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U.S. Department of Transportation
Research and Special Programs Administration

Office of the Chief Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

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BY FACSIMILE

Mr. Phillip A. Doyle, R.E.A.
Center for Legal and Social Justice
Immigration and Human Rights Clinic
2507 N.W. 36th Street
San Antonio, TX 78228

Dear Mr. Doyle:

I am responding to your request for an informal evaluation of Article IV of a proposed Hazardous Materials Handling and Transportation Ordinance for the City of Laredo, Texas (Draft Two).

As I believe you already understand, the Research and Special Programs Administration (RSPA) does not have adequate resources to conduct thorough reviews of State and local requirements outside of the preemption determination process set forth in 49 C.F.R. § 107.201 et seq. Moreover, informal reviews are hindered by the absence of the public input that occurs in the formal determination process under 49 U.S.C. § 5125(d)(1). To that end, I understand that Ms. Machado of my office has already provided you with an index and summary of preemption determinations and inconsistency rulings issued by RSPA. (The most current versions of that index and summary may be found on the Chief Counsel's Internet home page, at "http://rspa-atty.dot.gov".)

Nonetheless, at your request, I have briefly reviewed the draft Article IV you sent me, and I am providing you with my personal, informal, and unofficial comments addressed to requirements applicable to hazardous materials that are in storage incidental to transportation at "Short-term Storage Facilities." I understand that, under Article IV, "Long-term Storage" and "Temporary Storage" will not apply to any hazardous materials that are in transportation, including the loading, unloading and storage incidental to that transportation.

As you are aware, RSPA has initiated a rulemaking proceeding to better define "loading, unloading, and storage incidental" to transportation, and the applicability to these activities of Federal hazardous material transportation law and the Hazardous Materials Regulations (HMR). Accordingly, I am not in a position now to comment on the proposed definition of "Storage Incidental to Transportation" in proposed Sec. 15.68.200.D. For the purposes of these comments, I am assuming that the applicability of Subpart IIIB to those hazardous materials "which remain under active shipping papers upon arrival at a facility" is coextensive with the HMR's coverage of hazardous materials in storage incidental to transportation.

You should also be aware that the Department of Transportation has proposed to change the definitions of "hazmat employee" and "hazmat employer" in 49 U.S.C. § 5102. This proposal is in Section 10002 of the Department's proposed National Economic Crossroads Transportation Efficiency Act of 1997 that was sent to Congress last month. It can also be accessed through the Chief Counsel's home page.

The criteria for Federal preemption of local requirements affecting the transportation of hazardous materials are set forth in 49 U.S.C. 5125. Non-Federal requirements are preempted (unless they are otherwise authorized by Federal law) when they (a) make it impossible to comply with Federal hazardous material transportation law or the HMR; (b) create an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR; or (c) concern any of five "covered subjects" and are not "substantively the same as" requirements in Federal hazardous material transportation law or the HMR.

Under the proposed ordinance, each Short-term Storage Facility is required to hold the "hazardous materials storage permit" specified in Sec. 15.68.500. RSPA has stated many times that any permit requirement must be considered in the context of the requirements for obtaining a permit; i.e., the manner in which a permit requirement is applied and enforced is often critical to any determination whether a permit requirement is preempted. In proposed Sec. 15.68.500:

-the "information required by [the application] form" to be supplied by the City is not specified.

-although a Hazardous Materials Management Plan and Hazardous Materials Inventory Statement need not be submitted, and secondary containment is not required "for any [hazardous] material stored under active shipping papers," it is unclear whether "construction plans" are necessary, whether the permit will specify authorized "storage system(s)," and whether an additional permit will be required "whenever any storage system is substantially modified, replaced, closed, or removed . . ."

-to the extent that permit fees for Short-term Storage Facilities are used for administering and enforcing requirements related to other types of storage facilities, as apparently contemplated, there would be a violation of 49 U.S.C. § 5125(g)(1) which requires that fees related to transporting hazardous materials must be "fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response."

The applicability of Subpart IIIB to hazardous wastes appears to be somewhat conflicting. Sec. 15.68.400.B states that the hazardous materials regulated at Short-term Storage Facilities include "hazardous wastes . . . as defined in 49 CFR [§] 171.8" and also "materials designated as hazardous wastes as that term is defined in 40 CFR 261 et seq." However, under the HMR, the two categories are not coextensive. Only hazardous wastes that are "subject to the Hazardous Waste Manifest Requirements of the U.S. Environmental Protection Agency specified in 49 CFR part 262" are regulated as hazardous materials under the HMR. Moreover, the definitions (Sec. 15.68.200) state that "hazardous material" includes hazardous wastes, but other provisions in the proposed ordinance seem to regard the hazardous wastes as separate from hazardous materials. For example, the words "hazardous materials or wastes" are used in Secs. 15.68.410.B and 15.68.420.A.

The meaning and effect of the proposed "48 Hour Rule" in Sec. 15.68.400.D are also not clear, including the alternative of "suitable storage" when hazardous materials are not forwarded within 48 hours. This section may create time limits that conflict with:

-49 C.F.R. § 177.800(d), providing that highway shipments of hazardous materials "must be transported without unreasonable delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination."

-49 C.F.R. § 174.14(a), providing that a rail carrier "must forward each shipment of hazardous materials promptly and within 48 hours (Saturdays, Sundays, and holidays excluded) . . . except that where biweekly or weekly service only is performed, a shipment of hazardous materials must be forwarded on the first available train."

-40 C.F.R. § 263.12, allowing a transporter to store hazardous wastes at a transfer facility up to ten days without obtaining the permit required for a treatment, storage, and disposal facility.

In Sec. 15.68.420.A.1, the reference to "standards established under 49 CFR parts 100-199 for the safe packaging, storage, loading, unloading and transportation of [hazardous] materials" should be revised. The HMR consist of parts 171-180 of 49 C.F.R. Parts 101-130 do not appear applicable and 49 C.F.R. parts 190-199 relate to pipeline safety.

RSPA considers that 49 U.S.C. § 5125(b)(1) would preempt the requirement in Sec. 15.68.430.A.1 for a carrier to directly provide the City with a copy of an incident report submitted under 49 C.F.R. § 171.16. The submission of written incident reports is a covered subject, and the City's requirement for a separate submission is an additional requirement that is not substantively the same as submission of the written report to RSPA. The City may obtain from RSPA a copy of any report submitted to RSPA.

I hope this information is helpful. I have attempted to deal with all of the proposed requirements applicable to Short-term Storage Facilities, but my failure to discuss any of them should not be considered as a finding that a specific proposed

requirement would not be preempted. If you have specific questions, or wish to discuss any of these matters further, please feel free to contact me or Frazer Hilder of my staff, at 202-366-4400.

Sincerely,

Edward H. Bonekemper, III
Assistant Chief Counsel for
Hazardous Materials Safety and
Research and Technology Law