DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–98–3665]

Preemption Determination No. 21(R); Tennessee Hazardous Waste Transporter Fee and Reporting Requirements

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Applicant: Association of Waste Hazardous Materials Transporters (AWHMT).

Local Laws Affected: Tennessee Code 68–212–203(a)(6); Tennessee Rules and Regulations 1200–1–11–.04(4)(a)4, 1200–1–13–.03(1)(e).

Modes Affected: Highway and Rail.

SUMMARY: Federal hazardous material transportation law preempts Tennessee's requirement for hazardous waste transporters to pay a $650 per year remedial action fee because that fee is not fair and it is not used for purposes related to transporting hazardous material. Federal hazardous material transportation law also preempts Tennessee's requirement for a transporter to submit a written report of a discharge of hazardous waste during transportation because that requirement is not substantively the same as RSPA's requirement in the Hazardous Materials Regulations.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Background

In March 1998, AWHMT applied for a determination that Federal hazardous material transportation law preempts Tennessee statutory and regulatory requirements that transporters of hazardous waste pay a remedial action fee and file written reports of any discharge of hazardous waste within the State.

Tennessee requires a transporter to hold a permit in order to pick up or deliver hazardous waste within the State. Tennessee Code 68–212–108(a)(1); Rule 1200–1–11–.04(2) of the Tennessee Department of Environment and Conservation (DEC). In addition to the initial application and annual renewal fees to obtain this permit, which are not challenged by AWHMT, the transporter must also pay a $650 ''remedial action fee'' each year, under Tennessee Code 68–212–203(a)(6) and DEC Rule 1200–1–13.03(1)(e). (This fee had been set at $550 for the 1994–95 fiscal year and $600 for the 1995–96 fiscal year. *Id.*) The remedial action fees paid by transporters are deposited into a ''special agency account . . . known as the 'hazardous waste remedial action fund.' '' Tennessee Code 68–212–204(a). The monies in this fund may be used for a number of purposes, including identifying, investigating, cleaning up and monitoring ''inactive hazardous substance sites''; matching funds provided by the United States to clean up hazardous substance sites; providing on-site technical assistance to hazardous waste generators; taking additional measures to reduce the generation of hazardous waste within the State; and preparing an annual report to the Tennessee Legislature. Tennessee Code 68–212–205.

Tennessee also requires a transporter to submit to DEC, ''[w]ithin fifteen days of occurrence,'' a written report ''on each hazardous waste discharge during transportation that occurs in the state.'' DEC Rule 1200–1–11–.04(4)(a)4. The Note to this section states that a copy of DOT form F 5800.1, as required by 49 CFR 171.16, ''shall suffice for this report provided that it is properly completed and supplemented as necessary to include the information required'' in subsection (a)3 with respect to immediate notification of any discharge of hazardous waste.

AWHMT contends that Tennessee's remedial action fee is preempted because the proceeds are not used exclusively for purposes related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. AWHMT also maintains that this is a ''flat fee'' that is preempted because it has no relation to the transporter's operations within the State. In addition, AWHMT argues that Tennessee's requirement to submit written reports of any hazardous waste discharge is preempted because it is not substantively the same as DOT's requirements in 49 CFR 171.16.

The text of AWHMT's application was published in the **Federal Register**, and interested parties were invited to submit comments. 63 FR 17479 (April 9, 1998), correction, 63 FR 18964 (April 16, 1998). Comments were submitted by DEC, the Association of American Railroads (AAR), and the Hazardous Materials Advisory Council (HMAC). Rebuttal comments were submitted by AWHMT, DEC, and AAR. In its rebuttal comments, DEC asked RSPA to reopen the comment period to allow commenters to respond to rebuttal comments. RSPA denied that request but called DEC's attention to RSPA's procedural regulations providing that ''Late-filed comments are considered so far as practicable.'' 49 CFR 107.205(c). Accordingly, in the event that a commenter raises a new issue in rebuttal comments, or there is a change in the facts or law involved in a preemption application, an interested party may always bring these matters to RSPA's attention. No late-filed comments were received.

II. Federal Preemption

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.'' Pub. L. 93–633 § 102, 88 Stat. 2156, presently codified as revised in 49 U.S.C. 5101. The HMTA ''replace[d] a patchwork of state and federal laws and regulations * * * with a scheme of uniform, national regulations.'' *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted ''without substantive change'' by Public Law 103–272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51.

The HMR are currently issued under the direction in 49 U.S.C. 5103(b)(1) that DOT ''shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce.'' The term ''hazardous material'' specifically includes hazardous wastes. 49 CFR 171.8; *see also* § 171.1(a)(1).

A statutory provision for Federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee ''endorse[d] the principle of preemption in order 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.'' S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, a Federal Court of Appeals found that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments that expanded the preemption provisions.

Colorado Pub. Util. Comm'n v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

The 1990 amendments to the HMTA codified the ''dual compliance'' and ''obstacle'' criteria that RSPA had applied in issuing inconsistency rulings before 1990.[1] The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151 (1978). As now set forth in 49 U.S.C. 5125(a), these criteria provide that, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e) or unless it is authorized by another Federal law, ''a requirement of a State, political subdivision of a State, or Indian tribe'' is explicitly preempted if

(1) complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to the accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

In the 1990 amendments to the HMTA, Congress also added additional preemption provisions on certain ''covered subject'' areas and with regard to fees imposed by a State, political subdivision, or Indian tribe on the transportation of hazardous material. The covered subject areas include ''the written notification, recording, and reporting of the unintentional release in transportation of hazardous material,'' 49 U.S.C. 5125(b)(1)(D); unless it is authorized by another Federal law or a DOT waiver of preemption, a non-Federal requirement on this subject matter is preempted when it is not ''substantively the same as a provision of this chapter or a regulation prescribed under this chapter.'' 49 U.S.C. 5125(b)(1). RSPA has defined ''substantively the same'' to mean ''conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d).

In addition, 49 U.S.C. 5125(g)(1) provides that a State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing (which have been delegated to FHWA). 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination be published in the **Federal Register**. Following the receipt and consideration of written comments, RSPA will publish its determination in the **Federal Register**. *See* 49 CFR 107.209(d). A short period of time is allowed for filing petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not directly address issues of preemption arising under the Commerce Clause of the Constitution, except that, as discussed in more detail in Section III.B.2., below, RSPA considers that Commerce Clause standards are relevant to a determination whether a fee related to the transportation of hazardous material is ''fair'' within the meaning of 49 U.S.C. 5125(g)(1). Preemption determinations also do not address statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon,* above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 12612, entitled ''Federalism'' (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority.[2] Section 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

III. Discussion

A. Standing

In its initial comments, DEC questioned whether AWHMT ''has standing to pursue this petition.'' DEC asserted that AWHMT had not set forth sufficient facts in its application ''to know if the Association has any members that have standing.'' DEC stated that its remedial action fee ''does not apply to the universe of hazardous materials * * * but only to the subset of hazardous waste as defined by the Resource Conservation and Recovery Act (RCRA),'' 42 U.S.C. 6901 *et seq.*, and that

the fee only applies to persons who 'transport hazardous waste to or from locations within Tennessee.' TDEC Rule 1200–1–11–.04(2)(b)(1) in the Applicant's Attachment C. The fee does not apply to a transporter who passes through the State. [Footnote omitted]

With its rebuttal comments, AWHMT submitted affidavits of two of its members, Environmental Transport Group, Inc., of Flanders, New Jersey, and Tri-State Motor Transit Co., Inc., of Joplin, Missouri. Officials of each of these companies stated that their companies handled numerous shipments of hazardous waste every year that originate, terminate or are temporarily stored during the normal course of transportation in Tennessee. This is sufficient to allow AWHMT to petition for an administrative determination of preemption on behalf of its members. As stated in PD–2(R), Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest, 58 FR 11176, 11182 (Feb. 23, 1993),

if [an association's] members do not comply with the IEPA Uniform Hazardous Waste Manifest requirements, they are subject to State enforcement action and to delays of their shipments. Thus, [the association's] members are ''directly affected'' by the Uniform Hazardous Waste Manifest system, and [the association] has standing to apply for this preemption determination.

[1] While advisory in nature, RSPA's inconsistency rulings were ''an alternative to litigation for a determination of the relationship of Federal and State or local requirements'' and also a possible ''basis for an application * * * [for] a waiver of preemption.'' Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, etc., 44 FR 75566, 76657 (Dec. 20, 1979).

[2] On August 4, 1999, the President signed ''Federalism'' Executive Order No. 13132 which becomes effective on November 2, 1999. Although this replaces Executive Order No. 12612, it continues the policy that a Federal agency should find preemption ''only where the [Federal] statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal Statute.'' Sec. 4(a), 54 FR 43255, 43257 (Aug. 10, 1999).

Accord, PD–6(R), Michigan Marking Requirements for Vehicles Transporting Hazardous and Liquid Industrial Wastes, 59 FR 6186, 6189 (Feb. 9, 1994) (an association has standing to apply for a determination that Michigan requirements on the transportation of hazardous waste are preempted when its ''members include those who transport hazardous waste in or through Michigan by motor vehicle'').

RSPA finds that AWHMT has standing to apply for a determination that Federal hazardous materials transportation law preempts Tennessee requirements that apply to AWHMT's members that transport hazardous waste within Tennessee.

B. Remedial Action Fee

1. The Fee and its Uses

According to DEC, the remedial action fee mandated by Tennessee Code 68–212–203(a)(6) and DEC Rule 1200–1–13–.03(1)(e) is ''part of the Tennessee superfund program.'' DEC stated that these fees are paid by generators of hazardous waste, transporters of hazardous waste, and facilities that treat or dispose of hazardous waste.[3] DEC indicated that its Division of Superfund collected more than $2.5 million in remedial action fees in 1996, and almost $2.9 million in 1997. In both years, more than 90% of the fees were paid by generators and treatment and disposal facilities; transporters paid $176,800 (about 7% of the fees collected) in 1996, and $168,700 (about 6%) in 1997.

DEC stated that the remedial action fees paid by generators, transporters and treatment and disposal facilities are credited to the Hazardous Waste Remedial Action Fund,[4] which is ''distinct from the state general fund and any unencumbered balance does not revert to the general fund at the end of any fiscal year.'' DEC also advised that, besides these fees, the Hazardous Waste Remediation Fund receives criminal fines and civil penalties for violations of the Tennessee Hazardous Waste Management Act, and the State appropriates $1 million to this fund each year. See Tennessee Code 68–212–203(d), (e).

DEC stated that ''the primary use [of monies in the fund] is as a mechanism for the Department to investigate, contain and clean up 'inactive hazardous substance sites' * * * where disposal of hazardous substance has occurred.'' According to DEC, ''hazardous substance'' has the same meaning as in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 49 U.S.C. 9601(14), so that this term includes more than hazardous wastes.

DEC indicated that disposal can include ''[a]ny spilling, discharge, or leaking such as can occur during an accident during transportation or during loading and unloading.'' DEC stated that it ''accomplishes these activities through the use of contractors when the liable parties do not do it themselves.'' It indicated that it has separate contracts for emergency response, investigation and engineering, and for remediation. However, according to DEC, ''[t]here has not been a major spill in a transportation-related incident that we have had to address with the superfund.'' It mentioned that, in 1996, it ''used the fund and the emergency response contractor to address incidents on highways,'' at a total cost of $4,300. DEC also referred to two train derailments that resulted in the release of significant amounts of hazardous substances. It stated that, in these latter two cases, the rail transporter paid the direct costs of response and clean-up, and DEC incurred oversight costs that totaled slightly more than $10,000 for both incidents.

In its application, AWHMT challenges Tennessee's remedial action fee on the grounds that it is not ''fair'' and that it is not being used for purposes that are related to the transportation of hazardous material.

2. The Fairness Test

Both AWHMT and DEC have referred to the Commerce Clause as providing the standards for a determination whether the Tennessee remedial action fee is ''fair'' within the meaning of 49 U.S.C. 5125(g)(1). AWHMT contends that, because the remedial action fee is set at a ''flat rate'' for all transporters who pick up or deliver hazardous wastes within Tennessee, it fails to meet the ''internal consistency'' test discussed in *American Trucking Ass'ns* v. *Scheiner,* 483 U.S. 266, 97 S.Ct. 2829 (1987). AWHMT cited the Scheiner case, 483 U.S. at 290–291, as holding that ''because they are unapportioned, flat fees cannot be said to be '' 'fairly related' to a feepayer's level of presence or activities in the fee-assessing jurisdiction.'' It cited four State court decisions in cases also brought by the American Trucking Associations, Inc. (ATA) that ''strike down, enjoin, or escrow flat hazardous materials taxes and fees'': Wisconsin, 556 N.W.2d 761 (Wis. Ct. App.), *review denied,* 560 N.W.2d 274 (1996); Massachusetts, 613 N.E.2d 95 (1993); Maine, 595 A.2d 1014 (1991); and New Jersey, No. 11562–92 (N.J. Tax. Ct., March 11, 1998).[5]

AWHMT also asserted that the DEC remedial action fee is inherently ''unfair'' because of the possible cumulative effect if other jurisdictions charge similar fees:

> Some motor carriers, otherwise in compliance with the HMRs, will inevitably be unable to shoulder multiple flat fees, and thus will be excluded from some sub-set of fee-imposing jurisdictions. If the State's flat fee scheme is allowed to stand, similar fees must be allowed in the Nation's other 30,000 non-federal jurisdictions. The cumulative effect of such outcome would be not only a generally undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation and attendant, unnecessary handling of hazardous materials as these materials are transferred from one company to another at jurisdictional borders. The increased transfers would pose a serious risk to safety, since ''the more frequently hazardous material is handled during transportation, the greater the risk of mishap.''[6]

HMAC also argued that a

> flat fee of $650 per year * * * is clearly unfair to interstate carriers. If such fees were to be enacted by other States or jurisdictions, it would lead to assessments on interstate carriers many times the rates paid by local carriers for the same number of miles. A fee of this magnitude applied by 50 States would result in a cost to a single carrier of more than $32,000.

DEC has asserted that its remedial action fee is not unreasonably high because in 1997 transporters paid only about 6% of the total fees collected. DEC stated that its fee does not differentiate between interstate and intrastate

[3] It appears that the amount of fees paid by generators depends upon the amount of hazardous waste generated within the year. DEC Rule 1200–1–13–.03(1)(b). In addition, generators who ship hazardous waste offsite for treatment of disposal also pay an additional fee, also based on the amount of hazardous waste shipped. DEC Rule 1200–1–13–.03(1)(c). Although this additional ''off-site shipping fee'' may be a ''fee related to transporting hazardous material,'' 49 U.S.C. 5125(g)(1), no directly affected person has asked RSPA to determine whether Federal hazardous material transportation law preempts this separate fee imposed on generators.

[4] Although DEC stated initially that this fund is ''officially named the Hazardous Waste Remediation Fund,'' it later referred to the ''Hazardous Waste Remedial Action Fund,'' which is the name specified in Tennessee Code 68–212–204.

[5] After remand by the New Jersey Supreme Court, 713 A.2d 497 (1998), the Appellate Division reversed and remanded this case with directions to the State to apply to DOT for a determination on the fairness of New Jersey's hazardous waste transporter registration fee. Docket No. A–6334–97T3F (June 15, 1999). RSPA understands that the Appellate Division has denied motions for reconsideration of its June 15, 1999 decision and that both ATA and the State of New Jersey have appealed this decision to the New Jersey Supreme Court. AWHMT is affiliated with ATA.

[6] The quoted language is from *Missouri Pac. R.R.* v. *Railroad Comm'n of Texas,* 671 F. Supp. 466, 480–81 (W.D. Tex.)

carriers, because both pay the same $650 amount per year. Although not ''conced[ing] that the fee is a flat fee,'' DEC does ''acknowledge that all of the persons in the small subset of payers who are transporters of hazardous waste all pay the same amount.'' It contended that the *Scheiner* case is not dispositive, regardless of whether the remedial action fee is considered a ''tax'' or a regulatory ''fee.''

DEC stated that, because this fee is not used to pay the government's ''general debts and liabilities,'' it is not a tax, but rather a ''fee'' which is ''charged by the government in connection with the exercise of its police function to help defray costs of the government's provision of a specific service.'' This fee, DEC stated, helps ''defray the State's costs in the establishment and maintenance of a fund used to identify, investigate and remediate sites where there is a release or threatened release of hazardous substances,'' including '''maintaining a capability for emergency response'' when the actual or threatened release results from the transport of hazardous materials.'' It contended that the decisions in *V–1 Oil Co.* v. *Utah State Dept. of Public Safety,* 131 F.3d 1415 (10th Cir. 1997), and *Interstate Towing* v. *Cincinnati,* 6 F.3d 1154 (6th Cir. 1993), hold that uniform fees that are used to perform inspections of LPG facilities (in *V–1 Oil*) or tow trucks (in *Interstate Towing*) do not discriminate against interstate commerce. DEC also referred to *Evansville-Vanderburgh Airport Auth.* v. *Delta Airlines, Inc.,* 405 U.S. 707, 717, 92 S.Ct. 1349, 1355 (1972), as approving a $1.00 charge for each departing passenger on both interstate and intrastate flights as ''a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.''

DEC argued that ''tax cases such as *Scheiner*'' do not invalidate its remedial action fee. It stated that ''Tennessee's fee provision does not explicitly treat out-of-state interests differently,'' and that only transporters who pick up or deliver hazardous waste in the State must pay the fee, not all ''truckers who merely enter the State.'' In addition, DEC asserted that there should be no ''concern about burdensome multiple taxation,'' because ''If all the states were to adopt a law identical to Tennessee's, the highest number of them that would assess the fee on a particular shipment would be two, the beginning and terminating states.'' DEC cited *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331 (1995), and *Goldberg* v. *Sweet,* 488 U.S. 252, 109 S.Ct. 582 (1989), as situations where two States might permissibly impose taxes on the same interstate transaction, *i.e.,* a telephone call between persons in different States (*Goldberg*) or the purchase of a bus ticket from one State to another (*Jefferson Lines*). DEC maintained that *Scheiner* has not ''invalidated all flat taxes, but rather focused on ''the methods by which the flat taxes are assessed.'' DEC also argues that the remedial action fee ''is apportioned, as much as it can be,'' because

> there is no relation between miles driven and the potential cost of clean up if there is an accident. One of the most significant factors in the expense of a clean-up is the location of the spill, e.g., the proximity to a stream or the nature of the subsurface conditions and whether they impede the migration into ground water. * * * These cases [*Scheiner* and *Goldberg*] show that the commerce clause does not require the adoption of an apportionment formula that does not make sense.

In its rebuttal comments, AWHMT disagreed with each of DEC's arguments. AWHMT stated that the amount of the Tennessee remedial action fee is not reasonable because, except for one other State, it is the highest ''flat, unapportioned'' fee imposed on transporters of hazardous materials, and it is excessive when compared to ''the level of the transporter's instate activity'' or the ''DEC clean-up costs, even if transportation-related.'' AWHMT asserted that mileage ''is plainly relevant to the risk imposed upon the DEC, or the State for that matter, by the transportation of hazardous waste.'' Citing the decisions in the Maine (595 A.2d at 1017) and Massachusetts (613 N.E.2d at 103) cases, AWHMT argued that the factors cited by DEC do not vary between interstate and intrastate carriers and that *Scheiner* requires a State to apportion its fees based on mileage that the interstate carrier travels within the State, unless it is impracticable to do so.

AWHMT also noted that RSPA takes into account the number of high mileage transportation corridors in a State in allocating grants under the Hazardous Materials Emergency Preparedness (HMEP) grants program, carried out in accordance with 49 U.S.C. 5116. AWHMT stated that Tennessee received more than $500,000 from RSPA under the HMEP grant program between 1993 and 1996 (and a total of $19.4 million over the FY '92—FY '96 period in Federal assistance for preparing and responding to transportation emergencies, according to a Department of Energy report).

AWHMT stressed that the remedial action fee is an annual fee, which is the same regardless of the number of shipments into or from Tennessee, and that an interstate carrier is potentially exposed to a cumulative burden of $32,500 if every State adopted a similar fee. It is because the fee is set on an annual basis, rather than per shipment, AWHMT stated, that the fee discriminates against the interstate carrier who ''would pay a fee up to 49 times higher than the intrastate carrier for the same level of total covered operations.''

AWHMT also asserted that the same Commerce Clause standards apply, whether Tennessee calls the remedial action fee a tax or a fee, and that these fees are ''wholly unlike'' the user fees in the *Evansville-Vanderburgh* case and the inspection charges in *V–1 Oil* and *Interstate Towing* because they are not related to the usage of a facility or the services provided by the State. It stated that any language in *Evansville-Vanderburgh* sanctioning ''flat, annual user charges'' (which were not involved in that case) cannot be relied on following the *Scheiner* case. And it disputed DEC's argument that the ''internal consistency'' test should not apply to Tennessee's remedial action fee, stating:

> An interstate carrier faced with the prospect of paying $650 plus permit fees in advance of any contract for at least a single delivery or pickup of waste in Tennessee is subject to pressure to avoid the State altogether. By the same token, if every State implemented a system like the DEC remedial action, Tennessee transporters would be pressured to stay out of interstate commerce. The DEC remedial action fee thus runs squarely afoul of the fundamental Commerce Clause principle that ''revenue measures must maintain state boundaries as a neutral factor in economic decision-making.'' [*Scheiner,* 483 U.S. at 283]

AWHMT also disagreed with DEC's argument that the remedial action fee is justified because the State regulates hazardous waste more closely than it does hazardous substances. According to AWHMT, both must be transported in accordance with the HMR, which requires the use of the Uniform Hazardous Waste Manifest for hazardous wastes (but not other hazardous materials) and refers to the Environmental Protection Agency's requirement that a transporter of hazardous waste clean up any release during transportation. See 49 CFR 171.3 (note), 172.205; 40 CFR Part 263. AWHMT asserted that, ''[i]f environmental protection fee were in fact the goal, this fee would apply to all hazmat carriers, not just hazwaste transporters picking up or delivering hazardous waste in the State.''

In *Evansville-Vanderburgh*, the Supreme Court found that a state or

local ''toll'' would pass muster under the Commerce Clause so long as it ''is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred.'' 405 U.S. at 716–17, 92 S.Ct at 1355. In that case, the Court also indicated that ''a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive.'' 405 U.S. at 715, 92 S.Ct. at 1355. However, in *Scheiner,* the Court limited the application of this latter proposition to those situations where a flat tax is ''the only practicable means of collecting revenues from users and the use of a more finely graduated user-fee schedule would pose genuine administrative burdens.'' 483 U.S. at 296, 107 S.Ct. at 2847. More recently, the Court stated that ''a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.'' *Northwest Airlines, Inc.* v. *Kent,* 510 U.S. 355, 367–68, 114 S.Ct. 855, 864 (1994).

As a fixed annual fee, regardless of the number of pick-ups or deliveries of hazardous waste within the State, Tennessee's remedial action fee differs from the per-trip fees in *Evansville-Vanderburgh* and from the sales or gross receipts taxes on specific interstate transactions in the *Jefferson Lines* and *Goldberg cases.* It is also different from the fees charged to offset inspections performed by the State in the *V–1 Oil* and *Interstate Trucking* decisions, where the cost of performing a required inspection would be expected to the same amount for both interstate and intrastate companies. There is an absence of any evidence that Tennessee's $650 annual fee has any approximation to transporters' use of roads or other facilities within the State, or that ''genuine administrative burdens'' prevent the application of a more finely graduated user fee to transporters who pick up or deliver hazardous waste within the State. Accordingly, Tennessee's remedial action fee fails the test of ''reasonableness'' in *Evansville-Vanderburgh.*

This test appears to be the most appropriate one for interpreting the fairness requirement in 49 U.S.C. 5125(g)(1). RSPA notes that the House Committee on Energy and Commerce first used the word ''reasonable'' in referring to this requirement, H.R. Report No. 101–444, Part 1, p. 49 (1990), although this evolved into ''equitable'' in the 1990 amendments, Pub. L. 101–615, § 13, 104 Stat. 3260, and then to ''fair'' in the 1994 codification of the Federal hazardous material transportation law. Pub. L 103-272, 108 Stat. 783. As noted by AWHMT, Senator Exon subsequently stated in floor debate that, ''even though the recodification refers to fees that are 'fair' rather than 'equitable,' the usual constitutional commerce clause protections remain applicable and prohibit fees that discriminate or unduly burden interstate commerce.'' Cong. Rec. S11324 (Aug. 11, 1994).

RSPA notes that it is not simply a potential for multiple fees, but the lack of any relationship between the fees paid and the respective benefits received by interstate and intrastate carriers, that establishes discrimination against interstate commerce. As the Massachusetts Supreme Judicial Court stated in the case brought by ATA challenging that State's hazardous waste transporter fee:

> [as] viewed from the perspective of the user, as it must be, it is apparent that the fee does not vary on any ''proxy for value'' obtained from the Commonwealth. An interstate hazardous waste transporter which travels just one time in the Commonwealth must pay the same fee as a local hazardous waste transporter. It is therefore apparent that the ''privilege'' of using the compliance program is more valuable to local transporters so that the practical effect of apportioning total costs on a per vehicle basis is to discriminate against interstate commerce.

415 Mass. at 347, 613 N.E.2d at 102. The Wisconsin Court of Appeals discussed the difference between a tax on ''services provided by disposal facilities'' within the State, which

> would be constitutionally permissible under the Commerce Clause because the tax would be imposed on the delivery of services within the state. Chapter SERB 4 fees are not related to the services provided by in-state disposal facilities to interstate transporters but to carriers who cross the state line to use a facility in Wisconsin. Such fees are not ''apportioned'' in that they are unrelated to the extent of the mileage traveled within the state. Such a flat tax or fee clearly violates the spirit of the Commerce Clause to avoid the economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation.

556 N.W.2d at 766–67.

The statutory provisions directing DOT to issue Federal regulations governing uniform forms and procedures for State registration and permitting of persons who offer or transport hazardous materials (to be based on the recommendations of a working group) specifically provide that DOT's regulations may ''not define or limit the amounts of a fee a State may impose or collect.'' 49 U.S.C. 5119(c)(1). RSPA ''has never relied on the potential cumulative effect of a [fee] requirement as a basis for finding inconsistency,'' IR–17, Illinois Fee on Transportation of Spent Nuclear Fuel, 51 FR 20926, 20934 (June 9, 1986), although RSPA has previously acknowledged the ''impact of widespread adoption of such fees [may be] relevant to Commerce Clause litigation.'' IR–17, Action on Appeal, 53 FR 36200, 36201 (Sept. 25, 1987). Here, there is no showing that the potential for other States to adopt fees, by itself, makes the Tennessee remedial action fee unfair.

Because Tennessee's remedial action fee imposed on hazardous waste transporters is not based on some fair approximation of the use of the facilities and discriminates against interstate commerce, it is not fair and violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazardous material transportation law.

3. The ''Used For'' Test

DEC acknowledged that ''many of the situations the fund is used for are not related to transportation,'' but argued that it should not have to create ''two sub-funds, one for transportation incidents and one for everything else.'' If so, DEC claimed, there would be greater total costs for the additional ''staff to administer the program [and] it is quite likely that the transporters would have to pay a much larger fee to support a fund capable of paying the costs of a significant removal and remediation effort at a hazardous substance site.''

DEC refused to concede that ''any money paid by a transporter has actually been paid for any of these other situations or purposes because the fund has not been below $170,000 in the time period of concern.'' It also stated that ''Congress clearly authorized fees such as Tennessee's'' because

> The Hazardous Waste Remedial Action Fund is the only source of funds available to the Department of Environmental Conservation, or the State of Tennessee, which can be used to hire contractors to address emergencies caused by spills of hazardous waste resulting from transportation accidents.

DEC argued that even though it has spent less than $15,000 from this fund in cleaning up highway and rail incidents, ''[i]t just happens that the liable party is doing that work rather than the state's contractor.'' DEC asserted that the fund provides the capability for emergency response, including developing, implementing,

and supervising contracts, and that it is inappropriate to compare receipts and costs in any single year. It stated that ''§ 5125(g) does not require that we look into what events occur in what years with the possible result that the fee would be preempted in some years and not in others.''

DEC contrasts its remedial action fee with the fees charged by Los Angeles County which RSPA found to be preempted in PD–9(R), 60 FR 8774, 8784 (Feb. 15, 1995), petition for reconsideration pending. It stated that the fees considered in PD–9(R) paid for administration of a requirement that businesses plan for emergency response to hazardous materials not in transportation, rather than the State's own capability for emergency response to a transportation incident. DEC also argued that ''what the fees are actually spent on is irrelevant,'' under the *Evansville-Vanderburgh* case and *New Hampshire Motor Transport Ass'n* v. *Flynn*, 751 F.2d 43 (1st Cir. 1984). These cases, according to DEC, show that ''it is permissible under the commerce clause and the HMTA to combine the purposes of a fund.''

In its application, AWHMT asserted that Tennessee's remedial action fee is preempted because none of the uses of the Hazardous Waste Remedial Action Fund ''address enforcement and emergency response for transportation of hazardous materials within the meaning of 49 U.S.C. 5125(g)(1).'' In rebuttal comments, AWHMT questions whether ''inactive hazardous substance sites'' properly include the location of a hazardous material transportation incident, because the carriers are known parties from which the State can recover clean-up costs. It also questioned whether the '' 'clean up' after an emergency has been abated is 'transportation-related' within the meaning of 49 U.S.C. 5125(g)(1).'' AAR agreed that none of the purposes listed in Tennessee Code 68–212–205, for which the fund may be used, ''target transportation activities.'' HMAC stated that, while these monies may be used ''for many worthwhile purposes * * * the use of funds for these activities is not related to the transportation of hazardous material, as required by Federal statute, and therefore not permitted.''

AAR also stated in its rebuttal comments that a ''separate transportation program'' for use of the remedial action fees would not necessarily involve greater costs because ''Tennessee can create a separate program with shared administrative costs.'' AAR argued that, because there is no segregation of the fees paid by transporters of hazardous waste, it is impossible to find that these fees are being used only for transportation purposes, as required by § 5125(g)(1). AAR pointed out that the transporters themselves, rather than the State, have paid the cost of cleaning up train incidents.

With respect to DEC's statement that the Hazardous Waste Remedial Action Fund is the only source of funds available to clean up spills of hazardous waste in transportation, AAR contended that, even if correct, this point is irrelevant:

> Congress did not add a qualification that a State fee would not be preempted if it were the only source of funds for a particular purpose. * * * [T]here is nothing to prohibit Tennessee from developing an emergency response capability utilizing a fee that does not violate the dictates of 49 U.S.C. § 5125(g).

AWHMT referred to the responsibility of transporters to respond to an incident and the Federal financial responsibility requirements in 49 CFR Part 387 to cover environmental damage. It also pointed to Federal assistance, including grants by RSPA under the HMEP program.

In response to DEC's arguments that it had not actually used fees collected from transporters for non-transportation purposes, AWHMT addressed several points. It argued that the fact that the funds are commingled in a single fund precludes a claim of ''non-use,'' that the State may not properly collect fees on transportation and hold them indefinitely because § 5125(g)(1) requires that they be ''used'' for transportation-related activities, and that the total amount collected from transporters is at least $500,000, rather than the $170,000 just for 1996.

CERCLA was enacted ''to provide for a national inventory of inactive hazardous waste sites'' and to authorize EPA ''to take emergency assistance and containment actions with respect to such sites,'' finances by a ''Superfund.'' H.R. Report No. 96–1016, Part I, Interstate and Foreign Commerce Committee, p. 17 (May 16, 1990), as reprinted in 1980 U.S. Code Congressional and Administrative News, pp. 6119–20. In 1986, Congress amended CERCLA to provide additional funding ''to clean up the Nation's worst abandoned hazardous waste sites and uncontrolled leaking underground storage tanks.'' H.R. Report No. 99–253, Part I, Energy and Commerce Committee, p. 54, as reprinted in 1986 U.S. Code Congressional and Administrative News, p. 2836. While an ''inactive'' or ''abandoned'' waste site could result from a release in transportation, it is clear that the primary purpose of the Superfund was not to provide for the cleanup of transportation incidents.

Tennessee acknowledges that the primary purpose of its remedial action fund is similarly to clean up ''inactive hazardous substance sites.'' The State argues that the fund is also available (and is the only source for) cleaning up a release of a hazardous substance in transportation, but it admits that it has spent less than $15,000 in supervising cleanup activities conducted by transporters—out of the approximately $170,000 it collects each year. Without providing specific figures, Tennessee seems to claim that the unspecified excess that has been built up since 1994 is simply being kept in reserve for possible future transportation incidents.

This does not satisfy the requirement in 49 U.S.C. 5125(g)(1) that hazardous material transporter fees must be ''used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' If the State prefers not to create and maintain a separate fund for fees paid by hazardous materials transporters, then it must show that it is actually spending these fees on the purposes permitted by the law. In this area where only the State has the information concerning where these funds are spent, more specific accounting is required. Under section 5125(g)(2)(B), upon RSPA's request, a State must report on ''the purposes for which the revenues from the fee are used.'' In the April 6, 1998 public notice, RSPA asked Tennessee to set forth in detail how much it collected and how it used the fees it collected in fiscal year 1996–97. Although DEC's comments included information on the amounts of remedial action fees collected, the State accounted for less than $15,000 in expenditures. Although it claims that the current balance in the remedial action fund exceeds the amount collected from transporters in any one year, DEC has failed to demonstrate that none of the fees collected from transporters were spent for non-transportation purposes. Nor has it justified imposing fees on transporters of hazardous waste simply to create a large surplus for the future.

Because Tennessee is not using the remedial action fees paid by hazardous waste transporters for purposes related to transporting hazardous material, that fee violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazardous material transportation law.

C. Written Notification of Incidents

The HMR require a carrier to submit to RSPA, ''within 30 days of the date of discovery,'' a written report of certain incidents that occur during the course of transportation, including any ''unintentional release of hazardous materials from a packaging (including a tank) or [when] any quantity of hazardous waste has been discharged during transportation.'' This report must be submitted on DOT Form F 5800.1 and, when it pertains to a discharge of hazardous waste, a copy of the hazardous waste manifest must be attached, and ''[a]n estimate of the quantity of the waste removed from the scene, the name and address of the facility to which it was taken, and the manner of disposition of any removed waste must be entered in Section IX of the report form.'' 49 CFR 171.16(a).

Section 171.16 was added to the HMR in 1970 in response to a recommendation of the National Transportation Safety Board that DOT develop and establish a uniform system for reporting incidents in the transportation of hazardous materials by all modes. Final Rule, Reports of Hazardous Materials Incidents, 35 FR 16836, 16837 (Oct. 31, 1970); *see also* RSPA's notice of proposed rulemaking (NPRM), 34 FR 17450 (Oct. 29, 1969). In the NPRM, RSPA stated that:

> The information derived from these reports will be used by the Department: (1) As an aid in evaluating the effectiveness of the existing regulations; (2) to assist in determining the need for regulatory changes to cover changing transportation safety problems; and (3) to determine the major problem areas so that the attention of the Department may be more suitably directed to those areas.

Id. In 1989, the time for submitting written incident reports was increased from 15 days to 30 days after the carrier's discovery of the incident, and DOT Form F 5800.1 was revised. Final Rule, Detailed Hazardous Materials Incident Reports, 54 FR 25806, 25813 (June 19, 1989). RSPA has recently begun a new rulemaking proceeding to evaluate the need for any change in the reporting requirements and consider changes to DOT Form F 5800.1 to obtain more useful information and reduce the burdens on the carriers who are required to submit these reports. *See* RSPA's advance notice of proposed rulemaking, 64 FR 13943 (March 23, 1999).

Under DEC Rule 1200–1–11–.04(4)(a)4, a carrier must also send a written report to DEC ''on each hazardous waste discharge during transportation that occurs in'' Tennessee. This written report must be submitted ''[w]ithin fifteen days of occurrence,'' and must include specified information about the discharge, ''a discussion of the cause of the emergency, and a summary of the emergency response (including the treatment or disposition of any spilled waste or contaminated material).'' A copy of the hazardous waste manifest must be included with the report. The note to DEC Rule 1200–1–11.–04(4)(a)4 indicates that a copy of DOT Form F 5800.1 ''shall suffice for this report provided that it is properly completed and supplemented as necessary to include all information required by this paragraph.''

Although AAR contended that DEC requires ''more information [to] be provided'' than on DOT Form F 5800.1, and DEC admitted that its requirement calls for ''additional information to be submitted besides what is required on DOT form 5800.1,'' no party specified what additional information is required. Conceding that its written incident notification requirement is preempted, DEC stated that its ''[s]taff has been advised to amend those rules accordingly.'' In rebuttal comments, AWHMT asserted that DEC has not clarified whether it intends to eliminate its written incident notification requirement or revise that requirement to either be more ''consistent with the data sets on DOT form 5800.1 or otherwise require carriers to provide to the DEC a copy of the DOT form 5800.1.'' DEC Rule 1200–1–11–.04(4)(a)4 has not been revised in the current (March 1999) version of DEC's rules available on the State of Tennessee internet homepage.

Aside from the differing time periods in which the reports must be filed, and issues concerning the information that must be included, AWHMT refers to RSPA's prior holdings that Federal hazardous material transportation law preempts a State requirement for the carrier to directly submit a copy of the incident report form that it must send to RSPA. HMAC states that ''Federal law does not require localities to receive written reports when hazardous waste releases occur within their jurisdiction.''

In IR–2, RSPA contrasted State requirements for submission of follow-up written reports with the separate need for local emergency responders to have immediate oral or telephonic notification of an transportation incident involving hazardous materials. RSPA stated that:

> The written notice required to be supplied to [DOT] pursuant to 49 CFR 171.16 precludes the State from requiring additional written notice directed to hazardous materials carriers. * * * In light of the Federal written notice requirement, however, it is inappropriate for a State to impose an additional written notice requirement to apply solely to carriers already subject to the Hazardous Materials Regulations. The detailed hazardous materials incident reports filed with [DOT] are available to the public.

44 FR at 75568, affirmed on appeal in IR–2(A), 45 FR 71881, 71884 (Oct. 30, 1980), and in *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

In IR–3, Boston Rules Governing Transportation of Certain Hazardous Materials Within the City, 46 FR 18918, 18924 (Mar. 26, 1981), RSPA referred to its earlier decision in IR–2 and the procedures for RSPA to provide to a ''designated State agency'' copies of the written reports required by 49 CFR 171.16. RSPA reiterated its ruling that a State or locality may not require a carrier to directly submit a copy of the DOT Form F 5800.1:

> Subsequent written reports required within 15 days by DOT are not necessary to local emergency response. These reports themselves are publicly available, and [RSPA] is prepared to routinely send copies of written reports to a designated State agency on request. Copies of written reports required by DOT * * * may not be required by [the City's ordinance].

46 FR at 18924. In response to an administrative appeal submitted by the City of Boston, RSPA further explained that:

> the information in a written incident report * * * will very often be of only limited usefulness, is not time-sensitive, and in any event can be obtained by the City [from RSPA] with only a minimum of effort. If the City in fact intends to make serious use of the information in DOT incident reports, the effort to obtain it from [RSPA] rather than the carrier should not be significant. Accordingly, we reaffirm our previous conclusion that Boston's requirement that carriers submit written reports is redundant, unnecessary, and inconsistent with the HMTA and HMR.

IR–3(A), 47 FR 18457, 18462 (Apr. 29, 1982). *Accord*, IR–31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25582 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), where RSPA found that

> the provisions of State law which require the submission of *written* accident/incident reports are redundant with Federal requirements (particularly 49 CFR 171.16), tend to undercut compliance with the HMR requirements, and thus are inconsistent. [citations] This rationale also applies to requirements to provide copies of the incident reports filed with [RSPA]; as indicated in IR–3, *supra*, such a requirement is inconsistent, but [RSPA] is prepared to

routinely send copies of those reports to a designated state agency on request.

In the 1990 amendments to the HMTA, Congress provided that non-Federal requirements on written incident notification are preempted unless they are substantively the same as in the HMR. 49 U.S.C. 5125(b)(1)(D). In H.R. Report No. 101–444, Part I, at 34–35 (1990), the House Committee on Energy and Commerce set forth its belief that

> uniform requirements for written notices and reports describing hazardous materials incidents will allow for the development of an improved informational database, which in turn may be used to assess problems in the transportation of hazardous materials. Without consistency in this area, data related to hazardous materials incidents may be misleading and confusing. Additional State and local requirements would also be burdensome on those involved in such incidents and may lead to liability for minor deviations.

DOT has long encouraged States to adopt and enforce requirements for transporting hazardous materials that are consistent with the HMR. Under its Motor Carrier Safety Assistance Program, see 49 CFR Part 350, FHWA provides grants to States that adopt and enforce requirements that are compatible with both the HMR and the FHWA's Federal Motor Carrier Safety Regulations (FMCSR) at 49 CFR Parts 390–399.

Tennessee has adopted the HMR, including 49 CFR 171.16, as State law, Rule 1200–2–1–.32.[7] The State received more than $1.8 million in fiscal year 1999 from DOT to enforce the HMR and the FMCSR. Accordingly, Tennessee may require a carrier to file a written incident report with RSPA, under the same conditions specified in 49 CFR 171.16, and it may impose penalties on a carrier that fails to file the required written incident report with RSPA. Tennessee may also obtain from RSPA copies of incident reports filed by carriers in order to enforce this filing requirement and to conduct follow-up investigations of incidents occurring within the State. In each of these respects, Tennessee is acting ''substantively the same as'' Federal law. However, Tennessee may not require a carrier to file a copy of the DOT Form F 5800.1 report, or a separate incident report, directly with the State. This last requirement is substantively different from the HMR.

DEC Rule 1200–1–11.–04(4)(a)4 is preempted because it is not substantively the same as 49 CFR 171.16.

IV. Ruling

Federal hazardous material transportation law preempts:

1. Tennessee Code 68–212–203(a)(6) and Rule 1200–1–13.03(1)(e), requiring a transporter who picks up or delivers hazardous waste within the State to pay a remedial action fee, currently set at $650 per year.

2. Tennessee Rule 1200–1–11–.04(4)(a)4, requiring a transporter of hazardous waste to submit a written report on a discharge of hazardous waste during transportation.

IV. Petition for Reconsideration/ Judicial Review

In accordance with 49 CFR 107.211(a), ''[a]ny person aggrieved'' by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register**. Any party to this proceeding may seek review of RSPA's decision ''in an appropriate district court of the United States * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register**, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, D.C. on September 30, 1999.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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[7] Tennessee Code 68–212–107(d) also provides that ''Regulations providing requirements for the transportation, containerization, and labeling of hazardous waste shall be consistent with those issued by the United States department of transportation * * *''