DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Preemption Determination Nos. PD–8(R), PD–9(R), PD–10(R) and PD–11(R); Docket Nos. PDA–9(R), PDA–7(R), PDA–10(R), and PDA–11(R), respectively]

California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials

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

ACTION: Administrative determinations of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Applicants

Docket PDA–7(R)—HASA, Inc.
Dockets PDA–9(R), PDA–10(R), PDA–11(R)—Swimming Pool Chemical Manufacturers' Association (SPCMA)

State and Local Laws Affected

PD–8(R) (Docket PDA–9(R))—
Chapter 6.95, California Health and Safety Code:
§ 25501.3
§ 25503.7
PD–9(R) (Docket PDA–7(R))—
Title 2 Los Angeles County Code:
§ 2.20.140
§ 2.20.150
§ 2.20.160
§ 2.20.170
Title 32 Los Angeles County Code:
§ 4.108.c.7
Table 4.108–A
§ 79.809 (b), (c) and (f)
§ 80.101(a) exception 1
§ 80.101(b)
§ 80.103(a)
§ 80.103(b)(1)
§ 80.103(b)(2)
§ 80.103 (c), (d) and (e)
§ 80.201
§ 80.202 (a) and (b)
§ 80.203
Appendix VI–A
§ 80.301(a)(2)
§ 80.301(b)(1)
§ 80.402(b)(3)(G)(i)
§ 80.402(c)(8)(A)
PD–10(R) (Docket PDA–10(R))—
Title 32 Los Angeles County Code:
§ 4.108(c)(8)
§ 9.105
§ 75.101
§ 75.103(a)
Table 75.103–A
§ 75.104
§ 75.105 (a) and (b)
§ 75.108
§ 75.205
§ 75.602 (a), (b) and (c)
PD–11(R) (Docket PDA–11(R))—
Title 32 Los Angeles County Code:
§ 4.108.c.7

Applicable Federal Requirements: Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101–5127, and the Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180.

Mode Affected: Rail.

SUMMARY: Due to a lack of information in the record, RSPA is unable to make a preemption determination regarding:

(1) California Health and Safety Code (CHSC) § 25503.7, which states that hazardous materials contained in any rail car, rail tank car or rail freight container at the same railroad facility or business facility for more than 30 days is deemed stored and subject to the requirements of the CHSC;

(2) Title 32 LACoC §§ 80.103(e), which requires that hazardous materials business plans, risk management prevention programs and hazardous materials inventory statements be posted in an approved location and available to emergency responders; and

(3) 80.301(b)(1), which requires that containers and tanks be designed constructed in accordance with nationally recognized standards.

(4) Title 32 LACoC §§ 80.402(b)(3)(G)(i) and 80.402(c)(8)(A), which require that cylinders or portable containers of compressed gas be unloaded within a ventilated gas cabinet, laboratory fume hood, exhausted enclosure or separate gas storage room.

The following non-Federal requirements are preempted by Federal hazmat law:

(1) Title 2 Los Angeles County Code (LACoC) §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170, to the extent that those provisions levy a fee on tank car unloading activities. The fees collected under those provisions are not used for purposes related to hazardous material transportation;

(2) Title 32 LACoC § 79.809(f) as applied and enforced by Los Angeles County. Los Angeles County fails to recognize a Department of Transportation (DOT or Department) exemption that authorizes HASA, Inc. to employ alternative methods of compliance with certain Federal tank car unloading requirements;

(3) Title 32 LACoC § 79.809(c), which prohibits a tank car from remaining on a siding at point of delivery for more than 24 hours while connected for transfer operations, unless otherwise approved by the fire chief. The unloading restriction is not ''substantively the same'' as Federal tank car unloading requirements.

Federal hazmat law does not preempt any other CHSC or LACoC provision for which HASA and SPCMA request preemption determinations.

FOR FURTHER INFORMATION CONTACT: Nancy E. Machado, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW., Washington DC 20590–0001, telephone 202–366–4400.

SUPPLEMENTARY INFORMATION:

Document Outline

I. General Preamble

A. Procedural Summary

Each of the four Preemption Determination Applications (PDAs) at issue in this matter relates to a California State statute or Los Angeles County regulation applicable to the ''on-site'' transportation and handling of hazardous materials. For this reason, RSPA has reviewed these PDAs collectively, and is issuing its Preemption Determinations (PDs) with respect to each of the PDAs simultaneously.

The information, discussion and citations provided in this General Preamble constitute a part of each of the four PDs identified above. Where information or statements in this General Preamble address a specific PD, that information is relevant only to that PD. This General Preamble includes a discussion of the factual background applicable to each of the applications, a brief discussion of the California statutory and Los Angeles County regulatory requirements at issue in the four PDAs addressed in this document, and discussions regarding general authority and preemption under Federal hazmat law. It is followed by four PDs, each representing a separate administrative proceeding. These PDs do not address the issue of preemption under the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. 421 *et seq.*

Appendix A to this document contains the text of each CHSC and LACoC provision that is at issue.

B. Background

On December 22, 1992, HASA, Inc. applied for a determination that Federal hazmat law preempts certain provisions of LACoC Titles 2 and 32 applicable to the transportation and handling of hazardous materials in railroad tank cars on private property (Docket PDA–7(R)). HASA, a California corporation, manufactures, packages, warehouses, and transports chemical compounds for use in, among other things, potable and waste water treatment, and swimming pool and spa disinfection. HASA receives railroad tank cars containing liquefied chlorine, a liquefied compressed gas, from manufacturers engaged in interstate commerce. HASA unloads liquefied chlorine from railroad tank cars on a private siding adjacent to its facility in Santa Clarita, California. It has manufacturing and distribution facilities located in Santa Clarita, California, and Arizona. It distributes products throughout the western United States, Alaska and Hawaii.

Santa Clarita is an incorporated city in Los Angeles County. HASA explains that Santa Clarita does not maintain a city fire department. Instead, Santa Clarita is one of many cities that contracts with the Consolidated Fire Protection District of Los Angeles County (CFPD/LACo) for fire protection. Fire protection services for the CFPD/LACo are provided by the Los Angeles County Fire Department. HASA states that the CFPD/LACo adopted LACoC Title 32 as the fire code for the CFPD/LACo. Consequently, the fire codes for the County of Los Angeles and the CFPD/LACo are identical.

Between December 30, 1992, and January 20, 1993, SPCMA, a non-profit organization with members involved in the transportation of hazardous materials, submitted three separate applications (Dockets PDA–9(R), PDA–10(R) and PDA–11(R)) seeking determinations that Federal hazmat law preempts certain provisions of:

(a) CHSC Chapter 6.95 as they apply to the on-site handling and storage of hazardous materials in railroad tank cars (Docket PDA–9(R));

(b) LACoC Title 32 as they apply to the on-site transportation and handling of cryogenic liquids in railroad tank cars, including unloading, storage, and the construction of containers used for transporting cryogenic liquids (Docket PDA–10(R)); and

(c) LACoC Title 32 as they apply to the on-site transportation and handling of compressed gases in railroad tank cars (Docket PDA–11(R)).

SPCMA is a non-profit organization composed of individual member companies with manufacturing and distribution facilities located across the United States, including California. SPCMA members manufacture, package, warehouse, and transport chemical compounds for use in potable and waste water treatment, and swimming pool and spa disinfection. SPCMA states that many of these chemicals are classified as hazardous material by the HMR. For example, SPCMA's members transport, load, and off-load chlorine in railroad tank cars, cargo tanks, cylinders, and multi-unit tank car tanks, at facilities owned or leased by a member, or at facilities under a member's direct control.

SPCMA says that while some SPCMA members are subject to LACoC Title 32 because of the location of their facilities, others are subject to Title 32 because they ship into or transport hazardous materials through the CFPD/LACo or unincorporated areas of Los Angeles County.

On January 26, 1993, RSPA published a Public Notice and Invitation to Comment on HASA's application (58 FR 6176). That Notice set forth the text of HASA's application and asked that comments be filed with RSPA on or before March 31, 1993, and that rebuttal comments be filed on or before June 4, 1993.

On February 12, 1993, RSPA published a Public Notice and Invitation to Comment on each of SPCMA's applications (58 FR 8480, 8488, 8494). Those Notices set forth the text of SPCMA's applications and asked that comments be filed with RSPA on or before April 9, 1993, and that rebuttal comments be filed on or before June 4, 1993.

In a September 10, 1993 letter to Secretary of Transportation Federico Peña, Congressman George Miller (D-CA), Chairman of the House Committee on Natural Resources, stated his opposition to SPCMA's request for a preemption determination in Docket PDA–9(R). This letter was received outside the rebuttal comment period in PDA–9(R).

In a September 13, 1993 letter to Secretary Peña, California State Assemblyman Robert J. Campbell and 23 other State legislators requested that the Department deny SPCMA's request for a preemption determination in

Docket PDA–9(R). This letter also was received outside the rebuttal comment period in Docket PDA–9(R).

On October 14, 1993, RSPA published a Public Notice in the **Federal Register** (58 FR 53239) reopening the comment period in each of the four matters to allow all interested parties an opportunity to respond to Congressman Miller's and the California State legislators' letters. RSPA reopened the comment period in all four PDAs because they relate to the same California statutory and local regulatory requirements. RSPA also requested further information regarding how the California and Los Angeles County requirements at issue actually are applied and enforced. Furthermore, RSPA asked HASA and SPCMA to amend their applications to the extent necessary to make them consistent with the 1993 amendments to LACoC Title 32, which were adopted by Los Angeles County shortly after HASA's and SPCMA's applications were filed with RSPA.

C. California's Statutory and Regulatory Requirements

CHSC Chapter 6.95 (§§ 25500 *et seq.*) was enacted by the California Legislature in 1985. Section 25500, entitled ''Legislative Findings and Declaration,'' sets forth the legislative purpose of Chapter 6.95. Specifically, it states

> In order to protect the public health and safety and the environment, it is necessary to establish business and area plans relating to the handling and release or threatened release of hazardous materials. The establishment of minimum statewide standards for these plans is a statewide concern. Basic information on the location, type, quantity, and the health risks of hazardous materials handled, used, stored, or disposed of in the state, which could be accidentally released into the environment, is not now available to firefighters, health officials, planners, public safety officers, health care providers, regulatory agencies, and other interested persons. The information provided by business and area plans is necessary in order to prevent or mitigate the damage to the health and safety of persons and the environment from the release or threatened release of hazardous materials into the workplace and environment.

Chapter 6.95, Article 1 requires, among other things, that any business that handles hazardous materials (above specified threshold amounts) establish and implement a business plan for emergency response to a release or threatened release of a hazardous material (§ 25503.5). The required elements of a business plan include: (1) an annual inventory of the chemicals handled; (2) an emergency response plan and procedures; (3) an evacuation plan and procedures; and (4) training for all new employees and annual training (§ 25504).

Chapter 6.95, Article 2 states that handlers of ''acutely hazardous materials'' (AHM) (defined as any chemical designated as such in 40 CFR Part 355, Appendix A of the Environmental Protection Agency's (EPA's) regulations—which includes chlorine) must register with local authorities and, if required by local authorities, prepare and submit a risk management and prevention program (RMPP). An RMPP must include: (1) a history of each accident involving AHM for the preceding three-year period; (2) a report specifying the nature, age and condition of the equipment used to handle AHM at the facility; (3) design, operating and maintenance controls that minimize the risk of an accident involving AHM; (4) detection, monitoring or automatic control systems to minimize accident risk; and (5) a list of additional steps that the business will take to reduce the risk of an accident, based on an assessment of the processes, operations, and procedures of the business (§ 25534).

The requirements in Chapter 6.95, Articles 1 and 2, closely follow Federal environmental protection regulations under Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. 11001, *et seq.* (also known as the Emergency Planning and Community Right to Know Act of 1986 (EPCRA)), and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r). *See, e.g.*, 42 U.S.C. 7412(r)(1) (duty for facilities to undertake appropriate hazard assessment, design, and release response activities); 42 U.S.C. 7412(r)(7)(B) (requiring accident prevention and response planning, including reporting of accidental release history); 42 U.S.C. 11022 (SARA Title III chemical inventory and location information); 42 U.S.C. 11041(b) (authorizing local SARA Title III supplementary inventory forms).

The requirements in Chapter 6.95, Articles 1 and 2, are applied and enforced at the local level. Chapter 6.95 § 25502 states that ''every county shall implement [Chapter 6.95] as to the handling of hazardous materials in the county.'' Nevertheless, the legislature clearly indicated in § 25500 that Chapter 6.95 does not ''occupy the whole area of regulating the inventorying of hazardous materials and the preparation of hazardous materials response plans * * * and the legislature does not intend to preempt any local actions, ordinances, or regulations which impose additional or more stringent requirements on businesses which handle hazardous materials.''

In response to the mandate in § 25502, Los Angeles County implemented the requirements of Chapter 6.95 by promulgating the regulations contained in LACoC Titles 2 and 32. On May 20, 1993, the Los Angeles County Board of Supervisors passed Los Angeles County Ordinance No. 93–0044, which amended Title 32 by incorporating the 1991 edition of the Uniform Fire Code (UFC) (with amendments, additions and deletions).

D. Preemption Under Federal Hazmat Law

The Hazardous Materials Transportation Act (HMTA), former 49 App. U.S.C. 1801 *et seq.* (1993), was enacted in 1975 to give DOT 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.'' Id. at § 1801. 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, President Clinton signed Public Law (P.L.) 103–272, which codified the provisions of the HMTA without substantive change. P.L. 103–272, 108 Stat. 745 (1994). The purpose of P.L. 103–272 was to ''clean-up'' related Federal transportation laws, ''restating'' them in a format and language intended to be easier to understand without changing substantive content. Consequently, P.L. 103–272 revised, enacted, and codified provisions of the former HMTA, which now are found at 49 U.S.C. 5101–5127.

When it last substantively amended Federal hazmat law in 1990, Congress stated that uniform regulations promote safety in the transportation of hazardous materials. It specifically found that:

> (3) Many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,
>
> (4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of

hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

P.L. 101–615, § 2, 104 Stat. 3244 (1990).

In order to promote consistency in laws and regulations governing the transportation of hazardous material, to achieve greater uniformity among those laws, and to promote the public health, welfare, and safety at all levels, Congress gave DOT the authority to preempt a requirement of a State, political subdivision of a State or Indian tribe where:

(1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law] is not possible; or

(2) The requirement of the State, political subdivision, or tribe, as applied and enforced, is an obstacle to accomplishing and carrying out [Federal hazmat law] or a regulation prescribed under [Federal hazmat law].

49 U.S.C. 5125.

The two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria that RSPA had applied in issuing inconsistency rulings (IRs) prior to the 1990 amendments to the HMTA. While advisory in nature, these IRs 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 pursuant to section 112(b) of the HMTA.'' Inconsistency Ruling (IR)–2, 44 FR 75566, 76657 (Dec. 20, 1979). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *E.g., Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

Federal hazmat law also explicitly preempts:

A law, regulation, order or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects that is not substantively the same as a provision of [Federal hazmat law] or a regulation prescribed under [Federal hazmat law]:

(A) The designation, description, and classification of hazardous material.

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

49 U.S.C. 5125(b).

RSPA has defined ''substantively the same'' to mean ''conforms in every significant respect to the Federal requirement. 57 FR 20424, 20428. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d).

The HMTA explicitly exempted from preemption those non-Federal requirements that were authorized by other Federal law. *See* 49 App. U.S.C. 1804(a)(4)(A) and 1811(a) (a non-Federal requirement will not be preempted if it is ''otherwise authorized by Federal law''). A non-Federal requirement is not authorized by Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Utilities Comm'n* v. *Harmon*, 951 F.2d 1571 (10th Cir. 1991). The phrase ''unless otherwise authorized by Federal law'' was omitted inadvertently as ''surplus'' when Sections 1804(a)(4)(A) and 1811(A) of the HMTA were codified at 49 U.S.C. 5101 by P.L. 103–272. *See* H.R. Rep. No. 180, 103d Cong., 1st Sess., at 32 (1993). It was later reinstated by P.L. 103–429, October 31, 1994.

The Secretary of Transportation has delegated to RSPA the authority to make preemption determinations, except for those concerning highway routing, which are delegated to the Federal Highway Administration. 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). Federal hazmat law provides that the Department may waive a finding of preemption upon application by a State, political subdivision or Indian tribe, pursuant to 49 CFR 107.215 through 107.227, if the Department finds that the non-Federal requirement provides the public at least as much protection as Federal hazmat law and the HMR, and the requirement does not unreasonably burden commerce. 49 U.S.C. 5125(e). Alternatively, the jurisdiction may petition under 49 CFR 106.31 for adoption of a uniform Federal rule.

Preemption determinations under Federal hazmat law are consistent with the principles and policy set forth in Executive Order No. 12,612 (''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 clear evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Federal hazmat law contains an express preemption provision, which RSPA has implemented through its regulations. Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under Federal law, other than Federal hazmat law, unless it is necessary to do so in order to determine whether a requirement is ''otherwise authorized by Federal law.''

E. General Authority Under Federal Hazmat Law

The four PDAs filed with RSPA raise the issues of whether California's and Los Angeles County's regulation of a consignee's transportation of hazardous materials within the gates of its facility, and the consignee's unloading and storage of that hazardous material at its facility, conflict with Federal hazmat law and the HMR.

The HMR have been promulgated in accordance with the direction in 49 U.S.C. 5103(b) that the Secretary of Transportation ''prescribe regulations for the safe transportation of hazardous material in intrastate, interstate and foreign commerce.'' ''Transportation'' is defined as ''the movement of property, and any loading, unloading, or storage incidental to the movement.'' 49 U.S.C. 5102(12). Ground transportation is ''in commerce'' when it takes place on, across, or along a public road. Consequently, the HMR, issued under the authority of 49 U.S.C. 5103(b), apply to the ground transportation of hazardous material on, across, or along a public road, including loading, unloading and storage incidental to that transportation.

Federal hazmat law and the HMR do not apply to the movement of hazardous material exclusively at a consignee's facility. On the other hand, Federal hazmat law and the HMR regulate certain specific carrier and consignee handling of hazardous materials, including unloading of railroad tank cars, incidental to transportation in commerce, even when that unloading takes place exclusively at a consignee's facility. *See* 49 CFR 174.67.

Unloading that is incidental to transportation includes consignee unloading of tank cars containing hazardous materials. *See* 49 CFR 174.67 (requirements for tank car unloading).

Storage that is incidental to transportation includes storage by a carrier that may occur between the time a hazardous material is offered for transportation to a carrier and the time it reaches its intended destination and is accepted by the consignee. *See* 49 CFR 174.204(a)(2) (requirements for tank car delivery, including storage, of gases). Consequently, while consignor and consignee storage of hazardous material is not incidental to transportation in commerce, IR–28, *City of San Jose, California; Restrictions on Storage of Hazardous Materials,* 55 FR 8884 (Mar. 8, 1990), rail carrier storage of hazardous materials is incidental to transportation in commerce and is regulated under Federal hazmat law and the HMR. *See* 49 CFR 174.204. On the other hand, when a shipment is consigned by the offerer to a storage facility rather than to an end user, the shipment is out of transportation once received and then unloaded, or stored loaded, at the storage facility.

Other Federal agencies also regulate hazardous materials. For example, EPA regulates hazardous materials to ensure that they are not unintentionally or unlawfully released into the environment (*see, e.g.,* SARA Title III, 42 U.S.C. 1101, *et seq.*) and the Department of Labor's Occupational Safety and Health Administration (OSHA) regulates hazardous materials in the workplace to ensure worker safety (*see, e.g.,* the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*).

II. Preemption Determinations

A. PD–8(R) (Docket PDA–9(R))

California Requirements for the Handling and Storage of Hazardous Materials

Applicant: Swimming Pool Chemical Manufacturers' Association (SPCMA)
State Laws Affected: California Health and Safety Code (CHSC), Chapter 6.95, §§ 25501.3 and 25503.7

Summary: Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101–5127, does not preempt § 25501.3 because that section is otherwise authorized by Federal law, specifically Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. §§ 11001, *et seq.* (also known as the Emergency Planning and Community Right to Know Act of 1986 (EPCRA)), and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r). There is insufficient information in the record to determine whether Federal hazmat law preempts § 25503.7, which provides that certain bulk containers (including railroad tank cars) are deemed ''stored'' if they are expected to remain, or actually remain, at a facility for more than 30 days.

1. Application for Preemption Determination

In its application, SPCMA argues that Federal hazmat law preempts certain on-site storage and handling provisions of Chapter 6.95 as they pertain to transportation in commerce of hazardous materials in railroad tank cars. SPCMA alleges that the original intent of Chapter 6.95 was to minimize the release of hazardous materials from a fixed facility and to establish efficient evacuation plans for those localities in the event of such a release. SPCMA contends that, as originally enacted, Chapter 6.95 did not address or apply to the transportation of hazardous materials. SPCMA alleges that the subsequent addition of § 25501.3 and § 25503.7 expanded the reach of Chapter 6.95 to transportation in commerce.

SPCMA believes that Federal hazmat law preempts these provisions ''irrespective of where or when such transportation of hazardous materials including loading, unloading, and storage incidental thereto, occurs, *i.e.,* either in transit or on private property owned, leased, and/or otherwise under the control of the consignor, consignee, and/or transporter.'' SPCMA asserts that if the Research and Special Programs Administration (RSPA) preempts these two provisions, the remaining requirements in Chapter 6.95 no longer will apply to the transportation of hazardous materials, and loading, unloading and storage incidental thereto. In the event that RSPA does not preempt the amendments, SPCMA asks that RSPA review the remaining 63 provisions of Chapter 6.95 to determine whether they are preempted by Federal hazmat law.

In response to RSPA's February 12, 1993 Public Notice and Invitation to Comment, 58 FR 8494, which set forth the text of SPCMA's application, comments were submitted by the Chemical Waste Transportation Institute (CWTI), the City of California City Fire Department, Contra Costa County Health Services Department (Contra Costa), the American Trucking Associations (ATA), the Compressed Gas Association, the Carpinteria-Summerland Fire Protection District, the State of California Chemical Emergency Planning and Response Commission, the Kern County Fire Department, Congressman George Miller, California State Assemblyman Robert J. Campbell and 23 other State legislators, and the State of California Governor's Office of Emergency Services (California OES). SPCMA filed rebuttal comments.

In response to RSPA's October 14, 1993 Public Notice re-opening the comment period in Docket PDA–9(R), SPCMA, HASA, California OES, and the County of Los Angeles Fire Department submitted comments.

2. Discussion

a. Handling of Hazardous Materials. (1) CHSC Requirement. SPCMA challenges the following CHSC provision:

Chapter 6.95, § 25501.3 defines the term ''handle'' to include the use or potential for use of a quantity of hazardous material by the connection of any marine vessel, tank vehicle, tank car, or container to a system or process for any purpose other than the immediate transfer to or from an approved atmospheric tank or approved portable tank. (Section 25501(i), the general definition section of Chapter 6.95, states that ''handle'' means ''to use, generate, process, produce, package, treat, store, emit, discharge, or dispose of a hazardous material in any fashion.'' Section 25501.3 expanded that definition to include, in certain instances, tank car unloading to a system or process.)

(2) SPCMA's Arguments and Comments Supporting Preemption. SPCMA asserts that § 25501.3 extends all of the requirements of Chapter 6.95 to facilities that handle hazardous materials, including facilities that unload compressed gases incidental to transportation in commerce. SPCMA states that the exception in § 25501.3 for immediate transfers to or from approved atmospheric tanks or approved portable tanks is not applicable to the handling of compressed gases because compressed gases ''cannot be unloaded to or loaded from atmospheric tanks, *i.e.,* tanks which are open to the atmosphere, or to or from portable tanks which are not pressure vessels, *i.e.,* cylinders.''

SPCMA states that until a facility is in compliance with Chapter 6.95, the facility is not permitted to ''load, unload, or store hazardous materials incidental thereto.'' Furthermore, it states that transporters are prohibited from unloading and consignees are prohibited from accepting hazardous materials shipments until the receiving facility is in compliance with the State requirements. SPCMA contends that, as a practical matter, none of its member companies with facilities in California is in compliance with Chapter 6.95, and that it is not aware of any company

operating in California that is in compliance.

SPCMA concludes that § 25501.3 should be preempted because the requirement that handlers of hazardous materials comply with Chapter 6.95 is in addition to and different from Federal hazmat law and HMR requirements, and is an obstacle to accomplishing and carrying out those Federal requirements.

In its comments, CWTI agrees with SPCMA that loading and unloading operations constitute ''handling,'' which CWTI argues is a ''covered subject area.'' Specifically, CWTI states that,

> Congress recognized the importance of loading and unloading operations to ensure the safety of hazardous materials in transportation when it included ''packing, repacking, (and) handling * * * of hazardous materials'' as one of several regulatory subject areas reserved to the federal government. Non-federal requirements, unless they are ''substantively the same'' as the HMRs, are preempted.

Nevertheless, CWTI acknowledges that Congress limited the preemptive reach of Federal hazmat law to those non-Federal requirements that are not ''otherwise authorized by Federal law.'' CWTI notes that both SARA Title III, 42 U.S.C. §§ 11001, *et seq.*, and § 112(r) of the CAA Amendments, 42 U.S.C. 7412(r),

> Impose requirements on persons and facilities that handle hazardous materials with varying provisions for separate state action. [CWTI] thinks that the impact of these statutes, whether at the federal, state, or local level, cannot be avoided for facilities and operations handling hazardous materials that are not ''in transportation.''

HASA supports SPCMA's request for preemption and comments that the provisions of Chapter 6.95, as implemented by Los Angeles County through LACoC Titles 2 and 32, are applied and enforced ''as soon as the tank car containing liquefied chlorine is moved by the railroad from the railroad right-of-way to [HASA's] property and are applied and enforced on a continuous basis until the unloaded tank car is moved from [HASA's] property back to the railroad right of way.'' HASA further asserts that the provisions of Chapter 6.95 are applied and enforced against the railroad while the railroad is moving the car both onto and off of HASA's property.

ATA also believes that Federal hazmat law preempts § 25501.3. It urges RSPA to find that ''transportation ends and storage begins when the rail car or freight container is emptied of its contents, regardless of the time period it awaits the unloading process on the property of the ultimate user. In this instance, the [Federal hazmat law] prevails and should, therefore, preempt the [CHSC].'' Nevertheless, ATA also states that authority under Federal hazmat law ''does not extend to the storage and use (unloading) of hazardous materials once transportation has ended.'' ATA cites several cases interpreting the Interstate Commerce Act of 1887, 49 U.S.C. § 1 *et seq.* (repealed by Act, October 17, 1978, P.L. 95–473, § 4(b), 92 Stat. 1467, subject to certain exceptions) for the proposition that ''where on-site transportation is conducted at the location where compressed gases are used or have come to 'rest,' [Federal hazmat law] no longer prevails. A material comes 'to rest' when the intent of the shipper is fulfilled. It is the intent, with persistence, that governs when a product is in transportation.''

(3) Comments Opposing Preemption. Contra Costa states that Federal hazmat law addresses safety during transportation in commerce, while Chapter 6.95 continues attention to safety in the manufacturing process following that transportation. Contra Costa emphasizes throughout its comments that the intent of Chapter 6.95 is to regulate the users of hazardous materials, not the transporters. It states that Chapter 6.95 requirements apply to the ''handling of hazardous materials during processing and storage (*i.e.*, manufacturing), not during transportation.'' Contra Costa stresses that, contrary to statements made by SPCMA in its application, there is no provision of Chapter 6.95 that prohibits a carrier from delivering hazardous materials to a consignee. Also, it states that, contrary to SPCMA's assertions, there are many businesses and industries operating in Contra Costa County that are in compliance with Chapter 6.95.

Furthermore, Contra Costa states that even if there is an overlap of Federal hazmat law and Chapter 6.95 jurisdiction in the area of consignee loading or unloading of hazardous materials, the requirements of Chapter 6.95 are not incompatible or in conflict with the Federal requirements. Contra Costa indicates that § 25501.3 is consistent with the Environmental Protection Agency's (EPA's) intention to regulate tank car unloading to a manufacturing process. Specifically, Contra Costa notes that EPA issued a Notice of Proposed Rulemaking (NPRM) wherein it proposed a list of regulated substances and threshold quantities as required under § 112(r) of the CAA Amendments, 42 U.S.C. 7412(r). 58 FR 5102, January 19, 1993. Contra Costa states that, in the NPRM, EPA sets forth proposed requirements for chemical accident prevention steps that must be taken by the owner or operator of a stationary source. Contra Costa notes that EPA defines ''stationary source'' to include ''transportation containers that are no longer under active shipping orders and transportation containers that are connected to equipment at the stationary source for the purposes of temporary storage, loading, or unloading.''

California OES states that, through local government agencies, the State of California has required over 75,000 businesses to complete hazardous material emergency planning activities. It states that any reduction of California's ability to regulate emergency preparedness would increase the potential for chemical disasters. California OES asserts that Chapter 6.95 requirements are substantially the same as those set forth in SARA Title III and § 112(r) of the CAA Amendments. It notes that those Federal statutes, like Chapter 6.95, require businesses to develop and implement emergency response plans and accidental release prevention programs, to submit inventories of hazardous materials used and stored at their facilities, and to notify government agencies of releases of hazardous materials.

California OES also argues that Chapter 6.95 defines ''handling'' and ''handle'' specifically not to include transportation in commerce, but rather to regulate only the use or potential use of hazardous materials at business facilities. For example, by providing that the immediate transfer of hazardous materials to or from a system or process is outside the scope of ''handling,'' as defined in § 25501.3, California OES believes Chapter 6.95 avoids regulating the loading or unloading of hazardous materials incidental to transportation in commerce. California OES further states that—

> SPCMA fails to point out that immediate transfers from ''approved portable tanks'' also are specifically excluded from the Code, which would include the common practice of unloading or loading a rail car, truck or marine vessel as regulated under [Federal hazmat law]. * * * SPCMA presents no evidence whatsoever demonstrating that loading or unloading from such approved tank cars cannot occur, and that the Code's exemption for such practices is therefore not applicable.

California OES indicates that §§ 25501.3 and 25503.7 (discussed below) were designed to close a loophole in the State's regulation of hazardous materials at fixed facilities. California OES states that in 1991 it came to the attention of emergency responders and the State legislature that

businesses in increasing numbers were avoiding the public safety and emergency preparedness provisions of State and Federal law by using unique storage methods for hazardous materials. The businesses then claimed that the materials were still in transportation in commerce and, thus, subject to Federal regulation. For example, California OES says that businesses handling bulk chemicals were using bulk containers, such as tank cars, for fixed long-term storage at their facilities while they gradually off-loaded the material. According to California OES, a facility also would shuttle a bulk container to different nearby locations within the facility and claim that it still was in transportation in commerce. California OES asserts that chlorine has been one of the key chemicals involved in this ''non-transportation related'' storage practice. It says that to address the significant public safety risk of these chemicals, and to reduce ambiguity, Chapter 6.95 was amended to clearly identify when a business became subject to emergency response requirements.

Finally, California OES asserts that ''the California Code does not explicitly prohibit a business of any type that handles hazardous materials from operating if it does not comply with the code, nor does it require permits for operation. Instead, the purpose of the California Code is to ensure that fixed facilities that handle hazardous material implement appropriate emergency planning and accident prevention programs.''

Congressman Miller states that a July 1993 chemical spill in Richmond, California, located in Contra Costa County, underscores the importance of denying SPCMA's request for preemption of certain provisions of Chapter 6.95. He indicates that communities such as Contra Costa County currently are covered by the risk management and prevention program (RMPP), under Title 2 of Chapter 6.95, which requires responsible management of Acutely Hazardous Materials (AHM), such as chlorine. He expresses concern that RSPA's preemption of provisions of Chapter 6.95 will set a policy precedent that could render the RMPP useless, thereby depriving communities of accident prevention measures and emergency response planning.

Assemblyman Campbell and 23 other State legislators also cite the July 1993 chemical spill in Richmond, California, as evidence of a need to strengthen California's risk management and prevention laws. The legislators indicate that the State has worked diligently to put in place statutory and regulatory programs designed to minimize the risk of chemical accidents, citing Chapter 6.95 as an example. They say that California's regulatory requirements are intended to reduce the risk of accidents and assist in emergency response in the event that an accident occurs. They maintain that it does not conflict with Federal hazmat law and the HMR.

(4) Analysis. As discussed above in the General Preamble, unless ''otherwise authorized by Federal law'' or unless a waiver of preemption is granted by the Department of Transportation (DOT), Federal hazmat law explicitly preempts any requirement of a State or political subdivision thereof or Indian tribe if it applies to the ''handling'' of hazardous materials and is not substantively the same as the Federal requirement. *See* 49 U.S.C. 5125(b)(1)(B). ''Handling'' includes the unloading of hazardous materials, incidental to transportation in commerce.

In 1986, Congress enacted SARA Title III, 42 U.S.C. §§ 11001, *et seq.*, which requires States to establish State and local emergency planning groups to develop chemical emergency response plans for each community. SARA Title III also requires facilities to provide information regarding the hazardous chemicals they have on site to States, local planners, fire departments and, through them, the public. This information forms the foundation of both the community emergency response plans and the public-industry dialogue on risks and risk reduction.

SARA Title III directly delegates to States the authority to engage in emergency response planning, through the use of information gathered from regulated facilities. SARA Title III does not apply to the transportation, including storage incident to transportation, of any substance or chemical subject to the requirements of Title III. *See* 42 U.S.C. 11047. In its regulations implementing SARA Title III, EPA states that a substance is stored ''incident to transportation'' if it is still under active shipping papers and has not reached the ultimate consignee. *See* 40 CFR 355.40(b)(4)(ii). Consequently, hazardous materials that are stored incident to transportation are not subject to the requirements of SARA Title III. On the other hand, regulated materials that have been delivered to the ultimate consignee's facility are not stored ''incident to transportation,'' as that term is defined by EPA, and are subject to SARA Title III requirements.

Pursuant to the requirement in § 302 of SARA Title III, 42 U.S.C. 11002, EPA has issued a list of extremely hazardous substances (which includes chlorine) and threshold planning quantities for each substance. California regulates all 360 of the extremely hazardous substances on EPA's § 302 list. A facility is subject to the requirements of SARA Title III if a substance on the § 302 list is present at the facility in an amount in excess of the threshold planning quantity established for the substance. 42 U.S.C. 11002(b)(1).

Among other requirements, facilities subject to SARA Title III must prepare and submit an emergency and hazardous chemical inventory form to the appropriate local emergency planning committee (LEPC), State emergency response commission (SERC), and fire department with jurisdiction over the facility. 42 U.S.C. 11022(a)(1). Section 303(d)(3) of SARA Title III, 42 U.S.C. 11003(d)(3), specifically requires the owner or operator of a facility to promptly provide to an LEPC, on request, information that the LEPC believes is necessary for developing and implementing an emergency plan. Thus, certain hazardous materials (including chlorine) that are on site at SPCMA members' facilities, in above-threshold quantities, awaiting consumption in the manufacturing process, are regulated under SARA Title III. Furthermore, SARA Title III specifically authorizes California, and all other States, to collect information regarding these materials, for emergency response purposes, from facilities that are subject to SARA Title III requirements.

Although SARA Title III governs emergency response planning, it does not mandate that facilities establish accident prevention programs. The CAA Amendments of 1990, P.L. 101–549, 104 Stat. 2399, amended § 112 of the Clean Air Act, 42 U.S.C. 7412, by adding a new subsection (r), which includes requirements related to chemical accident prevention. The goal of § 112(r) is to prevent accidental releases, from facilities, of regulated substances and other extremely hazardous substances to the air, and to minimize the consequences of releases of chemicals that pose the greatest risk.

Section 112(r) has a number of provisions. It establishes a general duty for facility owners or operators to identify hazards that may result from releases, design and maintain a safe facility, and minimize the consequences of releases when they occur. Section 112(r)(3) requires EPA to promulgate a list of at least 100 substances that are known to cause, or reasonably may be anticipated to cause, death, injury, or serious adverse effects to human health or the environment when released to air. EPA also is required to set thresholds for each listed substance. The list of regulated substances and thresholds,

issued pursuant to § 112(r)(3), is used to determine which facilities must comply with the accident prevention regulations.

On January 31, 1994, EPA published a final rule which included the list of regulated substances and thresholds required under § 112(r). 59 FR 4478 (Jan. 31, 1994). The final rule became effective on March 2, 1994. Various compressed gases, including chlorine, appear on the list of regulated toxic substances. In that final rule, EPA defines ''stationary source'' as follows:

> Stationary source means any building, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur. *A stationary source includes transportation containers that are no longer under active shipping papers and transportation containers that are connected to equipment at the stationary source for the purpose of temporary storage, loading, or unloading.*

59 FR 4478, 4493 (definition of ''stationary source'') (to be codified at 40 CFR 68.3) (emphasis added). This definition applies to all regulations issued under § 112(r). In the preamble to the final rule, EPA states:

> [F]or purposes of regulations under section 112(r), the term stationary source does not apply to transportation conditions, which would include storage incident to such transportation, of any 112(r) regulated substance. . * * * [T]ransportation containers that are not under active shipping papers are not considered by EPA to be in storage incident to transportation; the agency considers the definition of stationary source to include such containers.

59 FR 4490.

Section 112(r)(7), 42 U.S.C. 7412(r)(7), also requires EPA to establish ''reasonable regulations and appropriate guidance'' to provide for the prevention and detection of accidental releases and for responses to such releases. These regulations must include, as appropriate, provisions concerning facilities' use, operation, repair, and maintenance of equipment to monitor, detect, inspect, and control releases, including training of personnel in the use and maintenance of equipment or in the conduct of periodic inspections. The regulations must require facility owners or operators to prepare and implement risk management plans that provide for compliance with regulations for managing risk and include a hazard assessment, a prevention program, and an emergency response program. The risk management plans developed under those programs must be registered with EPA, and provided to the Chemical Safety and Hazard Investigation Board established under the CAA Amendments, State governments, local planning authorities, and the public on request.

On October 20, 1993, EPA published an NPRM in the **Federal Register** proposing regulations that would require stationary source owners or operators that manufacture, process, use, store or otherwise handle regulated substances in quantities that exceed specified thresholds to develop and implement risk management programs, as required under § 112(r)(7). As part of the emergency response element of the risk management program, EPA proposes that the emergency response plan be coordinated with the LEPC plans required under SARA Title III for chemical releases. On request of the LEPC, the owner of a facility would be required to provide the LEPC with information necessary to develop and implement the LEPC plan. This requirement is a restatement of the mandate in § 303 of SARA Title III, 42 U.S.C. 11003, that the owner of a facility provide information to an LEPC, on request, and is proposed to ensure that the facility and community planning efforts are coordinated.

Many States, including California, have developed or are developing programs for control of hazardous air pollutants and for prevention and mitigation of accidental releases. Under § 112(r), these programs, developed to address specific State needs, may continue to exist and even differ from Federal rules being developed by EPA under § 112. However, State programs must be approved by EPA. State accidental release prevention programs, at a minimum, must be at least as stringent as the Federal regulations.

Section 112(l), 42 U.S.C. 7412(l), gives EPA the authority to approve and delegate Federal authority to the States. In the preamble of the October 20, 1993 NPRM, EPA recognizes that several States, including California, have existing risk management programs that address the same basic elements that EPA proposed in its NPRM. EPA recognizes that the existing State programs will need some revisions to meet the requirements under the CAA Amendments, but expects that most of the needed changes will involve the listing of chemicals and adjusting of thresholds. EPA issued a final rule addressing the approval of State programs and the delegation of Federal authorities on November 26, 1993. 58 FR 62262 (to be codified at 40 CFR Part 63, Subpart E). Section 112(l) also requires EPA to develop guidance for States, especially for the registration of facilities.

EPA's § 112(r) regulations apply in every State until a State has sought and received EPA approval of its own program. Once a State program is approved by EPA, the State may implement and enforce its rules and programs in place of certain Federal rules promulgated under § 112(r), with the EPA-approved State rules and programs being Federally enforceable. Consequently, EPA's regulation of tank car unloading to a manufacturing process, as part of its implementation of § 112(r), is applicable to any State that does not have a risk management program that is approved by EPA.

In its definition of ''stationary source,'' EPA clearly asserts authority over transportation containers that are no longer under active shipping papers and over transportation containers that are connected to equipment at the stationary source for the purpose of temporary storage, loading, or unloading. EPA regulates this activity as part of its statutory mandate under the CAA Amendments to issue regulations regarding hazardous materials accident prevention.

Section 310 of the Clean Air Act, as amended, states that ''this Act shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the [EPA] Administrator, or any other Federal officer, department, or agency.'' 42 U.S.C. 7610. Therefore, EPA's regulation of consignee unloading of hazardous materials may not supersede or conflict with RSPA's regulation of the same activity. But, it may coexist with it.

EPA's regulations and proposed regulations under § 112(r) focus on accident prevention and risk management of hazardous materials by requiring owners of facilities that handle certain hazardous materials above threshold amounts to: (1) register the name of the facility with EPA; (2) develop and implement a risk management program that addresses hazard assessment, prevention and emergency response; and (3) develop a risk management plan for submission to certain Federal, State and local entities. On the other hand, RSPA's tank car unloading regulation (49 CFR 174.67) applies to any person that unloads a tank car containing any material classed as a hazardous material under the HMR, and focuses solely on the physical aspects of unloading the tank car. EPA's regulation of tank car unloading does not conflict with RSPA's regulation of the same activity.

Pursuant to § 112(r), EPA has authority over tank car unloading by a facility to a manufacturing process for the purpose of chemical spill prevention, and has the authority to delegate its responsibilities under § 112(r) to the States. Once EPA issues a final rule regarding the Risk Management Programs for Chemical Accidental Release Prevention, it will begin to analyze State applications for Federal approval of State regulatory programs. RSPA, therefore, finds that § 112(r) of the CAA Amendments, 42 U.S.C. 7412(r), authorizes States' regulation of tank car unloading to a manufacturing process for purposes of establishing accident prevention programs that are within the scope of § 112(r).

There is insufficient evidence in the record to substantiate SPCMA's claim that § 25501.3 is applied and enforced against carriers. Furthermore, the evidence in the record does not support SPCMA's claim that consignees are prohibited from accepting hazardous materials shipments unless and until they are in compliance with Chapter 6.95.

Consequently, Federal hazmat law does not preempt § 25501.3 because it is otherwise authorized by Federal law—specifically, § 112(r) of the CAA Amendments, 42 U.S.C. 7412(r), and SARA Title III, 42 U.S.C. 11001 *et seq.*

b. Storage of Hazardous Materials. (1) CHSC Requirement. SPCMA challenges the following CHSC provision:

Chapter 6.95, § 25503.7 states that a hazardous material contained in any rail car, rail tank car, rail freight container, marine vessel, or marine freight container is deemed stored and, consequently, is subject to the requirements of Chapter 6.95 if it remains within the same railroad, marine or business facility for more than 30 days, or a business knows or has reason to know that it will. Furthermore, a business must immediately notify the administering agency whenever a hazardous material is stored in a rail car, rail tank car, rail freight container, marine vessel, or marine freight container.

(2) SPCMA's Arguments and Comments Supporting Preemption. SPCMA claims that § 25503.7 ''prohibits the storage of hazardous materials at places where and at times when such storage is permitted by [Federal hazmat law] and regulations thereunder.'' SPCMA asserts that ''there are no provisions [of Federal hazmat law] or regulations thereunder (Part 174 'Carriage by Rail' and Part 177 'Carriage by Public Highway') which prohibit storage—incidental to transportation—of hazardous materials in rail cars, rail tank cars, rail freight containers, marine vessels, or marine freight containers.'' SPCMA cites language in § 174.204(a)(2) of the HMR—''such cars may be stored on a private track * * * or on carrier tracks designated by the carrier for such storage''—as granting specific authority for consignee storage of hazardous materials in tank cars. SPCMA argues that ''the prohibition of storage in rail tank cars is an obstacle to the transportation of hazardous materials.''

HASA urges preemption of § 25503.7. Nevertheless, HASA remarks that it seldom has the same tank car ''on site'' for more than a few days, and recognizes that ''section 25503.7 exempts incidental storage of hazardous materials in railroad tank cars for periods of less than 30 days from the requirements of Chapter 6.95.''

ATA believes that Federal hazmat law preempts § 25503.7. ATA states in its comments to Dockets PDA–7(R), PDA–10(R), and PDA–11(R), however, that ''[s]trict storage of materials for use on the consignee's property is not governed by [Federal hazmat law] or the HMRs.''

(3) Comments Opposing Preemption. California OES believes that the HMR only address storage ''directly incidental to transportation, with an aim to expediting the completion of such storage. * * * The [HMR] do not permit the indefinite storage of hazardous materials.'' California OES also states that ''contrary to SPCMA's claim, Code § 25503.7 does not prohibit or even directly regulate the storage of hazardous materials in rail cars. It simply requires facilities storing hazardous materials in such cars for more than 30 days to prepare emergency response plans and risk prevention plans.'' California OES indicates that § 25501.2 further clarifies that ''hazardous materials which are in transit or are temporarily maintained in a fixed facility for a period of less than 30 days during the course of transportation'' are excluded from the coverage of Chapter 6.95.

CWTI believes that ''storage incidental to transportation refers to any storage which may occur between the time a hazardous material is offered for transportation to a carrier until it reaches its intended destination and is accepted by the consignee.'' CWTI also notes, citing a RSPA interpretation letter dated October 13, 1992, that ''[a] carrier can be a consignee if a hazardous material is consigned to a carrier's storage facility rather than to an end user of the material.'' CWTI concludes that ''[s]hipments of hazardous materials in storage incidental to transportation remain regulated under the HMRs. However, the storage of accepted hazardous materials, no matter how temporary, at its intended destination is not storage protected by [Federal hazmat law].''

CWTI states that Congress limited the preemptive reach of Federal hazmat law to those non-Federal requirements that are not ''otherwise authorized by Federal law,'' and states that both SARA Title III and the CAA Amendments impose requirements on persons and facilities that handle hazardous materials, with varying provisions for separate State action.

Contra Costa submits that SPCMA is incorrect in its assertion that § 25503.7 ''clearly prohibits the storage of hazardous materials in rail cars, rail tank cars, rail freight containers, marine vessels or marine freight containers.'' Contra Costa states that ''Chapter 6.95 requires that storage of hazardous materials in these types of containers for longer than 30 days be reported to the local administering agency, along with the other requirements of the business plan. These requirements are not onerous or unreasonable and are necessary for local emergency response planning.''

Congressman Miller and 24 California State legislators believe preemption of the CHSC requirements will deprive communities of accident prevention measures and emergency response planning.

(4) *Analysis.* The crux of SPCMA's contention regarding § 25503.7 is that it prohibits consignee storage of hazardous materials ''at places where and at times when such storage is permitted by [Federal hazmat law] and regulations thereunder.'' SPCMA asserts that HMR Parts 174 and 177 authorize consignee storage incidental to transportation and, thus, concludes that § 25503.7 is an obstacle to accomplishing and carrying out Federal hazmat law. However, SPCMA presents no evidence that § 25503.7, as applied and enforced, actually prohibits storage incidental to transportation.

Section 25503.7, on its face, does not prohibit storage of hazardous materials. It simply requires a facility that stores or plans to store hazardous materials in a rail car, rail tank car, rail freight container, marine vessel, or marine freight container for a period greater than 30 days to comply with the requirements of Chapter 6.95. Also, it requires that the facility give notice to the local administering agency. Both Contra Costa and California OES state that § 25503.7 does not prohibit storage, but simply requires facilities to comply with Chapter 6.95 requirements when

they engage in storage of hazardous materials, as defined by that section.

Furthermore, SPCMA's reliance on HMR Parts 174 and 177 is incorrect. Part 177 of the HMR, which applies to transportation by public highway, is inapplicable to the regulation of rail transportation. Section 174.204(a)(2), which SPCMA relies on to support the proposition that the HMR authorize a consignee to *store* hazardous materials in tank cars, is equally inapplicable to the situation at issue. Section 174.204 sets forth duties and responsibilities with respect to the *delivery and unloading* of gases that are in transportation in commerce.

3. *Ruling.* Based on the above, Federal hazmat law does not preempt § 25501.3 to the extent that it makes handlers of hazardous materials subject to emergency response planning and accident prevention requirements that are within the scope of SARA Title III and § 112(r) of the CAA Amendments. There is insufficient information in the record to determine whether Federal hazmat law preempts § 25503.7.

Although SPCMA requests that RSPA review the remaining 63 provisions of the CHSC in the event that RSPA does not preempt § 25501.3 and § 25503.7, this ruling does not address those provisions. There is no information in the record regarding how these provisions are actually applied and enforced or how SPCMA members are affected by these provisions.

B. PD–9(R) (Docket PDA–7(R))

Los Angeles County, California Requirements Applicable to the Transportation and Handling of Hazardous Materials on Private Property

Applicant: HASA, Inc.
Local Laws Affected:
Los Angeles County Code (LACoC), Title 2:
§ 2.20.140
§ 2.20.150
§ 2.20.160
§ 2.20.170
Title 32 LACoC:
§ 4.108.c.7
Table 4.108–A
§ 79.809(b), (c) and (f)
§ 80.101(a) exception 1
§ 80.101(b)
§ 80.103(a)
§ 80.103(b)(1)
§ 80.103(b)(2)
§ 80.103(c), (d) and (e)
§ 80.201
§ 80.202(a) and (b)
§ 80.203
Appendix VI–A
§ 80.301(a)(2)
§ 80.301(b)(1)
§ 80.402(b)(3)(G)(i)
§ 80.402(c)(8)(A)

Summary: Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101–5127, preempts the following provisions of LACoC Titles 2 and 32:

(1) Title 2 LACoC §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170, to the extent that those provisions levy a fee on tank car unloading activities. The fees collected under those provisions are not used for purposes related to hazardous materials transportation;

(2) Title 32 LACoC § 79.809(f) as applied and enforced by Los Angeles County. Los Angeles County fails to recognize a Department of Transportation (DOT) exemption that authorizes HASA, Inc. to employ alternative methods of compliance with certain Federal tank car unloading requirements; and

(3) Title 32 LACoC § 79.809(c), which prohibits a tank car from remaining on a siding at point of delivery for more than 24 hours while connected for transfer operations, unless otherwise approved by the fire chief. The unloading restriction is not substantively the same as Federal tank car unloading requirements applicable to a tank car connected for transfer operations.

Based on a lack of information in the record, the Research and Special Programs Administration (RSPA) is unable to determine whether Federal hazmat law preempts LACoC Title 32, §§ 80.103(e), 80.301(b)(1), 80.402(b)(3)(G)(i) and 80.402(c)(8)(A).

Federal hazmat law does not preempt the following provisions of LACoC Title 32: § 4.108.c.7, Table 4.108–A, § 79.809(b), § 80.101(a) exception 1, § 80.101(b), § 80.103(a), § 80.103(b)(1), § 80.103(b)(2), § 80.103(c), § 80.103(d), § 80.201, §§ 80.202(a) and (b), § 80.203, Appendix VI–A, and § 80.301(a)(2).

1. Application for Preemption Determination

HASA states that transportation of liquefied chlorine at its facility, including loading, unloading, and storage incidental thereto, is in accordance with: (1) Federal hazmat law; (2) HMR Part 174 (49 CFR Part 174); (3) the Chlorine Manual and related pamphlets published by the Chlorine Institute, Inc.; and (4) DOT Exemption E–10552, issued by RSPA. Nevertheless, HASA states that ''[o]ver the past year, HASA has been inspected numerous times by the county fire department and, as a result of these inspections, subsequently ordered to comply with the regulation[s] contained in the county fire code with respect to 'on-site transportation' of hazardous materials.'' HASA states that it is the ''clear intent'' of Title 32 to regulate the on-site transportation of compressed gases.

HASA explains that its application for an administrative determination is ''specific to the transportation, including loading, unloading, and storage incidental thereto, of liquefied chlorine in railroad tank cars at the Santa Clarita, California manufacturing facility of HASA, Inc.'' HASA requests a determination that:

(1) Regulation of the transportation of chlorine in railroad tank cars, including loading, unloading, and storage incidental thereto at [its] facility in Santa Clarita, California, is exclusive to the Federal government pursuant to the [Federal hazmat law] and regulation[s] thereunder;

(2) The term ''transportation,'' as defined [by Federal hazmat law], includes both ''on-site'' and ''off-site'' transportation of hazardous materials in commerce, including loading, unloading, and storage incidental thereto; and

(3) [The Los Angeles County regulations at issue] are preempted by [Federal hazmat law] and regulations promulgated thereunder with respect to both ''off-site'' and ''on-site'' transportation of chlorine in railroad tank cars, including loading, unloading, and storage incidental thereto.

In response to RSPA's January 26, 1993, Public Notice and Invitation to Comment, 58 FR 6176, which set forth the text of HASA's application, comments were submitted by the Chemical Waste Transportation Institute (CWTI), the Orange County Fire Department, the California Fire Chiefs' Association, the Chlorine Institute, Inc., the Los Angeles County District Attorney's Office, the County of Los Angeles Fire Department, and the County of Santa Barbara Environmental Health Services Department. Rebuttal comments were submitted by HASA and the Chlorine Institute, Inc.

In response to RSPA's October 14, 1993, Public Notice re-opening the comment period in Docket PDA–7(R), comments were submitted by HASA and the County of Los Angeles Fire Department.

2. Discussion

a. Fees. (1) LACoC Requirements. HASA challenges the following provisions of LACoC Title 2:

§ 2.20.140 requires that every handler of hazardous materials pay an annual fee for the administration and enforcement of the provisions of California Health and Safety Code (CHSC) Chapter 6.95 (commencing with § 25500). Fees range from $110 annually for a minor handler of hazardous materials to $2,650 annually for a major handler of large volumes of hazardous materials.

§ 2.20.150 requires every handler of acutely hazardous materials (AHM) to pay an additional annual fee to the county for the administration and enforcement of AHM registration, risk assessment, and risk mitigation. The fee is calculated according to a formula set forth in § 2.20.150.

§ 2.20.160 imposes a late submission fee on: (1) handlers of hazardous materials for failure to file the required hazardous materials business plan or inventory documents on a timely basis; and (2) handlers of AHM for failure to submit the required AHM registration documents on a timely basis.

§ 2.20.170 sets out the formula for calculating annual adjustments to the schedule of fees contained in § 2.20.140 through § 2.20.160.

(2) HASA's Arguments and Summary of Comments

HASA states that §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170 establish fees applicable to ''handlers'' of hazardous materials. HASA notes that § 2.20.100(E) defines ''handler'' to mean ''any business which handles a hazardous material or acutely hazardous material.'' HASA asserts that ''handling'' is a transportation-related activity that is regulated under Federal hazmat law and the HMR.

HASA indicates that fees paid by handlers of hazardous materials to the County of Los Angeles are used for the administration and enforcement of CHSC Chapter 6.95. HASA further states that the requirements under Chapter 6.95 (*e.g.*, the preparation of hazardous materials business plans, inventories and risk management and prevention programs (RMPPs)) are not related to the transportation of hazardous materials. HASA concludes that Federal hazmat law preempts the collection of fees by Los Angeles County because the fees are not used for purposes relating to the transportation of hazardous material.

The California Fire Chiefs' Association, the Los Angeles County District Attorney's Office and the County of Los Angeles Fire Department all acknowledge that the fees collected under LACoC Title 2 are used to cover the cost of administering CHSC Chapter 6.95. The County of Los Angeles Fire Department states that § 25513 and § 25535.2 of Chapter 6.95 give the local agencies that administer Chapter 6.95 the authority to assess and collect fees in order to recover ''the cost to administer both the Risk Management and Prevention Program and the Hazardous Materials Release Response Plans and Inventory Program.''

(3) Analysis

Federal hazmat law provides that:

> A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and *used for a purpose related to transporting hazardous material*, including enforcement and planning, developing, and maintaining a capability for emergency response.

49 U.S.C. 5125(g) (emphasis added). Consequently, fees levied in connection with the transportation of hazardous materials must be equitable and used for a purpose related to the transportation of hazardous materials.

LACoC §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170 establish fees applicable to ''handlers'' of hazardous materials. Section 2.20.100(E) defines ''handler'' to mean ''any business which handles a hazardous material or acutely hazardous material.'' ''Handle,'' as defined at § 2.20.100(D), means—

> To use, generate, process, produce, package, treat, store, emit, discharge, or dispose of a hazardous or acutely hazardous material in any fashion and includes the use or potential use of a quantity of hazardous or acutely hazardous material by the connection of any marine vessel, tank vehicle, tank car or container to a system or process for any of the above purposes or activities.

The County definition of ''handle'' under 2.20.100(D) includes a number of activities that are not regulated by Federal hazmat law and the HMR because they are outside the scope of transportation in commerce, *i.e.*, the use, generation, processing, production, treatment, emission, discharge, and disposal of hazardous materials. The definition of ''handle'' also includes activities, *i.e.*, packaging and storage, that are regulated by Federal hazmat law and the HMR only in certain instances. Specifically, the HMR apply to hazardous materials storage that is incidental to transportation in commerce, and the packaging of hazardous materials for transportation in commerce. The HMR do not apply to storage that is not incidental to transportation in commerce, or packaging of hazardous materials for purposes other than transportation in commerce. HASA does not assert, and the record does not reflect, that the term ''store,'' as used in § 2.20.100(D), includes storage that is incidental to transportation in commerce, or that the term ''package'' as used in § 2.20.100(D) includes the packaging of hazardous materials for transportation in commerce. Consequently, for purposes of this decision, RSPA assumes that the terms refer to activities that are not subject to the requirements of Federal hazmat law and the HMR.

The definition of ''handle'' also includes the use or potential use of hazardous materials by the connection of a railroad tank car to a system or process. Tank car unloading is regulated under the HMR as incidental to transportation in commerce. 49 CFR 174.67. Consequently, any fee levied for unloading activities must be fair and used for a purpose related to transporting hazardous material.

There is no assertion in the record that the fees are unfair. Furthermore, the participants in this proceeding agree that the fees are used to administer Chapter 6.95, which primarily concerns emergency response planning for hazardous materials no longer in transportation in commerce. Accordingly, the fees collected from facilities that engage in tank car unloading are not being used for ''a purpose related to transporting hazardous material.'' Therefore, 49 U.S.C. 5125(g) preempts §§ 2.20.140, 2.20.150, 2.20.160 and 2.20.170 to the extent that those provisions levy a fee on facilities for tank car unloading activities. To the extent that they levy a fee for non-transportation activities, they are not preempted.

b. Permits. (1) LACoC Requirements. HASA challenges the following provisions of LACoC Title 32:

§ 4.108.c.7 and Table 4.108–A require a permit from the Bureau of Fire Prevention prior to engaging in the storage, on-site transportation, dispensing, use, or handling, at normal temperatures and pressures, of a compressed gas in excess of amounts specified in Table 4.108–A.

§ 80.103(a) states that the permit requirement in § 4.108.c.7 applies to any person, firm or corporation that stores, dispenses, uses or handles hazardous material in excess of quantities specified in § 4.108.

§ 80.103(b)(1) requires that each permit application include a Hazardous Materials Business Plan (HMBP) that meets the requirements contained in LACoC Title 2, Chapter 2.20, Part 2. Title 2, § 2.20.130 requires the applicant to follow the requirements of CHSC Chapter 6.95 when preparing an HMBP.

§ 80.103(b)(2) states that, with respect to HMBPs, every business shall comply with the reporting requirements in LACoC Title 2, Chapter 2.20, Part 2.

§ 80.103(c) states that each application for a permit shall include a hazardous materials inventory statement (HMIS) in accordance with LACoC Title 2, Chapter 2.20, Part 2. Section 2.20.130 of Title 2, Chapter 2.20, Part 2 requires the applicant to follow the requirements of CHSC Chapter 6.95 when preparing an HMIS.

§ 80.103(d), entitled ''Risk Management and Prevention Program,'' (RMPP) requires that every business comply with the requirements of LACoC Title 2, Chapter 2.20, Part 2.

§ 80.103(e) states that HMBPs, RMPPs and HMISs shall be posted in an approved location and immediately available to emergency responders. Further, the fire chief may require that the information be posted at the entrance to the occupancy or property.

(2) HASA's Arguments and Summary of Comments

HASA states that § 4.108.c.7 and § 80.103(a) require any facility that stores, dispenses, uses or handles compressed gas in excess of quantities specified in Table 4.108–A to obtain a permit from the Bureau of Fire Prevention prior to engaging in the on-site storage, transportation, dispensing, use or handling of compressed gas in railroad tank cars.

HASA indicates that § 80.103(b) and § 80.103(c) require that each permit application include an HMBP and HMIS that meet the requirements contained in LACoC Title 2, Chapter 2.20, Part 2. Section 80.103(d) requires that, with respect to RMPPs, every business comply with the requirements of LACoC Title 2, Chapter 2.20, Part 2. LACoC Title 2, Chapter 2.20, Part 2 implements the administration and enforcement of CHSC Chapter 6.95, Articles 1 and 2. Permit applicants under the LACoC, therefore, must follow the requirements of CHSC Chapter 6.95 when preparing an HMBP, HMIS and RMPP. HASA asserts that—

> Requirements contained in Chapter 6.95 of the [CHSC] provide *inter alia* for written notification, recording, and reporting of the unintentional release of hazardous materials. These requirements are preempted [as covered subjects].

HASA asserts that ''there is no assurance that a permit for 'on-site transportation' will be issued or that it will not be revoked for reasons unrelated to the transportation of hazardous materials. Business plans and risk management plans are not only subject to approval by the administering agencies, but such approval is subject to unspecified delays.''

HASA believes that the LACoC requirement that a facility obtain a permit prior to engaging in the on-site storage, transportation, dispensing, use or handling of compressed gas is preempted because: (1) it applies to ''handling,'' which is a covered subject, and the requirement is not substantively the same as Federal regulations; (2) it applies to the ''on-site'' transportation of hazardous materials and, consequently, is an obstacle to accomplishing and carrying out Federal hazmat law and the HMR; and (3) it requires permit applicants to comply with the written notification, recording and reporting requirements pertaining to unintentional releases of hazardous materials contained in CHSC Chapter 6.95, as implemented by LACoC Titles 2 and 32, which HASA believes are preempted as covered subjects.

In support of its position, HASA states that similar permit requirements have been found to be inconsistent with Federal hazmat law and the HMR, citing IR–28, *City of San Jose, California; Restrictions on Storage of Hazardous Materials*, 55 FR 8884 (Mar. 8, 1990), and *Southern Pacific Transp. Co.* v. *Public Service Comm'n of Nevada*, 909 F.2d 352 (9th Cir. 1990).

HASA does not discuss how § 80.103(e), which requires that HMBPs, RMPPs and HMISs be posted in an approved location and immediately available to emergency responders, conflicts with the Federal hazmat law or the HMR.

The Chlorine Institute, Inc. believes that Federal hazmat law preempts the LACoC permit requirements. It states that ''the permit requirement under section 4.108.c.7 of the [LACoC] is restrictive in that it requires an application, inspection and permit prior to unloading certain quantities of hazardous materials on private property regardless of whether the activity is in compliance with DOT regulation * * *. The permit process and requirements are not consistent with [Federal hazmat law] and DOT regulations.''

The Los Angeles County District Attorney's Office and the County of Los Angeles Fire Department both oppose preemption of the permit requirements, stating that the requirements are not an obstacle to accomplishing and carrying out Federal hazmat law and the HMR.

(3) Analysis

Permit requirements do not fall within any of the five covered subject areas enumerated in 49 U.S.C. 5125, described above in the General Preamble. They also do not, *per se*, make it impossible to comply with Federal hazmat law or HMR requirements, or create an obstacle to accomplishing and carrying out Federal hazmat law or the HMR. Whether or not a permit requirement is preempted depends on the steps required to obtain the permit. *See* IR–28, 55 FR 8884 (Mar. 8, 1990); IR–20, 52 FR 24396 (June 30, 1987); IR–3 (Appeal), 47 FR 18457 (Apr. 29, 1982); IR–2, 44 FR 75566 (Dec. 20, 1979); *New Hampshire Motor Transport Ass'n* v. *Flynn,* 751 F.2d 43 (1st Cir. 1984); *Colorado Public Utilities Comm'n* v. *Harmon,* CV 88–Z–1524 (D. Colo. 1989), *rev'd on other grounds,* 951 F.2d 1571 (10th Cir. 1991).

First, HASA asserts that Los Angeles County's regulation of ''handling,'' through the permit process, is preempted because handling is one of the five covered subject areas established under 49 U.S.C. 5125. The LACoC permit requirements are Los Angeles County's response to the mandate in CHSC § 25502 that ''every county shall implement this chapter as to the handling of hazardous materials in the county.'' The LACoC requires chemical manufacturers to obtain a permit ''prior to engaging in the storage, on-site transportation, dispensing, use or handling, at normal temperatures and pressures, of a compressed gas in excess of specified amounts.'' As part of the permit process under LACoC Title 32, facilities that handle hazardous materials must submit, to the County, an HMBP, HMIS and RMPP that meet the reporting requirements in LACoC Title 2. Title 2, § 2.20.130 requires that these documents be prepared in accordance with the requirements set forth in CHSC Chapter 6.95.

As discussed above in PD–8(R), Federal hazmat law does not preempt Chapter 6.95 requirements applicable to the handling of hazardous materials because they are otherwise authorized by Federal law, Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. §§ 11001 *et seq.*, and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r). As a result, the LACoC permit program, which implements the CHSC handling requirements, is not preempted because its underlying substantive requirements are ''otherwise authorized'' by SARA Title III and § 112(r) of the CAA Amendments.

Second, HASA asserts that Los Angeles County's permit requirements are preempted because they apply to the on-site transportation of hazardous materials at HASA's facility and, therefore, present an obstacle to accomplishing and carrying out Federal hazmat law. Transportation that takes place entirely on private property is not transportation ''in commerce.'' Federal hazmat law and the HMR do not apply to a consignee's transportation of hazardous materials solely within the gates of a private manufacturing facility. To the extent that the permit requirements under the LACoC provide that HASA must obtain a permit prior to transporting hazardous materials within its facility, the requirements do not apply to transportation in commerce

and are not preempted by Federal hazmat law. The holdings in *Southern Pacific Transp. Co.* v. *Public Service Comm'n of Nevada* and IR–28, which HASA relies on to support its argument in favor of preemption, are inapposite to the facts in this case. The holdings are based on local regulation of common carriers engaged in the transportation of hazardous materials in commerce.

Finally, HASA asserts that permit applicants must comply with the reporting requirements of LACoC Title 2, Chapter 2.20, Part 2 and, by reference therein, CHSC Chapter 6.95, Articles 1 and 2. HASA asserts that Chapter 6.95 requirements include written notification, recording, and reporting of the unintentional release of hazardous materials. HASA argues that the written notification, recording and reporting requirements are preempted as covered subjects. HASA believes that the permit requirements are preempted to the extent they mandate compliance with Chapter 6.95 requirements regarding the reporting of unintentional releases of hazardous materials.

HASA is correct that Federal hazmat law preempts any State or local requirement dealing with the ''written notification, recording, and reporting of the unintentional release *in transportation* of hazardous material,'' unless the requirement is substantively the same as the Federal requirement or otherwise authorized by Federal law. 49 U.S.C. 5125(b)(1)(D) (emphasis added). However, HASA fails to identify in its application the sections of Chapter 6.95 that it believes are preempted, or even to set forth the text of those sections for RSPA's review and consideration. Consequently, RSPA cannot determine whether the permit requirements under the LACoC are preempted to the extent that they require compliance with unidentified provisions of LACoC Title 2, Chapter 2.20, Part 2 and, by reference therein, CHSC Chapter 6.95.

Nowhere does the record reflect that a permit actually is required in order for a facility to engage in storage, dispensing, use or handling of hazardous materials in excess of threshold quantities. In fact, HASA admits that it is not in compliance with LACoC requirements it believes are preempted, and information in the record seems to indicate that HASA has operated without a § 4.108.c.7 permit for extended periods of time. To the extent that Los Angeles County has taken enforcement action against HASA, it appears that it has done so in an effort to persuade HASA to comply with the substantive permit application requirements (*e.g.*, the hazardous materials inventory requirement). Consequently, to the extent that the Bureau of Fire Prevention has the authority to issue permits, that authority does not appear to have been enforced and applied to prevent facilities from storing and handling hazardous materials incidental to transportation. Therefore, the permit requirement does not violate the ''obstacle'' standard.

For the reasons stated above, Federal hazmat law does not preempt the following sections of LACoC Title 32: § 4.108.c.7, Table 4.108–A, § 80.103(a), § 80.103(b)(1), § 80.103(b)(2), and §§ 80.103 (c) and (d). There is insufficient information in the record to determine whether Federal hazmat law preempts LACoC § 80.103(e).

c. Hazard Classification. (1) LACoC Requirements. HASA challenges the following provisions of LACoC Title 32:

§ 80.101(a) exception 1 exempts the off-site transportation of hazardous materials from the classification system set forth in LACoC Article 80, if the transportation is in conformance with the HMR.

§ 80.101(b) states that the classification system referenced at §§ 80.202 and 80.203 applies to all hazardous materials, including those materials regulated elsewhere in the LACoC.

§ 80.201 requires that hazardous materials be divided into hazard categories. The categories include materials regulated under LACoC Article 80 and materials regulated elsewhere in the LACoC.

§ 80.202(a) classifies certain materials as physical hazards, including compressed gases, flammable liquids and combustible liquids. A material with a primary classification of ''physical hazard'' also can present a health hazard (as set forth below at § 80.202(b)). Chlorine is listed, in Appendix VI–A to Title 32, as a toxic compressed gas that constitutes a physical hazard.

§ 80.202(b) classifies certain materials as health hazards, including highly toxic or toxic materials. A material with a primary classification of ''health hazard'' also can present a physical hazard. Chlorine is listed, in Appendix VI–A to Title 32, as an example of a toxic compressed gas that constitutes a health hazard.

§ 80.203 states that descriptions and examples of materials included in hazard categories are contained in Appendix VI–A to Title 32.

Appendix VI–A contains information, explanations and examples to illustrate and clarify the hazard categories contained in Division II of Article 80. The hazard categories are based on Occupational Safety and Health Administration (OSHA) standards set forth in the Code of Federal Regulations, Title 29. Where numerical classifications are included, they are in accordance with nationally recognized standards.

(2) HASA's Arguments and Summary of Comments. HASA states that the classification system in the LACoC is different from and in addition to the hazardous materials classification system under Federal hazmat law and the HMR and, therefore, should be preempted as relating to a covered subject under 49 U.S.C. 5125(b)(1). HASA indicates that the classification system under the LACoC only applies to a facility's on-site transportation of hazardous materials, and not to off-site transportation of hazardous materials conducted pursuant to the HMR. HASA provides several examples of how the LACoC classification system differs from that under the HMR.

The Chlorine Institute, Inc. urges preemption of the LACoC classification system. It states that the classification requirements ''define categories of hazardous materials that are not consistent with the DOT regulations shown in 49 CFR 173.2 * * *. Compliance with [both the LACoC and the HMR] would necessitate dual compliance for personnel handling and unloading a chlorine tank car on private property. The situation creates confusion and leads to errors in judgment.''

CWTI believes that the classification system used under the LACoC is not preempted because it is otherwise authorized by Federal law, specifically the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.* CWTI states:

> In order to protect employees from the effects of hazardous chemicals in the workplace, OSHA implemented the hazardous communication standard (HCS) which requires employers to develop and implement a written hazard communication program, including lists of hazardous chemicals present, labeling of containers of chemicals in the workplace as well as of containers of chemicals being shipped to other workplaces that does not conflict with the HMTA, preparation and distribution of [Material Safety Data Sheets], and development and implementation of employee training programs regarding the hazards of chemicals and protective measures. (*See* 29 CFR 1910.1200.) The hazardous materials classifications, 'physical hazards' and 'health hazards' referenced by HASA as required by the County are terms of classification used under the HCS. (*See* LA County Code 80.202 and 29 CFR 1910.1200(c)). Section 18 of the OSH Act provides that no state or political subdivision of a state may adopt or enforce * * * any requirements relating to the issue addressed

by the HCS, except pursuant to a federally-approved state plan. California is a federally-approved state.

CWTI also notes that Congress, during passage of the 1990 amendments to the HMTA, recognized the authority of OSHA to regulate the storage of hazardous materials at consignee locations. Specifically, CWTI asserts that Congress directed OSHA, under authority of the OSH Act, to issue regulations requiring the retention of HMR markings, placards, and labels, and any other information as may be required by the HMR, on a package, container, motor vehicle, rail freight car, aircraft, or vessel until the hazardous materials have been removed. *See* P.L. 101–615, § 29, 104 Stat. 3277.

The County of Los Angeles Fire Department opposes preemption of the LACoC classification requirement, stating that the classification system required under § 80.201 is based on the OSHA classification system at Title 29 CFR.

(3) Analysis. The classification of hazardous materials for purposes of transportation in commerce is exclusive to the Federal Government. *See* 49 U.S.C. 5125(b)(1)(A). Federal hazmat law preempts State, local and Indian tribe requirements that are not substantively the same as the Federal classification requirements, or not otherwise authorized by Federal law. *Id*.

The Department of Transportation has an exclusive role in defining hazard classes for materials that are offered or transported in commerce. The HMR classification system is used to determine the type of packagings that must be used to transport hazardous materials in commerce, and the applicable placarding, labeling and marking requirements necessary for that transportation. The HMR classification of hazardous materials does not apply to materials that are not in transportation in commerce. The movement of hazardous materials by a consignee exclusively on private property, for purposes related to a manufacturing process, is not transportation in commerce under Federal hazmat law.

Section 80.101(a) exception 1 states that off-site hazardous materials transportation in accordance with DOT requirements is excepted from the requirements of LACoC Article 80 (which includes the classification system under § 80.201, § 80.202, § 80.203 and Appendix VI-A). HASA does not dispute that the LACoC classification system applies only to HASA's on-site transportation of hazardous materials. Consequently, Federal hazmat law does not preempt the LACoC classification requirements, as they pertain to the on-site transportation of hazardous materials exclusively within a chemical manufacturing facility, because the LACoC requirements do not apply to hazardous materials that are in transportation in commerce.

d. Storage. (1) LACoC Requirement. HASA challenges the following provision of LACoC Title 32:

§ 80.301(a)(2) prohibits the use of tank vehicles and railroad tank cars as storage tanks.

(2) HASA's Arguments and Summary of Comments.

Section 80.301(a)(2) states that tank vehicles and railroad tank cars shall not be used as storage tanks. HASA argues that neither Federal hazmat law nor the HMR ''prohibit storage—incidental to transportation or otherwise—of hazardous materials in either tank vehicles or in tank cars.'' HASA states that 49 CFR 174.204(a)(2) specifically permits storage of specified gases on both private and carrier track. HASA notes that § 174.204(a)(2) states, in part, ''such cars may be stored on private track * * * or on carrier tracks designated by the carrier for such storage.'' HASA believes that the LACoC's prohibition of storage in tank vehicles and railroad tank cars is an obstacle to accomplishing and carrying out Federal hazmat law and the HMR, and should be preempted.

No commenter addressed this issue specifically.

(3) Analysis. HASA states that it receives railroad tank cars containing liquefied chlorine from manufacturers engaged in interstate commerce. HASA unloads the tank cars on a private siding adjacent to its facility. HASA asserts that § 80.301(a)(2) prohibits it from storing hazardous material, for use in its manufacturing process, in the tank cars in which the material arrives at HASA's facility. There is no indication in the record that HASA stores hazardous materials in cargo tank motor vehicles, and there is no information in the record regarding how this requirement is applied and enforced when hazardous materials are stored in cargo tank motor vehicles.

Federal hazmat law and the HMR apply to hazardous materials that are in transportation in commerce, and loading, unloading and storage that is incidental to that transportation. Federal hazmat law and the HMR do not apply to storage activities not incidental to transportation, such as storage activities at consignees' facilities. *See* IR–28, 55 FR 8884 (Mar. 8, 1990). As a result, hazardous materials that are stored at a manufacturing facility awaiting consumption in the manufacturing process are not stored incidental to transportation in commerce, and are beyond the reach of Federal hazmat law. Federal hazmat law, therefore, does not prevent Los Angeles County from prohibiting the use of tank cars for storage purposes, where that storage is not incidental to transportation in commerce.

Section § 174.204(a)(2) of the HMR, which HASA relies on to support the proposition that the HMR authorize a consignee to store hazardous materials in tank cars, is inapplicable to the situation at issue. Section 174.204 sets forth duties and responsibilities with respect to the delivery and unloading of gases that are in transportation in commerce.

Thus, Federal hazmat law does not preempt § 80.301(a)(2).

e. Unloading. (1) LACoC Requirements. HASA challenges the following provisions of LACoC Title 32:

§ 80.301(a)(2) requires that containers, cylinders and tanks containing hazardous materials be unloaded in accordance with the requirements for flammable and combustible liquids at § 79.809.

§ 79.809(b) states that flammable and combustible liquids may be transferred from a tank car only into an approved atmospheric tank or approved portable tank.

§ 79.809(c) states that, unless otherwise approved by the fire chief, a tank car may not remain on a siding at point of delivery for more than 24 hours while connected for transfer operations.

§ 79.809(f) states that the operator or other competent person must be in attendance at all times while a tank car is discharging cargo.

§ 80.402(c)(8)(A) states that when tank cars regulated by DOT are used outdoors, gas cabinets or a locally exhausted enclosure must be provided. Installation and design must be in accordance with the requirements of Title 32.

§ 80.402(b)(3)(G)(i) states that when portable or stationary tanks are ''utilized in use or dispensing,'' they must be within a ventilated separate gas storage room or placed within an exhausted enclosure.

(2) HASA's Arguments and Summary of Comments. Section 79.809 addresses unloading operations for flammable and combustible liquids. Section 80.301(a)(2) makes the unloading requirements in § 79.809 applicable to the unloading of railroad tank cars containing hazardous materials regulated under Title 32. HASA states that ''many of the requirements in § 79.809 are not only inappropriate but unsafe for unloading compressed and

liquefied gases, including chlorine.'' HASA offers, as examples, the requirements to transfer flammable and combustible materials only to an approved atmospheric tank or approved portable tank (§ 79.809(b)), the prohibition against remaining on a siding for more than 24 hours while connected for unloading operations (§ 70.809(c)), and the tank car unloading attendance requirement (§ 79.809(f)).

HASA states that liquefied and nonliquefied compressed gases cannot be unloaded into a tank ''open to the atmosphere'' because they will no longer be contained or compressed. HASA, therefore, believes that this LACoC requirement conflicts with Federal hazmat law and the HMR and should be preempted.

HASA further explains that liquefied gases, including chlorine, are unloaded ''under their own vapor pressure, at a finite rate,'' to prevent the liquefied gas remaining in the tank car from freezing as heat is withdrawn by gas vaporization. HASA maintains that liquefied chlorine gas has a normal unloading rate of 3,600 to 7,200 pounds per hour. HASA concludes that it takes between 25 and 50 hours to unload each tank car containing 90 tons of liquefied chlorine. As a result, HASA believes that the 24-hour time limit on unloading conflicts with Federal hazmat law and the HMR and should be preempted.

HASA notes that 49 CFR 174.67 (i) and (j) pertain to tank car unloading. HASA applied for, and obtained from RSPA, an exemption (E–10552) from the requirements in 174.67 (i) and (j), including the requirement that a person physically attend a tank car while cargo is discharged. HASA states that the local attendance requirement at § 79.809(f) is similar to the Federal attendance requirement set out at 49 CFR 174.67(i). Nevertheless, HASA asserts that Los Angeles County refuses to recognize that HASA's exemption from Federal attendance requirements prevents the County from enforcing the local attendance requirement. Consequently, HASA asserts that § 79.809(f) conflicts with E–10552 and should be preempted.

HASA further requests a preemption determination regarding § 80.402(b)(3)(G)(i) and § 80.402(c)(8)(A), which it states require secondary containment for the ''use'' of railroad tank cars which contain highly toxic or toxic compressed gases. HASA states that ''use'' is defined at LACoC § 9.123 as ''the placing in action or making available for service by opening or connecting anything utilized for confinement of material whether a solid, liquid or gas.'' HASA contends that this definition of the term ''use'' encompasses the unloading of tank cars. HASA, therefore, alleges that tank car unloading must take place in accordance with § 80.402(b)(3)(G)(i) and § 80.402(c)(8)(A). HASA believes these requirements conflict with unloading requirements under Federal hazmat law and the HMR, and should be preempted.

In summary, HASA asks RSPA to compare several aspects of the LACoC unloading requirements with (1) the general unloading requirements for tank cars set out at 49 CFR 174.67; (2) the specific unloading requirements for compressed gases in Title 49, Subpart F of the CFR (49 CFR 174.200–174.204, 174.208, 174.280, and 174.290); and (3) the requirements in E–10522 with respect to chlorine.

The Chlorine Institute supports preemption of LACoC §§ 79.809, 80.402(b)(3)(G)(i) and 80.402(c)(8)(A). It agrees with HASA's assertion that several requirements under these provisions are obstacles to accomplishing and carrying out HMR provisions regarding handling and unloading of chlorine tank cars on private property. Specifically, the Chlorine Institute supports preemption of: (1) the requirement that unloading be to an approved atmospheric tank only; (2) the prohibition against remaining on a siding for more than 24 hours while connected; (3) the requirement that someone physically attend the unloading process; and (4) the requirement for special unloading equipment. The Chlorine Institute believes that these LACoC requirements conflict with E–10552 and with 49 CFR 174.600, which it believes enable a tank car of chlorine to be received at a private siding with no maximum holding time.

The County of Orange Fire Department, the County of Los Angeles Fire Department, and the California Fire Chiefs' Association do not agree with HASA that §§ 79.809, 80.402(b)(3)(G)(i) and 80.402(c)(8)(A) conflict with Federal hazmat law and the HMR. Consequently, they oppose preemption of those provisions.

(3) Analysis. *(a) Unloading to Storage Tanks.* Section 80.301(a)(2) makes the unloading requirements for flammable and combustible liquids at § 79.809(b) applicable to the unloading of tank cars containing hazardous materials. Section 79.809(b), which pertains to unloading to storage tanks, requires that flammable and combustible liquids be transferred from a tank car only into an approved atmospheric tank or approved portable tank. HASA states that it cannot comply with this requirement when unloading liquefied and nonliquefied compressed gases because those materials cannot be stored in a tank ''open to the atmosphere.'' HASA, therefore, asks that RSPA preempt this LACoC requirement. HASA does not indicate why storage in approved portable tanks is not possible. Furthermore, there is no evidence in the record that Los Angeles County has cited HASA for failure to comply with § 79.809(b) while unloading compressed gases.

Tank car unloading is not regulated under Section 79.809(b). Section 79.809(b) dictates the type of storage tanks that may be used when unloading a tank car. RSPA does not regulate consignee storage, including the types of containers used to store hazardous materials that are no longer in transportation in commerce. HASA's storage of hazardous materials at its facility, for use in its manufacturing process, is beyond the scope of Federal hazmat law and the HMR. Consequently, Federal hazmat law does not preempt LACoC § 79.809(b), which applies to consignee storage.

(b) 24–Hour Time Limit. Section 79.809(c) states that ''unless otherwise approved by the chief, a tank car shall not be allowed to remain on a siding at point of delivery for more than 24 hours while connected for transfer operations.'' HASA states that this restriction on the amount of time a tank car may remain connected for transfer operations should be preempted because there is no similar restriction under Federal hazmat law or the HMR.

Certain consignee tank car unloading activities fall under the term ''handling,'' a covered subject. Unless substantively the same as Federal regulation, or otherwise authorized by Federal law, non-Federal regulation of a covered subject area is preempted. Section 174.67 of the HMR applies to the mechanics of the tank car unloading process by dictating unloading procedures to be followed prior to, during and after unloading, *e.g.*, brake requirements; posting of caution signs; procedures for breaking seals and removing manhole covers; prohibition against unloading connections remaining attached after unloading is completed or discontinued; attendance requirements. Nowhere do the HMR limit the amount of time a tank car may remain on a siding at point of delivery while connected for transfer operations. The 24-hour time restriction is not substantively the same as the Federal requirements and, therefore, is preempted by § 5125(b)(1)(B) of Federal hazmat law, 49 U.S.C. 5125(b)(1)(B).

Local time restrictions, if properly crafted, may serve a legitimate purpose. Under certain circumstances, however, time restrictions may not promote

safety. For example, time restrictions on tank car unloading may prompt a chemical manufacturing facility to unload tank cars at higher pressures, at greater risk, in order to expedite the unloading process. Also, facilities may be forced to discontinue unloading a tank car and to disconnect the transfer lines between the tank car and the storage receptacle, or manufacturing process, simply to meet the local time restriction. This results in the more frequent exposure of employees to product remaining in the disconnected lines.

Consequently, a request for a waiver from preemption may be granted if it can be shown that a local time restriction provides an equal or greater level of protection to the public than the HMR, and does not unreasonably burden commerce.

(c) Attendance. Section 79.809(f) requires that the operator or another competent person attend a tank car at all times while the tank car is discharging cargo. Tank car unloading is an aspect of ''handling,'' a covered subject. Nevertheless, § 79.809(f) is substantively the same as 49 CFR 174.67(i), which requires that a tank car be attended throughout the entire unloading process and, therefore, is not preempted except as it is applied and enforced.

A consignee that unloads tank cars containing hazardous materials may obtain a DOT exemption from the Federal attendance requirement. The DOT exemption allows the consignee to use an alternative monitoring procedure. HASA holds such an exemption (E–10552). Specifically, E–10552 permits HASA to use electronic surveillance to monitor tank car unloading, under certain conditions and restrictions, in lieu of a human observer at the unloading site.

Exemptions from Federal hazmat law and HMR requirements are issued by the Associate Administrator for Hazardous Materials Safety pursuant to 49 U.S.C. 5117 and 49 CFR 107.101–107.123. Exemptions may be issued on a showing by the applicant that procedures it proposes to adopt will achieve a level of safety that is at least equal to that specified in the regulation from which the exemption is sought. *See* 49 U.S.C. 5117(a)(1)(A). If the regulations do not specify a level of safety, the applicant must show that its proposed procedures will be consistent with the public interest. See 49 U.S.C. 5117(a)(1)(B).

Exemption applications are published in the **Federal Register**, and all interested parties, including States, localities and Indian tribes, are invited to submit comments. Once issued, DOT exemptions are binding on State, local and Indian tribe authorities, and on regulated entities. See 49 CFR 171.2. To avoid conflict with Federal hazmat law and the HMR, State, local and Indian tribe authorities must implicitly or explicitly recognize a DOT exemption. *See* IR–31, 55 FR 25572 (June 21, 1990).

HASA claims that Los Angeles County fails to recognize that E–10552 exempts HASA not only from the Federal attendance requirements but also from the local attendance requirements (which are substantively the same as the Federal requirements). Los Angeles County's failure to recognize a DOT exemption undermines the exemption authority granted to the Secretary of Transportation under 49 U.S.C. 5117. Section 5117(A) explicitly authorizes DOT to issue exemptions when the applicant can demonstrate that it will transport or ship hazardous materials in a manner that achieves a safety level at least equal to that required under Federal hazmat law, or that the exemption is consistent with the public interest.

Los Angeles County's continued enforcement of § 79.809(f) against HASA, in spite of the fact that HASA holds DOT exemption E–10552, is an obstacle to accomplishing and carrying out Federal hazmat law and the regulations issued thereunder. Consequently, § 5125(a)(2) of Federal hazmat law, 49 U.S.C. 5125(a)(2), preempts LACoC § 79.809(f) as it is applied and enforced. However, California has incorporated the HMR by reference into its regulations (*see,* Title 13 California Code of Regulations, Division 2, Chapter 6). If Los Angeles County finds at any time that HASA is not in compliance with its DOT exemption, it can enforce the HMR and its own regulations.

(d) Ventilation. HASA asks that RSPA preempt § 80.402(b)(3)(G)(i) and § 80.402(c)(8)(A) because they apply to the unloading of hazardous materials in a manner that conflicts with Federal hazmat law and the HMR. Specifically, these LACoC provisions require the use of a gas cabinet or locally exhausted enclosure when a tank car is unloaded outdoors, and the use of a ventilated separate gas storage room or an exhausted enclosure when a portable or stationary tank is unloaded indoors.

There is insufficient information in the record regarding how the LACoC ventilation requirements are applied and enforced. RSPA, therefore, is unable to determine whether the requirements are preempted by Federal hazmat law.

f. Packaging Design and Construction. (1) LACoC Requirement. HASA challenges the following provision of LACoC Title 32:

§ 80.301(b)(1) states that containers and tanks must be designed and constructed in accordance with nationally recognized standards. Title 32, § 2.304(b) sets forth the national standards and publications recognized under that title. The most recent edition of Title 49 CFR Chapter 1 (which includes the HMR) is referenced.

(2) HASA's Arguments and Summary of Comments. HASA provides no explanation or arguments regarding how § 80.301(b)(1) is applied and enforced, or why HASA believes that it should be preempted.

(3) Analysis. Section 80.301(b)(1), on its face, requires that containers and tanks be designed and constructed in accordance with nationally recognized standards. ''Nationally recognized standards'' is defined at Title 32, § 2.304(b) to include the most recent edition of the HMR. There is no evidence in the record that design, construction, and performance standards other than those contained in the HMR are being applied and enforced under the LACoC, or that the containers and tanks at issue are being used to transport hazardous materials in commerce. Furthermore, LACoC § 80.101(a) exception 1 exempts ''off-site hazardous materials transportation in accordance with DOT requirements'' from the requirements of LACoC Article 80, including § 80.301(b)(1).

Thus, there is insufficient evidence in the record to determine whether Federal hazmat law preempts § 80.301(b)(1).

3. Ruling

Based on the above, Federal hazmat law preempts the following provisions of LACoC Titles 2 and 32:

(1) Title 2 LACoC §§ 2.20.140, 2.20.150, 2.20.160, and 2.20.170, to the extent that those provisions levy a fee on tank car unloading activities. The fees collected under those provisions are not used for purposes related to hazardous materials transportation;

(2) Title 32 LACoC § 79.809(f), as applied and enforced by Los Angeles County. Los Angeles County fails to recognize the validity of a DOT exemption that authorizes HASA to employ alternative methods of compliance with certain Federal tank car unloading requirements; and

(3) Title 32 LACoC § 79.809(c), which prohibits a tank car from remaining on a siding at point of delivery for more than 24 hours while connected for transfer operations, unless otherwise approved by the fire chief. The unloading restriction is not

''substantively the same'' as Federal tank car unloading requirements.

Based on a lack of information in the record, RSPA is unable to determine whether Federal hazmat law preempts LACoC Title 32, §§ 80.103(e), 80.301(b)(1), 80.402(b)(3)(G)(i) and 80.402(c)(8)(A).

Federal hazmat law does not preempt the following provisions of LACoC Title 32: § 4.108.c.7, Table 4.108–A, § 79.809(b), § 80.101(a) exception 1, § 80.101(b), § 80.103(a), § 80.103(b)(1), § 80.103(b)(2), § 80.103(c), § 80.103(d), § 80.201, §§ 80.202(a) and (b), § 80.203, Appendix VI-A, and § 80.301(a)(2).

C. PD–10(R) (Docket PDA–10(R)

Los Angeles County, California Requirements Applicable to the Transportation and Handling of Hazardous Materials on Private Property

Applicant: Swimming Pool Chemical Manufacturers' Association (SPCMA)
Local Laws Affected:
Los Angeles County Code (LACoC) Title 32 :
§ 4.108(c)(8)
§ 9.105
§ 75.101
§ 75.103(a)
Table 75.103–A
§ 75.104
§ 75.105 (a) and (b)
§ 75.108
§ 75.205
§ 75.602 (a), (b), and (c)

Summary: Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101–5127, does not preempt the following provisions of LACoC Title 32: § 4.108(c)(8), § 9.105, § 75.101, § 75.103(a), Table 75.103–A, § 75.104, §§ 75.105 (a) and (b), § 75.108, § 75.205, and §§ 75.602 (a), (b), and (c).

1. Application For Preemption Determination

SPCMA filed its application with the Research and Special Programs Administration (RSPA) on January 20, 1993, asking that certain provisions of Title 32 of the 1990 LACoC be preempted. SPCMA states that preemption is warranted because the LACoC applies to the transportation of cryogenic liquids, including unloading and storage. Furthermore, SPCMA asserts that the LACoC applies to the construction of containers used for the transportation of cryogenic liquids, a covered subject area.

On February 12, 1993, RSPA published a Public Notice and Invitation to Comment on SPCMA's application. 58 FR 8480. That Notice set forth the text of SPCMA's application. Following publication of the Public Notice, comments were submitted by the American Trucking Associations (ATA), the County of Los Angeles Fire Department, and the Compressed Gas Association, Inc. Rebuttal comments were submitted by SPCMA.

In response to RSPA's October 14, 1993 Public Notice re-opening the comment period in Docket PDA–10(R), comments were submitted by SPCMA, HASA and the County of Los Angeles Fire Department. SPCMA also updated its application to reflect amendments to Title 32 that were adopted by Los Angeles County in May 1993.

2. Discussion

a. Permits. (1) LACoC Requirements.

SPCMA challenges the following provisions of LACoC Title 32:

§ 75.101 requires that storage, handling, and transportation of cryogenic fluids be in accordance with LACoC Article 75. (Article 75 sets forth all requirements pertaining specifically to cryogenic fluids.)

§ 4.108(c)(8) states that a permit must be obtained from the Bureau of Fire Prevention prior to producing, storing or handling ''cryogens'' in excess of amounts specified in Table No. 4.108–B, except where Federal or State regulations apply.

§ 75.104 indicates that a permit must be obtained to store, handle or transport ''cryogens,'' and references § 4.108.

(2) SPCMA's Arguments and Summary of Comments. SPCMA asserts that the permit requirements in Title 32 apply to any person, firm or corporation that stores, handles or transports cryogenic liquids in excess of the permit amounts set forth in Table No. 4.108–B. Based on its review of § 4.108.c.8, § 75.101, and § 75.104, SPCMA concludes that, in the LACoC, the terms ''handling'' and ''transportation'' are synonymous. SPCMA points out that ''handling'' is defined in LACoC § 9.110 as ''the deliberate transport of material by any means to a point of storage or use.''

SPCMA further contends that ''there is no assurance that a permit can be obtained from the Bureau of Fire Prevention and/or obtained without prior compliance with the LACoC, and in particular, Article 75. Many of the requirements contained in Article 75 are themselves preempted by [Federal hazmat law] and regulation[s] thereunder.'' SPCMA concludes that the requirement to obtain a permit prior to the storage, handling or transportation of cryogenic liquids is an obstacle to accomplishing and carrying out Federal hazmat law and the HMR and is, therefore, preempted.

ATA supports SPCMA's position. ATA states that the LACoC applies to the transportation of cryogenic liquids, including loading, unloading, and storage incidental thereto, in interstate and intrastate commerce. ATA believes that the requirements directly conflict with Federal hazmat law and the HMR.

The County of Los Angeles Fire Department disagrees with SPCMA's assertion that certain provisions within Title 32 apply to transportation in commerce, and asserts that Title 32 applies to fixed facilities that ''handle'' hazardous materials. It states that, under the LACoC, ''transport'' is defined as ''handle.'' It explains that cryogenic liquids arrive at a manufacturing facility via railroad tank car, and the contents are unloaded to a stationary storage tank at the facility. As the need arises, the cryogenic liquids are ''transported'' via either piping or containers to the site of use. The County of Los Angeles Fire Department explains that, in the above-described situation, '' 'transport' can mean the transport of cryogenic liquids to processing equipment and pressure vessels from a distant stationary pressure storage tank via piping or from a portable pressure tank that is transported to the processing area.'' It submits that the meaning of transport in the above example is quite different from that set forth under 49 CFR 107.3, which defines ''transportation'' as ''any movement of property by any mode, and any loading, unloading, or storage incidental thereto.''

(3) Analysis. SPCMA, like HASA (in PDA–7(R), discussed above in PD–9(R)), seeks preemption of the permit requirements under the LACoC. In this instance, a permit is required to produce, store, transport on site or handle cryogenic fluids in excess of specified amounts. SPCMA, like HASA, asserts that the permit requirements are preempted because they apply to a facility's on-site transportation of hazardous materials and, therefore, are an obstacle to accomplishing and carrying out Federal hazmat law. For the reasons enumerated above in PD–8(R), Federal hazmat law does not preempt the LACoC permit requirements, which implement the handling requirements under Chapter 6.95 of the California Health and Safety Code.

b. Definition/Classification of Cryogenic Fluids. (1) LACoC Requirements. SPCMA challenges the following provisions of LACoC Title 32:

§ 9.105 defines cryogenic fluids as those fluids that have a normal boiling point below 150 degrees fahrenheit.

§ 75.103(a) specifies that cryogenic fluids shall be classified according to Table No. 75.103–A.

Table No. 75.103–A classifies specified cryogenic fluids as either ''flammable,'' ''nonflammable,'' Corrosive/Highly Toxic'' or ''Oxidizer.''

(2) SPCMA's Arguments and Summary of Comments. SPCMA states that the definition of cryogenic fluid at LACoC § 9.105 differs from the definition of cryogenic liquid contained at 49 CFR 173.115(g). Specifically, § 9.105 defines ''cryogenic fluid'' as ''a fluid that has a normal boiling point below 150 degrees fahrenheit.'' Section 173.115(g) defines ''cryogenic liquid'' as ''a refrigerated liquefied gas having a boiling point colder than −90 degrees celsius (−130 degrees Fahrenheit) at 101.3 kPa (14.7 psi) absolute.'' SPCMA alleges that ''it is impossible to comply with both the definition in the LACoC and the definition in Title 49, because the LACoC definition includes additional 'hazardous materials' which are not classified for shipment as 'cryogenic liquids' in the 'Hazardous Materials Table' at 49 CFR 172.101.'' SPCMA, therefore, concludes that § 9.105 should be preempted because it applies to a covered subject area—the designation of materials as hazardous—and compliance with both the Federal and local requirement is impossible.

With respect to the classification of hazardous materials, SPCMA states that § 75.103 and Table 75.103–A provide a classification system for cryogenic fluids that is in addition to and different from the HMR. SPCMA gives several examples of how the LACoC classification system and the HMR classification system differ. SPCMA concludes that Federal hazmat law preempts § 75.103 and Table 75.103–A because those provisions apply to hazardous materials classification, a covered subject, and are not substantively the same as the Federal requirement.

The County of Los Angeles Fire Department opposes preemption of § 75.103 and Table 75.103–A. It states that ''Title 32 [of the LACoC] regulates the handling and not the transport[ation] (per 49 CFR 107.3) of hazardous substances at a fixed facility. The chemical classification under [Federal hazmat law and the HMR] applies to transportation and does not apply to 'handling' of cryogenic liquids within a fixed facility.''

(3) Analysis. The designation of materials as hazardous and the classification of hazardous materials, for purposes of transportation in commerce, are exclusive to the Federal Government. See 49 U.S.C. 5125(b)(1)(A). Federal hazmat law provides that State, local and Indian tribe requirements pertaining to hazardous materials designation and classification for purposes of transportation in commerce are preempted if they are not substantively the same as the Federal requirements or are not otherwise authorized by Federal law. Id. The Federal Government's exclusive role in hazardous materials designation and classification is limited, however, to materials that are in transportation in commerce. Federal hazmat law provides that ''[t]he Secretary of Transportation shall designate material * * * or a group or class of material as hazardous when the Secretary decides that *transporting the material in commerce* in a particular amount and form may pose an unreasonable risk to health and safety or property.'' 49 U.S.C. 5103 (emphasis added).

There is no evidence in the record that Los Angeles County, through LACoC § 9.105, is attempting to designate additional materials as hazardous for purposes related to transportation in commerce. Furthermore, there is no evidence in the record that the LACoC's classification system for cryogenic fluids is applied to materials that are in transportation in commerce. In order for Federal hazmat law to preempt the LACoC requirements, the LACoC requirements would have to apply to the transportation of hazardous materials *in commerce*, or loading, unloading or storage incidental thereto.

The LACoC's designation of certain materials as ''cryogenic fluids'' and its classification of those materials, in conjunction with the amount of the cryogenic fluid at issue, appear from the record and from RSPA's review of LACoC Article 75 to be used to determine, among other things: (1) whether a permit is required under Article 4 of Title 32, Table 4.108–A; and (2) the required minimum separation between cryogenic fluids in storage on the one hand, and buildings, public spaces, and other hazardous materials, on the other. *See* Table 75.303–A. RSPA has determined that Federal hazmat law does not preempt the LACoC permit requirements because the underlying substantive requirements are otherwise authorized by Federal law. Furthermore, consignee storage of hazardous materials is not regulated under Federal hazmat law.

Thus, Federal hazmat law does not preempt § 9.105, § 75.103(a), or Table No. 75.103–A.

c. Hazard Communication. (1) LACoC Requirements. SPCMA challenges the following provisions of LACoC Title 32:

§ 75.108 requires that warning labels and signs be posted on containers and equipment at locations prescribed by the fire chief.

§ 75.205 states that containers must be identified by the attachment of a nameplate in an accessible place marked as authorized by nationally recognized standards (as set forth at § 2.304(b)) or DOT regulations.

§ 75.602(a) indicates that vehicles transporting cryogenic fluids and subject to Title 32 must be ''placarded at the front, rear and on each side identifying the product.'' Placards must have letters not less than two inches high using approximately a ⅝ inch stroke. Abbreviations are not permitted. Vehicles also must bear other placards required by DOT.

(2) SPCMA's Arguments and Summary of Comments. SPCMA states that § 75.108 requires fixed facilities to post warning labels and signs on containers and equipment and at locations prescribed by the fire chief. SPCMA asserts that the phrase ''warning labels and signs'' includes labeling, marking and placarding of cryogenic liquid containers. SPCMA further asserts that the LACoC does not specify the particular requirements for labeling, marking and placarding and that, therefore, SPCMA cannot compare the LACoC requirements with Federal hazmat law and HMR requirements in order to ascertain whether they are substantively the same. SPCMA also alleges that different fire chiefs in different jurisdictions ''are likely to have different requirements.'' SPCMA concludes that the requirements under § 75.108 are preempted because they apply to a covered subject—labeling, marking and placarding of hazardous materials—and are an obstacle to accomplishing and carrying out Federal hazmat law and the HMR.

SPCMA states that § 75.205 requires that nameplates be attached to containers ''as authorized by nationally recognized standards or DOT regulations.'' SPCMA asserts that ''nationally recognized standards'' may or may not be substantively the same as requirements under the HMR. SPCMA states that § 75.205 is preempted because it applies to containers used for the transportation of cryogenic liquids—a covered subject area.

SPCMA states that the vehicle placarding requirements under § 75.602 are in addition to, and different from, Federal requirements. Furthermore, SPCMA asserts that § 75.602(a) confuses the requirements for ''marking'' and ''placarding.'' SPCMA states that ''[p]lacarding' is required in the LACoC where neither 'placarding' nor 'marking' is required by Federal regulation. In the LACoC, placarding is required for all

shipments of cryogenic liquids, irrespective of quantity being transported. [Under the HMR,] placarding is not required for shipments of 1,000 pounds or less for 2.1 and 2.2 materials. All shipments—irrespective of quantity—of 2.3 material require placarding.''

SPCMA also states that the ''placarding'' requirement at 75.602(a) actually appears to be a ''marking'' requirement addressed in Subpart D of 49 CFR Part 172. SPCMA states that § 75.602(a) requires '' 'placarding' on all vehicles transporting any quantity of cryogenic liquids, and that 'placarding' includes 'placards' and 'markings.' '' SPCMA concludes that the requirements at § 75.602(a) are in addition to and different from Federal requirements, in that placarding is required under the LACoC ''at times when and at places where there is no Federal requirement.'' SPCMA asserts that § 75.602(a) requirements pertain to a covered subject area and are not substantively the same as the Federal requirements. SPCMA, therefore, requests that the requirements be preempted. SPCMA also alleges that the § 75.602(a) requirements ''fail'' the dual compliance test.

The County of Los Angeles Fire Department opposes preemption of § 75.602(a), stating that the placarding requirements under the LACoC apply to the on-site handling of hazardous materials and not the transportation of hazardous materials in commerce.

(3) Analysis. The record does not reflect that the labeling, nameplating and placarding requirements under §§ 75.108, 75.205, and 75.602(a), respectively, are applied to hazardous materials that are in transportation in commerce and, consequently, regulated under Federal hazmat law and the HMR. These regulations appear to apply to hazardous materials stored and transported at facilities for consumption in manufacturing processes. As stated throughout this determination, Federal hazmat law and the HMR do not apply to: (1) hazardous materials that are stored at a consignee's facility; or (2) the transportation of hazardous materials exclusively on private property. Therefore, to the extent that the requirements in §§ 75.108, 75.205 and 75.602(a) pertain to hazardous materials that are stored at a consignee's facility or that are being transported exclusively within that facility, they do not conflict with Federal hazmat law and are not preempted.

d. Motor Vehicles. (1) LACoC Requirements. SPCMA challenges the following provisions of LACoC Title 32:

§ 75.602(b) requires that vehicles transporting cryogenic fluid be equipped with not less than one approved-type fire extinguisher, with a minimum rating of 2–A:20–B:C.

§ 75.602(c) requires that vehicles transporting cryogenic fluid be equipped with adequate chock blocks.

(2) SPCMA's Arguments and Summary of Comments. SPCMA notes that 49 CFR 177.804 requires motor carriers and other persons subject to 49 CFR Part 177 to comply with Federal Motor Carrier Safety Regulations (FMCSR). SPCMA states that the FMCSR, at 49 CFR 393.95, requires a host of safety equipment on all power units, *e.g.*, fire extinguishers, spare fuses, flares, red flags. SPCMA asserts that because ''there is no requirement [under the LACoC] for emergency equipment other than fire extinguishers * * * the [LACoC] fire extinguisher requirement is inconsistent with the Federal requirements contained in * * * 49 CFR 393.95(a).'' SPCMA concludes that the fire extinguisher requirement ''fails both the 'obstacle' and 'dual compliance' tests'' and should be preempted.

SPCMA does not address the requirement in § 75.602(c) that vehicles transporting cryogenic fluid be equipped with adequate chock blocks.

No commenter specifically addressed § 75.602(b) or § 75.602(c).

(3) Analysis. SPCMA does not allege and the record does not reflect that the requirements under § 75.602(b) or § 75.602(c) are applied to motor vehicles that transport hazardous materials on other than private property. As stated earlier, Federal hazmat law and the HMR apply to transportation in commerce. Ground transportation is ''in commerce'' when it takes place on, across, or along a public way. Ground transportation of hazardous material that takes place entirely on private property is not transportation ''in commerce,'' and is not regulated by Federal hazmat law and the HMR.

Thus, Federal hazmat law does not preempt LACoC § 75.602(b) or § 75.602(c) to the extent that each applies to motor vehicles that are transporting hazardous materials exclusively on private property.

e. Packaging Design and Construction. (1) LACoC Requirements. SPCMA challenges the following provisions of LACoC Title 32:

§ 75.105(a) requires that containers, equipment and devices used for the storage, handling and transportation of ''cryogenic fluids'' be of a type, material and construction approved by the fire chief as suitable for that use. Approval is based on satisfactory evidence that design, construction and testing are in accordance with nationally recognized standards. Title 32, § 2.304(b) lists various national standards and publications, and indicates that the most recent edition or supplement may be used; included in that list is Title 49, Code of Federal Regulations, Chapter 1, which contains the HMR.

§ 75.105(b) states that containers, equipment or devices that are not in compliance with recognized standards for design and construction may be approved by the chief on presentation of satisfactory evidence that they are designed and constructed for safe operation.

(2) SPCMA's Arguments and Summary of Comments. SPCMA notes that the term ''container'' is defined at § 75.102(b) as ''any cryogenic vessel used for transportation, handling or storage.'' SPCMA believes the term ''container'' includes all containers used for both storage and on-site transportation of cryogenic liquids, including portable tanks, cargo tanks and rail cars. SPCMA further notes that the fire chief has discretionary approval authority under §§ 75.105 (a) and (b).

SPCMA specifically requests that three issues be addressed in RSPA's preemption determination regarding §§ 75.105 (a) and (b):

(1) Can the chief prohibit the use of containers for the transportation of cryogenic liquids, which he has not approved, and where there are no Federal specifications?

(2) Can the chief approve containers for the transportation of cryogenic liquids [when those containers] are different from those specified in Title 49 of the CFR?

(3) Can the chief approve containers for the transportation of cryogenic liquids which are not in compliance with Federal specifications where Federal specifications exist?

SPCMA states that the fire chief is authorized to approve containers prior to the on-site transportation of cryogenic liquids, including type, material, and construction, absent any Federal requirements. Furthermore, SPCMA alleges that requirements and specifications are likely to vary from district to district, depending on requirements and specifications established by the local fire chief. SPCMA also asserts that the fire chief is authorized to approve any container for on-site transportation without regard to whether the container is constructed in accordance with DOT specifications. Consequently, the fire chief can approve specifications and construction of containers that are in addition to, different from, or not approved by DOT. SPCMA concludes that the requirements under §§ 75.105 (a) and (b) should be

preempted by the Federal hazmat law because they: (1) are an obstacle to accomplishing and carrying out Federal hazmat law and the HMR; and (2) apply to a covered subject area and are not substantively the same as the Federal requirements.

ATA agrees with SPCMA's position and arguments regarding the LACoC packaging design and construction requirements to the extent that the requirements ''pertain to actual transportation of hazardous materials.'' Nevertheless, ATA believes that the LACoC requirements are not in conflict with Federal hazmat law and the HMR where transportation has concluded. ATA notes that ''strict storage of materials for use on the consignee's property is not governed by [Federal hazmat law] and HMRs. Regulations pertaining to storage of materials are within the purview of [OSHA] at the Federal level and similar agencies within the states.''

(3) Analysis. Federal hazmat law and the HMR apply to the design and construction of containers used to transport hazardous materials in commerce. This authority is exclusive to the Federal Government. *See* 49 U.S.C. 5125(b)(1)(E). Federal hazmat law provides that the ''design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a package or container represented, marked, certified or sold as qualified for use in transporting hazardous material'' is a covered subject area. *Id.* A State, local or Indian tribe requirement that is not substantively the same as the Federal requirements, therefore, is preempted unless otherwise authorized by Federal law.

The packaging design and construction requirements under the LACoC apply to packagings used to transport hazardous materials within the gates of a facility. Federal hazmat law and the HMR do not apply to packagings that are intended for use solely on private property, *i.e.*, packagings that are not intended for the transportation of hazardous materials in commerce. The record does not reflect that the containers, equipment and devices regulated under §§ 75.105 (a) and (b) are used to store, handle or transport cryogenic fluids that are in transportation in commerce.

Consequently, Federal hazmat law does not preempt §§ 75.105 (a) and (b).

3. Ruling

Based on the above, Federal hazmat law does not preempt any of the following provisions of Title 32 LACOC: § 4.108(c)(8), § 9.105, § 75.101, § 75.103(a), Table 75.103–A, § 75.104, §§ 75.105 (a) and (b), § 75.108, § 75.205, and §§ 75.602 (a), (b) and (c).

D. PD–11(R) (Docket PDA–11(R))

Los Angeles County, California Requirements for The On-Site Transportation of Compressed Gases

Applicant: Swimming Pool Chemical Manufacturers' Association (SPCMA)

Local Laws Affected: Los Angeles County Code (LACoC), Title 32 § 4.108.c.7

Summary: Federal hazardous material transportation law, 49 U.S.C. 5101–5127, does not preempt LACoC § 4.108.7 because the substantive permit application requirements are otherwise authorized by Federal law, specifically Title III of the Superfund Amendments and Reauthorization Act (SARA Title III), 42 U.S.C. §§ 11001 *et seq.* and § 112(r) of the Clean Air Act Amendments of 1990 (CAA Amendments), 42 U.S.C. 7412(r).

1. Application for Preemption Determination

On January 12, 1993, SPCMA applied for a determination that Federal hazmat law preempts the permit requirement under LACoC Title 32 as it applies to the on-site transportation of compressed gases. On February 12, 1993, the Research and Special Programs Administration (RSPA) published a Public Notice and Invitation to Comment on SPCMA's application in the **Federal Register**, 58 FR 8488. That Notice set forth the text of SPCMA's application. Following publication of this Public Notice, comments were submitted by the American Trucking Associations, the County of Los Angeles Fire Department, and the Compressed Gas Association. Rebuttal comments were submitted by SPCMA.

In response to RSPA's October 14, 1993, Public Notice re-opening the comment period in Docket PDA–11(R), comments were submitted by SPCMA, HASA and the County of Los Angeles Fire Department.

2. Discussion Regarding Permits

a. LACoC Requirement. SPCMA challenges the following provision under LACoC Title 32:

§ 4.108.c.7 requires a permit to be obtained from the Bureau of Fire Prevention prior to engaging in the storage, on-site transportation, dispensing, use or handling of a compressed gas, at normal temperatures and pressures, in excess of specified amounts listed in Table 4.108–A.

b. SPCMA's Arguments and Summary of Comments. SPCMA states that a permit is required ''for the 'on-site' transportation of compressed gases, *i.e.*, movement on property owned, leased, or otherwise under the control of the consignor, consignee, manufacturer, transporter, etc.'' SPCMA further asserts that ''[i]n almost all cases, both 'loading' and 'unloading' of compressed gases occur 'on-site.' Therefore, the permit requirement in the LACoC is applicable to such activities.''

SPCMA asserts that ''there is no assurance in the LACoC that a permit can be obtained from the bureau of fire prevention and/or obtained without prior compliance with the LACoC. Moreover, a permit can be revoked or cancelled where a change in ownership of the business occurs, change in use of the property, noncompliance with the fire code, change in operations, etc.'' SPCMA believes that ''the permit system is an unauthorized prior restraint on shipment of compressed gases in commerce which are presumptively safe based on compliance with [Federal hazmat law and the HMR], and therefore, constitutes an obstacle to the accomplishment and execution of [Federal hazmat law].''

The County of Los Angeles Fire Department opposes preemption of § 4.108.c.7, stating that the permit requirement does not apply to the transportation of hazardous materials in commerce. It asserts that:

> ''transportation'' as stated in 49 CFR 107.3, means any movement of property by any mode, and any loading, unloading or storage incidental thereto, as related to intrastate and interstate commerce. Under [Title 32 of the LACoC] the * * * meaning of transport is defined as 'handle.' Title 32 * * * regulates the 'storage,' 'handling' and 'use' of hazardous substances, materials and devices that may prove to be hazardous to life or property in the use or occupancy of buildings or premises. [The permit requirement for compressed gases] specifically states the exemption of the permitting requirement for those facilities [where] Federal or State regulations apply.

c. Analysis. In PDA–7(R), HASA challenged LACoC § 4.108.c.7. A discussion of the LACoC permit requirement under § 4.108.c.7, and the rationale for RSPA's finding that Federal hazmat law does not preempt § 4.108.c.7, are at PD–8(R), above.

3. Ruling

Based on the above, Federal hazmat law does not preempt § 4.108.7 because the substantive permit application requirements are otherwise authorized by Federal law, specifically SARA Title III and § 112(r) of the CAA Amendments.

III. Appeal Rights

In accordance with 49 CFR 107.211(a), ''[a]ny person aggrieved'' by these decisions may file a petition for reconsideration within 20 days of service of this decision. Any party to these proceedings may seek review of RSPA's decisions ''by the appropriate district court of the United States * * * within 60 days after such decision becomes final.'' 49 App. U.S.C. 1811(e).

These decisions will become RSPA's final decisions 20 days after service 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 the decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of these decisions is filed within 20 days of service, 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 February 7, 1995.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

Appendix A—Statutory and Regulatory Provisions at Issue in PD–8(R), PD–9(R), PD–10(R) and PD–11(R)

A. PD–8(R)—(Docket PDA–9(R)) California Health and Safety Code, Chapter 6.95

25501.3. Additional definition of ''Handle''

''Handle'' also means the use or potential for use of a quantity of hazardous material by the connection of any marine vessel, tank vehicle, tank car, or container to a system or process for any purpose other than the immediate transfer to or from an approved atmospheric tank or approved portable tank.

25503.7. Railroad car, marine vessel, or tank truck at same facility 30 days; stored

(a) When any hazardous material contained in any rail car, rail tank car, rail freight container, marine vessel, or marine freight container remains within the same railroad facility or business facility for more than 30 days, or a business knows or has reason to know that any rail car, rail tank car, rail freight container, marine vessel, or marine freight container containing any hazardous material will remain at the same railroad facility, marine facility, or business facility for more than 30 days, the hazardous material is deemed stored at that location and for purposes of this chapter and subject to the requirements of this chapter.

(b) Subdivision (a) does not apply to a marine vessel while under construction, repair, modernization, or retrofitting while located in a ship repair facility.

(c) Notwithstanding Section 25510, a business handling hazardous materials or hazardous substances which are stored in a manner subject to subdivision (a) shall immediately notify the administering agency whenever a hazardous material is stored in a rail car, rail tank car, rail freight container, marine vessel, or marine freight container. (Amended by Stats. 1991, Ch. 1128.)

B. PD–9(R)—(Docket PDA–7(R)) Los Angeles County Code, Titles 2 and 32

Title 2

Section 2.20.140 Annual fees to be paid by handlers of hazardous materials.

The annual fee required to be paid to the county by every handler of hazardous materials for the administration and enforcement of the provisions of the Act shall be as follows:

Fee group	Total quantity of hazardous materials handled at any one time during the retotal quantity of hazardous materials handled at any one time during fee group the reporting year	Annual fee
I.	Minor Handler ..... 55–500 gallons or 500–5,000 pounds or 200–2,000 cubic feet	$110.00
II.	Moderate Handler ..... 501–2,750 gallons or 5,001–25,000 pounds or 2,001–10,000 cubic feet	330.00
III.	Major Handler ..... 2,751 and over gallons or 25,001 and over pounds or 10,0001 and over cubic feet	770.00
IV.	Major Handler—Large Volume ..... (a) 50,000 gallons and over or (b) 500,000 pounds and over or (c) 200,000 cubic feet and over or (d) A total quantity of two or more hazardous materials when expressed in or converted to pounds that is 500,000 pounds or greater, AND (e) Which is either a refinery, chemical plant, distillery, bulk plant, or terminal as defined herein.	2,650.00

The following definitions govern the construction of this Section 2.20.140:

''Refinery'' means a plant in which flammable or combustible liquids are produced on a commercial scale from crude petroleum, natural gasoline, or other hydrocarbon sources.

''Chemical plant'' means a large integrated plant or that portion of such a plant other than refinery or distillery where liquids are produced by chemical reactions or used in chemical reactions.

''Distillery'' means a plant or that portion of a plant where liquids produced by fermentation are concentrated, and where the concentrated products may also be mixed, stored, or packaged.

''Bulk plant or terminal'' means that portion of a property where liquids are received by tank vessel, pipelines, tank car, or tank vehicle, and are stored or blended in bulk for the purpose of distributing such liquids by tank vessel, pipeline, tank car, tank vehicle, portable tank, or container.

V.	Exempt Handler ..... Less than 55 gallons and Less than 500 pounds and Less than 200 cubic feet	No fee
Exception:	..... Underground fuel tanks regardless of quantity.	Annual fee $110.00

Fee group	Total quantity of hazardous materials handled at any one time during the retotal quantity of hazardous materials handled at any one time during fee group the reporting year	Annual fee

Exemption: Every governmental agency shall comply with the reporting requirements established by the county administering agency relating to hazardous materials under the Act, but every governmental agency is exempt from the annual fee required to be paid under this Section 2.20.140.

(Ord. 90–0109 § 3.1990: Ord. 89–0055 § 1.1989: Ord. 87–0001 § 1 (part), 1987.)

2.20.150 Additional fees—Acutely hazardous substances.

Every handler of an acutely hazardous material, shall in addition to the fee specified in Section 2.20.140, be required to pay an annual fee to the county for the administration and enforcement of acutely hazardous materials registration, risk assessment, and risk mitigation in accordance with compliance under the Act. This fee shall be calculated as follows:

AHM Fee = Base Administrative Fee + RMPP Risk Factor Fee

Where:

The base administrative fee shall be charged each handler of one or more acutely hazardous materials or mixtures containing an acutely hazardous material handled in quantities equal to or greater than the threshold planning quantities specified in Section 25536 of the Act, as follows:

1–3 AHMs = $50

4 or more AHMs = $100

And

RMPP Risk Factor Fee = Rate Factor x Handler Risk Units

Where:

The county rate factor shall be calculated as the county RMPP program cost (the cost base for which is defined in Section 2.20.170), minus the total of the handler base administrative fees, divided by the total county risk units.

Rate Factor = County RMPP Program Cost—Total Base Admin. Fees÷Total County Risk Units

The total county risk units is determined by adding the risk units for each AHM registered in the county. The number of risk units for each AHM is equal to the total reported daily maximum quantity in pounds divided by the assigned TPQ for that AHM. For the 1990–91 fiscal year, the county RMPP program cost is $547,871, the total base administrative fees is $38,650, the total county risk units is 885,629 and the rate factor is $0.57498

And:

The handler risk units are determined by adding risk units for each AHM required to be registered by each handler.

Any ''Third Party Technical Review'' required by the administering agency shall be a cost paid by the handler.

Exemption:

Every governmental agency shall comply with the reporting requirements established by the county administering agency relating to AHMs under the Act, but every governmental agency is exempt from the annual fee required to be paid under this Section 2.20.150.

(Ord. 90–0190 § 4, 1990.)

2.20.160 Late submission fee.

A late submission fee shall apply to the filing requirements of both the business plan and inventory and to the AHM registration requirements as follows:

Each handler submitting the required hazardous materials business plan or inventory documents after January 1st of each year or of each second year as specified in Section 2.20.130 and each AHM handler submitting the required AHM registration documents after January 1st of each year shall be levied a late submission fee commensurate to the additional administrative costs as determined by the administering agency and approved by the auditor-controller. Said late submission fee shall be $230 for the 1990–91 fiscal year.

(Ord. 90–0190 § 5, 1990.)

2.20.170 Fee schedule—Annual adjustment procedure.

Beginning with the 1991–92 fiscal year, the schedule of fees contained in Sections 2.20.140 through 2.20.160 inclusive shall be adjusted annually by the following procedure:

The annual adjustment shall be the result of computing the change in the annualized cost to the administering agency of administering the program, where ''annualized cost'' is defined as the program cost which includes applicable salary, employee benefits and overhead calculated from rates contained in the administering agency's rate package, as approved by the auditor-controller.

Program Cost=Hazmat Section Personnel Salaries+Employee Benefits+Overhead

The program cost is annually re-allocated among handlers based upon:

(A) Disclosure Unit—The number of handlers in each fee group and time involved in processing the required documents in each group.

(B) RMPP Unit—Total county risk units and each handlers risk units.

Where:

Disclosure unit is the unit assigned to administer the hazardous materials disclosure program (Section 2.20.140), and RMPP unit is the unit assigned to administer the AHM registration and risk management and prevention programs (Section 2.20.150).

(Ord. 90–0190 § 6, 1990.)

TITLE 32

§ 4.108.

A permit shall be obtained from the bureau of fire prevention prior to engaging in the following activities, operations, practices or functions: * * *

c.7. Compressed gases. To store, transport on site, dispense, use or handle at normal temperatures and pressures compressed gases in excess of the amounts listed in Table No. 4.108.A.

TABLE NO. 4.108–A.—PERMIT AMOUNTS FOR COMPRESSED GASES[1]

Type of gas	Amount
Corrosive	Any amount.
Flammable (except cryogenic fluids and liquefied petroleum gases).	200 cubic feet.
Highly toxic	Any amount.
Inert	6,000 cubic feet.
Oxidizing (including oxygen).	500 cubic feet.
Pyrophoric	Any amount.
Radioactive	Any amount.
Toxic	Any amount.
Unstable (reactive)	Any amount.

[1] See Articles 74, 80 and 82 for additional requirements and exceptions.

§ 79.809.

(b) Storage Tanks. Class I, II or III liquids shall be transferred from a tank vehicle or tank car only into an approved atmospheric tank or approved portable tank.

(c) Time Limit. Tank vehicles and tank cars shall be unloaded as soon as possible after arrival at point of delivery and shall not be used as storage tanks. Tank cars shall be unloaded only on private sidings or railroad siding facilities equipped for transferring the liquid between tank cars and permanent storage tanks. Unless otherwise approved by the chief, a tank car shall not be allowed to remain on a siding at point of delivery for more than 24 hours while connected for transfer operations.

(f) Attendant. The operator or other competent person shall be in attendance at all times while a tank vehicle or tank car is discharging cargo. When practical, the tank vehicle or tank car shall be positioned such that the operating controls and the discharging end of the hoses are both in view of the operator or other competent person.

§ 80.101.

(a) General. Prevention, control and mitigation of dangerous conditions related to storage, dispensing, use and handling of hazardous materials and information needed by emergency response personnel shall be in accordance with this article.

Exceptions: 1. Off-site hazardous materials transportation in accordance with DOT requirements. * * *

(b) Material Classification. Hazardous materials are those chemicals or substances defined as such in Article 9. See Appendix VI–A for the classification of hazard categories and hazard evaluations.

Exception: For the purpose of this article, carcinogens, irritants and sensitizers do not include commonly used building materials and consumer products which are not otherwise regulated elsewhere in this code.

The classification system referenced in Division II shall apply to all hazardous materials regulated elsewhere in this code.

§ 80.103.

(a) General. Permits are required to store, dispense, use or handle hazardous material in excess of quantities specified in Section 4.108.

A permit is required when a material is classified as having more than one hazard category if the quantity limits are exceeded in any category.

Permits are required to install, repair, abandon, remove, place temporarily out of service, close or substantially modify a storage facility or other area regulated by this article. See also Sections 80.110 and 80.111.

(b) Hazardous Materials Business Plan. 1. Application. Each application for a permit required by this article shall include a hazardous materials business plan (HMBP) in accordance with Part 2 of Chapter 2.20 of Title 2 of this code. (2)—Reporting. Every business shall comply with the reporting requirements as set forth in Part 2 of Chapter 2.20 of Title 2 of this code.

(c) Hazardous Materials Inventory Statement. Each application for a permit required by this article shall include a hazardous materials inventory statement (HMIS) in accordance with Part 2 of Chapter 2.20 of Title 2 of this code.

(d) Risk Management and Prevention Program. Every business shall comply with the requirements as set forth in Part 2 of Chapter 2.20 of this code.

(e) Emergency Information. Hazardous materials business plans, risk management prevention programs and hazardous materials inventory statements shall be posted in an approved location and immediately available to emergency responders. The chief may require that the information be posted at the entrance to the occupancy or property. (Ord. 93–0044 § 100, 1993.)

§ 80.201.

Hazardous materials shall be divided into hazard categories. The categories include materials regulated under this article and materials regulated elsewhere in this code.

§ 80.202.

(a) Physical Hazards. The materials listed in this subsection are classified as physical hazards. A material with a primary classification as a physical hazard can also present a health hazard.

1. Explosives and blasting agents, regulated elsewhere in this code.
2. Compressed gases, regulated in this article and elsewhere in this code.
3. Flammable and combustible liquids regulated elsewhere in this code.
4. Flammable solids.
5. Organic peroxides.
6. Oxidizers.
7. Pyrophoric materials.
8. Unstable (reactive) materials.
9. Water-reactive solids and liquids.
10. Cryogenic fluids, regulated under this article and elsewhere in this code.

(b) Health Hazards. The materials listed in this subsection are classified as health hazards. A material with a primary classification as a health hazard can also present a physical hazard.

1. Highly toxic or toxic materials, including highly toxic or toxic compressed gases.
2. Radioactive materials.
3. Corrosives.
4. Carcinogens, irritants, sensitizers and other health hazards.

§ 80.203.

For descriptions and examples of materials included in hazard categories, see Appendix VI–A.

Appendix VI–A—[available in RSPA Dockets Unit]

§ 80.301.

(a)(2) Quantities exceeding exempt amounts. Storage of hazardous materials, in containers, cylinder and tanks, in excess of the exempt amounts specified in Sections 80.302 through 80.315 shall be in accordance with this division. Tank vehicles and railroad tank cars shall not be used as storage tanks. Unloading operations shall be in accordance with Section 79.808 [sic] [Should read ''Section 79.809'']. (Ord. 93–0044 § 104, 1993.)

(b)(1) Containers and Tanks. Design and construction. Containers and tanks shall be designed and constructed in accordance with nationally recognized standards. See Section 2.304(b).

§ 80.402.

(b)(3)(G)(i) [Indoor dispensing and use] [Closed Systems] Special requirements for highly toxic and toxic compressed gases. Ventilation and storage arrangement. Compressed gas cylinders in use shall be within ventilated gas cabinets, laboratory fume hoods, exhausted enclosures or separate gas storage rooms. When portable or stationary tanks are utilized in use or dispensing, they shall be within a ventilated separate gas storage room or placed within an exhausted enclosure.

(c)(8)(A) [Exterior Dispensing and Use] Special requirements for highly toxic or toxic compressed gases. Ventilation and storage arrangement. When cylinders or portable containers are used out-of-doors, gas cabinets or a locally exhausted enclosure shall be provided.

C. PD–10(R)—(Docket PDA–10(R))

LOS ANGELES COUNTY CODE, TITLE 32

§ 4.108.

(c)(8). Cryogens. Except where federal or state regulations apply and except for fuel systems of the vehicle, to produce, store or handle cryogens in excess of the amounts listed in Table No. 4.108–B.

§ 9.105.

Cryogenic Fluid is a fluid that has a normal boiling point below 150°F.

§ 75.101

Storage, handling and transportation of cryogenic fluids shall be in accordance with this article.

For quantity limits for storage in buildings, see Section 80.311.

§ 75.103.

(a) Classification. Cryogenic fluids shall be classified according to Table No. 75.103–A.

TABLE NO. 75.103–A.—CLASSIFICATION OF CRYOGENIC FLUIDS

Flammable	Nonflammable	Corrosive/highly toxic	Oxidizer
Carbon Monoxide Deuterium [1] Ethylene Hydrogen Methane.	Air Argon Helium Krypton Neon Nitrogen Xenon.	Carbon Monoxide Fluorine Nitric oxide.	Fluorine. Nitric oxide. Oxygen.

[1] Heavy hydrogen is treated as hydrogen in this article.

§ 75.104.

For a permit to store, handle or transport cryogens, see Section 4.108.

Exception: Permits are not required for vehicles properly equipped for and using cryogenic fluids as the primary fuel for propelling the vehicle or for refrigerating the lading.

§ 75.105.

(a) General. Containers, equipment and devices used for the storage, handling and transportation of cryogenic fluids shall be of a type, material and construction approved

by the chief as suitable for such use. Approval shall be based upon satisfactory evidence that the design, construction and test are in accordance with nationally recognized standards. See Section 2.304(b).

(b) Unidentified Containers. Containers, equipment or devices which are not in compliance with recognized standards for design and construction may be approved by the chief upon presentation of satisfactory evidence that they are designed and constructed for safe operation.

§ 75.108.

Warning labels and signs shall be posted on containers and equipment and at locations prescribed by the chief.

§ 75.205.

Containers shall be identified by the attachment of a nameplate in an accessible place marked as authorized by nationally recognized standards or DOT regulations. See Section 2.304(b).

§ 75.602.

Vehicles transporting cryogenic fluids and subject to requirements of this code shall:

(a) Be placarded at the front, rear and on each side identifying the product. Placards shall have letters not less than 2 inches high using approximately a 5/8-inch stroke. Abbreviations shall not be used. In addition to the placard identifying the product, vehicles shall also bear other placards required by DOT, such as FLAMMABLE GAS and OXIDIZER.

(b) Be equipped with not less than one approved-type fire extinguisher, with a minimum rating of 2–A:20–B:C.

(c) Be equipped with adequate chock blocks.

D. PD–11(R)—(Docket PDA–11(R))

LOS ANGELES COUNTY CODE, TITLE 32

§ 4.108.

A permit shall be obtained from the bureau of fire prevention prior to engaging in the following activities, operations, practices or functions: * * *

c.7. Compressed gases. To store, transport on site, dispense, use or handle at normal temperatures and pressures compressed gases in excess of the amounts listed in Table No. 4.108–A.

[FR Doc. 95–3590 Filed 2–14–95; 8:45 am]

BILLING CODE 4910–60–P