing for an alternative highway route for the duration of the prohibition;

2) require additional or special personnel, equipment or escort;

3) require additional or different shipping paper entries, placards or other hazard warning devices;

4) require the filing of routing plans or other documents containing information that is specific to individual shipments;

5) require pre-notification;

6) require accident or incident reporting other than as immediately necessary for emergency assistance; or

7) unnecessarily delay transportation.[42]

3. *Court Challenges of State and Local Legislation*

Despite the availability of DOT guidelines and inconsistency rulings, both state and local governments have enacted legislation that has been challenged in the courts on grounds that such legislation is preempted under the HMTA and violates the Commerce Clause.

Local governments have pursued a variety of goals through the enactment of local ordinances regulating the transportation of hazardous materials through their localities. Among these goals have been blatant attempts to impose flat bans on hazardous shipments on a city, township or county-wide basis. Perhaps the best documented example of such an attempt is the ten year battle waged by New York City in seeking to have upheld its local regulations banning the transport of spent nuclear fuel from Brookhaven, Long Island, through metropolitan New York City.

The Brookhaven National Laboratories, which has operated a nuclear reactor on Long Island since 1954, routinely shipped highly radioactive uranium by truck through New York City, using a densely populated route across the 59th Street Bridge, north on Third Avenue and across town to the George Washington Bridge, where it was then carried south to a reprocessing site in South Carolina. In 1976, New York City amended its local Health Code to ban such shipments through the City. Brookhaven, which was then forced to barge its uranium shipments across the Long Island Sound into Connecticut, petitioned DOT to declare the New York City regulation inconsistent with federal regulations, and thereby preempted. In light of DOT regulations designating a system of preferred routes encompassing the interstate highway system and supplemented by local highways selected and approved by state routing agencies, DOT expressed the opinion that local regulations such as New York's, which "... prohibit the transportation of large quantity radioactive materials by

42. 49 C.F.R. § 177, app. A (1982).

highway between any two points without providing an alternative route for the duration . . . are preempted."[43]

Shortly thereafter, New York City filed in district court, seeking invalidation of the DOT preemption ruling. The District Court partially invalidated the DOT regulation, based on its interpretation of the HMTA as requiring that regulations promulgated under the statute set the safest feasible standard for the transportation of hazardous materials.[44] On appeal to the United States Court of Appeals for the Second Circuit, the District Court's ruling was reversed, thereby upholding the Transportation Department's power to preempt local law.[45] In reversing the findings of the District Court, the appellate court relied heavily on the legislative history of the HMTA in reiterating the need for a central and consolidated authority in controlling the transportation of hazardous materials. The court noted that:

> In framing (the) HMTA, Congress decided that federal regulations would presumptively preempt inconsistent local regulations and that local authorities would then have the burden of demonstrating to DOT that their local regulations provided greater safety without burdening interstate commerce. Courts are not free to reverse this presumption or to shift the burden of proof from states to federal authorities.[46]

Unassuaged, New York City followed the advice of the court in formally petitioning DOT for a waiver of preemption, based on its claim that the city's dense population makes it unsafe to transport radioactive materials on roadways located in the Bronx and in Queens. On September 9, 1985, DOT denied the City's petition, based upon the city's failure to show exceptional circumstances that would justify a waiver from preemption.[47] The decision marked the first time that DOT has ruled on a request from a local government that it be allowed to override federal regulations.[48]

Despite New York City's stated intention to appeal the DOT decision,[49] they will have an uphill battle in light of the fact that courts have held that flat ban ordinances unconstitutionally discriminate against interstate commerce.[50]

Although flat ban ordinances have been stricken as inconsistent with federal regulations and violative of the Commerce Clause, at least one

---

43. *Id.*

44. City of New York v. Department of Transp., 539 F. Supp. 1237 (S.D.N.Y. 1982), *rev'd*, 715 F.2d 732 (2d Cir. 1983) *cert. den.* 104 S. Ct. 1403 (1984).

45. *Id.* 715 F.2d 732 (2d Cir. 1983).

46. *Id.* at 752.

47. N.Y. Times, Sept. 10, 1985, at A1, col. 5.

48. *Id.*

49. On September 9, 1985, when the DOT decision was announced, Mayor Koch told reporters, "We will press this matter until the last court has an opportunity to render justice." *Id.*

50. Browning-Ferris, Inc. v. Anne Arundel County, 292 Md. 136, 438 A.2d 269 (1981).

court has upheld a local ordinance which severely restricts shipment of hazardous materials through densely populated cities. In *National Tank Truck Carriers v. New York City,*[51] the court upheld New York City Fire Department regulations which ban the shipment of hazardous gases by tank truck through New York City unless no practical alternate roadway exists, and which further limit use of city streets by establishing curfews for tank truck travel.

The court in *National Tank Truck Carriers* relied heavily on the factual record, which indicated that a provision for practical alternatives existed, and that trucks were able to use a New Jersey-Westchester-Long Island route, which took only one hour longer to drive than the prohibited New Jersey-New York City-Long Island route.[52] It is important to note that the alternative roadway provision distinguishes the instant Fire Department regulations from those deemed inconsistent in *New York City v. DOT*,[53] in which no practical alternative existed within the State other than barging the shipments across Long Island Sound.

Although the appellant in *National Tank Truck Carriers* argued that curfews established under the regulations which prohibited all travel on City roadways during rush hours were inconsistent with DOT regulations forbidding unnecessary delay in transport,[54] the court viewed the curfew delays (which forced the drivers to wait for curfew to lift en route) as necessary when viewed in light of the intended purpose of the federal regulations, namely, to protect against risks to life and property from the transportation of hazardous materials.[55]

Applying the two-pronged test to determine consistency with federal guidelines,[56] the court held that truckers could dually comply with local and federal regulations, and that the local regulations did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[57]

In discussing the burden placed upon interstate commerce by the local regulations, the court held that the local regulations might, in fact, burden interstate commerce through increased shippers' costs by making trucks travel more miles to circumvent the city or by delaying trips by the established curfews. However, such inconveniences were found not

51. National Tank Truck Carriers v. New York City, 677 F.2d 270, (2d Cir. 1982).
52. *Id.* at 274.
53. City of New York v. Department of Transp., 715 F.2d 732 (2d Cir. 1983).
54. 49 C.F.R. § 177.853 (a) provides:
"No unnecessary delay in movement of shipments. All shipments of hazardous materials shall be transported without unnecessary delay, from and including the time of commencement of the loading of the cargo until its final discharge at destination."
55. National Tank Truck Carriers v. New York City, 677 F.2d 270, 275 (2d Cir. 1982).
56. 49 C.F.R. § 107.209(c) (1) & (2).
57. National Tank Truck Carriers v. New York City, 677 F.2d 270, 275 (2d Cir. 1982).

unconstitutionally disproportionate when balanced against the public interest in avoiding catastrophic incidents in densely populated urban areas.[58]

It should be noted that the court's decision in *National Tank Truck Carriers v. New York City* is inapposite to the decision in *National Tank Truck Carriers v. Burke,*[59] in which state regulations containing curfew provisions identical to those established by the New York City Fire Department were stricken as inconsistent with federal regulations. Further, the decision, in *National Tank Truck Carriers v. New York City* conflicts with DOT's current policy of preempting regulations that force drivers to take alternate routes, which "export the problem" to other jurisdictions.[60]

State regulations requiring hazardous materials transporters to obtain licenses and pay annual licensing fees have been upheld in the courts. Relying on a prior DOT ruling,[61] the court in *New Hampshire Motor Transport Association v. Flynn,*[62] upheld New Hampshire licensing regulations on the ground that such fees were not preempted as inconsistent with the HMTA nor violative of the Commerce Clause.[63] In characterizing delays that might occur in the obtaining of licenses as insignificant, the court noted that under the regulations, truckers could obtain single-trip licenses during ordinary business hours, and those making nighttime or weekend trips could apply in advance for an annual state license.[64] Additionally, the court discussed in some detail the state's proposed use of revenues obtained from licensing fees, as follows:

> The fees are expected to generate annual revenues of between $700,000 and $800,000. At the same time, the state must spend money to enforce the hazardous materials regulations. It must, for example, tell truckers what the rules are (it originally sent out notices to approximately 15,000 affected parties); it must inspect and license trucks; and it must train employees ot carry out enforcement work. When a truck has an accident involving significant damage, the state sends employees to the scene to make out accident reports, to re-route or direct traffic away from the location of the accident, to inform the necessary state agencies which must then help to control the damage and clean up the spill, and to make certain that both people and surroundings will be properly protected. Such work is directly attributable to the transportation of hazardous substances within the state.[65]

Somewhat inexplicably, a local regulation imposing similar licensing fees on hazardous materials transporters has been stricken as violative of

58. *Id.* at 274.
59. National Tank Truck Carriers v. Burke, 535 F. Supp. 509 (D.R.I. 1982).
60. 44 Fed. Reg. 75,566 (1979).
61. *Id.* at 75,570.
62. New Hampshire Motor Transport Assoc. v. Flynn, 751 F.2d 43 (1st Cir. 1984).
63. *Id.* at 46.
64. *Id.* at 51.
65. *Id.* at 47.

the Commerce Clause. In *Browning-Ferris, Inc. v. Anne Arundel County*,[66] the court characterized local regulations requiring the payment of annual licensing fees by those who transported hazardous materials through Anne Arundel County as an impermissible burden upon interstate commerce. In supporting its conclusion, the court held that:

> [I]f Anne Arundel County may enact such requirements consistent with the Commerce Clause, so may other counties in Maryland, and other counties in every other state as well. If each county has that power to regulate, it follows that each would have the authority to enact regulations unique unto itself. Every county, then, could have regulations in this area different from those other counties enacted regulations in this area, a person transporting hazardous waste from New York through Maryland to Virginia would be burdened not simply with the requirements of Anne Arundel County, and those of several other counties in Maryland, but of every other local government in every state on his route . . . [T]he resulting cumulative burden on interstate commerce might well be insurmountable.[67]

Reviewing a number of other provisions contained in the local regulations, such as labelling and vehicle certification, the court noted that, ". . . [b]etween the State and federal laws and regulations, all transportation of hazardous substances through the county is already subject to the types of controls and requirements which the county seeks to impose . . . [to deal] with transportation."[68] In so noting, the court has approached a subject as yet infrequently discussed: the consideration of local regulations that may be consistent with federal regulations but nevertheless impose duplicative requirements on hazardous materials transporters.

Certain states have required extensive prenotification when hazardous materials are to be transported over the state's roadways as well as the necessity of written documentation of emergency plans in order to receive a permit prior to transport. DOT, through the issuance of its inconsistency rulings, has warned that it views such regulations as imposing unrealistic compliance burdens on carriers and will strike such regulations on preemption grounds.

An example of such an attempt at regulation occurred in Rhode Island, whose regulations required that a permit be obtained prior to transport of shipments of liquified gases upon any highway, street or roadway within the state. Its regulations stated that a permit must be sought not less than four hours nor more than two weeks prior to transport and, in effect, required separate application and receipt of permit for each such shipment within the state. Specific information unique to each shipment was required, including the proposed route to be followed as well as the quantity of hazardous materials sought to be transported. Upon chal-

66. Browning-Ferris, Inc. v. Anne Arundel County, 292 Md. 136, 438 A.2d 269 (1981).
67. *Id.* at 274, 275.
68. *Id.* at 276.

lenge of the regulations by an association of cargo carriers, the court held that such regulations would inevitably and substantially delay all interstate transport of hazardous materials and deemed such regulations inconsistent with DOT regulations, which prohibit all unnecessary delays in the transportation of hazardous materials.[69] In so holding the court also noted that at least some of the information sought under the state regulations was identical to information that had already been furnished in accord with DOT regulations, and suggested that redundant and duplicative state legislation presented severe obstacles to the accomplishment and execution of the full purposes of the HMTA.[70]

C. *DOT Inconsistency Rulings*

In reviewing recent court decisions, it is apparent that courts are increasingly following DOT's lead in the determination of consistency with federal guidelines.

DOT inconsistency rulings have been issued preempting as inconsistent state or local regulations which require additional testing or certification of containers used in transporting hazardous materials. For example, Vermont and Michigan regulations required storage containers to be tested for conformity with standards established for unique transportation situations, especially movement over the states' major bridges.[71]

DOT inconsistency rulings have likewise invalidated state regulations which purport to classify certain transported materials as hazardous when such classifications are inconsistent with those established under the HMTA or DOT regulations.[72]

At issue were Vermont regulations which included the acronym "RADWAS", defined as irradiated reactor fuel and radioactive waste that are large quantity radioactive materials. In ruling that Vermont's regulations were preempted under the HMTA, DOT noted that the term "RADWAS" was not synonymous with the "highway route controlled quantity radioactive materials" as established by DOT regulations. Discussing the effect of such regulations, DOT expressed the view that:

> By imposing additional regulations on a subgroup of highway route controlled quantity radioactive material to be known as "RADWAS", Vermont has created a new hazard class. If every state were to assign additional regulations on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusing [sic] of regulatory requirements would lead ineluctably to the increased likelihood of reduced compliance with hazardous materials regulations and subsequent decrease

69. National Tank Truck Carriers v. Burke, 535 F. Supp. 509, 517 (D.R.I. 1982).
70. *Id.* at 518.
71. 40 Fed. Reg. 75,566 (1979).
72. 49 Fed. Reg. 46,632, 46,660 (1984).

in public safety.[73]

In this respect, courts have uniformly followed DOT's lead by requiring that hazard class definitions contained in state or local regulations be entirely consistent with those established by DOT, and have on occasion remanded cases where alleged conflicts existed in local hazard class regulations to await pending DOT inconsistency rulings.[74]

III. CONCLUSION

In conclusion, it is clear that a number of beneficial goals can be accomplished through legislation regulating the roadway transport of hazardous materials. These include:

1) improving the safety of such shipments and, conversely, decreasing the likelihood of catastrophic accident;

2) establishing emergency response guidelines that would save lives and assist emergency response personnel in coping with accidents that do occur; and

3) providing uniformity and consistency in regulation so as to permit the flow of materials in interstate commerce and to simplify compliance by the nation's trucking and chemical industries.

It is likewise clear that federal legislation and regulation embodied in the Hazardous Materials Transportation Act and Department of Transportation regulations achieve such goals. In large part, however, the proliferation of additional legislation at the state and local levels has frustrated such goals by engrafting duplicative or inconsistent requirements on an already heavily regulated area. The Department of Transportation and a number of courts have realized that however laudable the purposes of such legislation, the result is deleterious, in placing an insurmountable burden on companies that must ship hazardous materials across a number of states and localities in interstate commerce.

The Department of Transportation has properly defined narrow areas in which state and local governments may regulate. As such, local governments should consult with state routing agencies in establishing routes of preferred travel in light of particular local hazards within their jurisdictions. It may be argued that licensing on the state and local levels provides much needed revenues for dealing with accidents that occur within their jurisdictions. However, if varying licensing requirements were enacted within every locality and state in the nation, the flow of interstate commerce would be severely hampered. As more practical alternatives, a federal fund might be established that would be available to both states and localities or, uniform state licensing requirements might be estab-

73. *Id.* at 46,660.

74. National Tank Truck Carriers v. New York City, 677 F.2d 270 (2d Cir. 1982).

lished. Similarly, densely populated cities which seek to decrease the risk of accident by banning the transport of hazardous materials altogether merely export inherent and unavoidable risks to other jurisdictions unfairly. Instead, cities must work with state and federal agencies in designating preferred routes that minimize the risks while permitting continued interstate transportation of hazardous materials.

In seeking to protect the Nation and its people against the risks involved in the roadway transport of hazardous materials, Congress has enacted comprehensive and effective federal legislation. By ensuring that such legislation plays a dominant and unifying role, the continued free flow of necessary materials in interstate commerce will be assured.