determination in the **Federal Register**. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review under 49 U.S.C. 5127(a).

A person who is adversely affected or aggrieved by a preemption determination may file a petition for judicial review of that determination in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Issued in Washington, DC on this 15th day of January, 2009.

David E. Kunz,

Chief Counsel.

[FR Doc. E9–1419 Filed 1–22–09; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–99–3599 (PD–19(R))]

New York State Department of Environmental Conservation Requirements on Gasoline Transport Vehicles

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

Local Laws Affected: New York Codes, Rules and Regulations (NYCRR), Chapter 6, Sections 230.4(a)(3), 230.6(b) & (c).

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

Modes Affected: Highway.

SUMMARY: Federal hazardous material transportation law does not preempt that part of 6 NYCRR 230.4(a)(3) requiring that a gasoline transport vehicle must be marked, near the U.S. DOT specification plate, with the date on which the tank was last tested for vapor tightness. Federal hazardous material transportation law preempts (1) the provisions in 6 NYCRR 230.4(a)(3) which require that the marking be a minimum two inches and contain ''NYS DEC''; (2) the requirement in 6 NYCRR 230.6(b) for maintaining a copy of the most recent pressure-vacuum test results with the gasoline transport vehicle; and (3) the requirement in 6 NYCRR 230.6(c) to retain pressure-vacuum test and repair results for two years, because these requirements are not substantively the same as requirements in the HMR on the marking, maintaining, repairing, or testing of a package or container that is represented, marked, certified, or sold as qualified for transporting hazardous material.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Background

A. Application

In this determination, PHMSA considers whether the Federal hazardous material transportation law preempts the following requirements of the New York State Department of Environmental Conservation (NYSDEC):

—Marking a gasoline transport vehicle, ''near with U.S. Department of Transportation certificate plate, in letters and numerals at least two inches high, which reads: NYS DEC and the date on which the gasoline transport vehicle was last tested'' for vapor tightness (6 NYCRR 230.4(a)(3));

—Maintaining a copy of the ''most recent pressure-vacuum test results * * * with the gasoline transport vehicle'' (6 NYCRR 230.6(b)); and

—Retaining test and repair records ''for two years after the testing occurred'' (6 NYCRR 230.6(c)).

In February 1998, the National Tank Truck Carriers, Inc. (NTTC) applied for a determination that the Federal hazardous materials transportation law preempts these marking and record keeping requirements. NTTC has not challenged the underlying requirement in 6 NYCRR 230.4(b) that gasoline transport vehicles undergo the annual pressure-vacuum test set forth in ''Reference method 27 in Appendix A of 40 CFR'' (EPA Method 27). NTTC also stated it has no quarrel with the requirement in 6 NYCRR 230.6(a) to ''maintain records of pressure-vacuum testing and repairs.''

In a notice published in the **Federal Register** on June 2, 1998 (63 FR 30032), the Research and Special Programs Administration (PHMSA's predecessor agency) [1] invited interested persons to submit comments on NTTC's application. In response to this notice, comments were submitted by NYSDEC; the environmental agencies of three other States (Connecticut, Delaware, and Pennsylvania); Region 2 of the U.S. Environmental Protection Agency (Region 2); and four industry associations: Association of American Railroads (AAR), Empire State Petroleum Association, Inc. (ESPA), National Propane Gas Association (NPGA), and Petroleum Marketers Association of America (PMAA). NYSDEC, NTTC, and AAR submitted rebuttal comments. PHMSA denied NYSDEC's request to formally extend or reopen the comment period, but advised NYSDEC that an interested person may always bring new developments or address a newly raised issue under the procedural regulations which provide that ''Late-filed comments are considered so far as practicable.'' 49 CFR 107.205(c).

In its application, NTTC stated that its members had received citations for violations of these requirements. ESPA confirmed that these requirements were being actively enforced and stated that, in January and February 1998, NYSDEC ''conducted separate enforcement details outside the ports of Albany and Rensselaer in upstate New York. Numerous citations were issued alleging the failure to post a mandated DEC label and the failure to keep a copy of the tank test results with the cargo tank or transport vehicle.''

PHMSA's decision on NTTC's application has been delayed in order for PHMSA to:

1. Consult with the U.S. Environmental Protection Agency (EPA) whether the NYSDEC marking and record keeping requirements are authorized by the Clean Air Act, 42 U.S.C. 7401 *et seq.*, EPA's December 1978 control technology guidance document ''Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems'' (EPA 1978 CTG), and Region 2's approval of New York's State Implementation Plan (SIP) (see 51 FR 21577 [June 13, 1986]), as contended by NYSDEC, the Connecticut, Delaware,

[1] Effective February 20, 2005, PHMSA was created to further the ''highest degree of safety in pipeline transportation and hazardous materials transportation,'' and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C. 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108–426, § 2, 118 Stat. 2423 (Nov. 30, 2004)); and 49 CFR 1.53(b), as amended at 70 FR 8301–02 (Feb. 18, 2005). For consistency, the terms ''PHMSA'' and ''we'' are used in the remainder of this determination, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

and Pennsylvania environmental agencies, and Region 2;

2. Attempt to resolve the issue concerning the marking requirements in 6 NYCRR 230.4(a)(3) by adding to the HMR a separate marking on a cargo tank which has been leakage tested under EPA Method 27 in order to ''establish a national, uniform marking requirement for cargo tanks tested for vapor tightness in accordance with EPA regulations instead of, or in addition to, the leak test procedures specified in the HMR.'' Final rule, ''Requirements for Cargo Tanks,'' 68 FR 19258, 19263 (Apr. 18, 2003).

3. Determine whether NYSDEC was still enforcing its marking and record keeping requirements after issuance of PHMSA's 2003 final rule adding the EPA Method 27 marking to the HMR.

NTTC has recently advised that NYSDEC is continuing to enforce its different marking provisions in 6 NYCRR 230.4(a)(3) and its record keeping requirements in 6 NYCRR 230.6(b) and (c). In October 2007, NTTC submitted a copy of a July 22, 2006 citation issued to one of its members for failing to maintain records of the pressure vacuum test on the vehicle and photographs of tank trucks marked ''NYS DEC'' plus the month and year of the most recent pressure-vacuum test. NTTC also stated that NYSDEC has not responded to inquiries about the present level of enforcement of these requirements.

Neither NTTC's application nor any of the comments indicate that NYSDEC has been actively applying the requirements for a pressure-vacuum test, or the marking and record keeping requirements challenged by NTTC, to rail tank cars used to transport gasoline or other petroleum products. PHMSA understands that relatively little gasoline is transported by rail. PHMSA's Office of Hazardous Materials Safety concluded that less than 1.5% of the tonnage of petroleum products moves by rail, in its 1998 study of ''Hazardous Materials Shipments.'' Based on the 2002 Vehicle Inventory Use Survey maintained by the U.S. Bureau the Census, PHMSA estimates that, in contrast, there are approximately 40,000 cargo tank motor vehicles in service which deliver some 332 million gallons of gasoline each day in the United States. While PHMSA understands that motor vehicle deliveries of gasoline are primarily local (traveling an average of 50 miles per trip), both NTTC and ESPA stated that gasoline tank trucks are regularly moved from southern states to the northeast in winter. ESPA also noted that ''it is common for gasoline and other petroleum transport vehicles in New York to switch cabs and cargo tanks for delivery,'' so that the test record must be transferred ''whenever a cab and a cargo tank are interchanged.'' The difficulty (if not impossibility) of maintaining test and repair records with a rail tank car is a final reason to assume that NYSDEC is not applying its marking and record keeping requirements to rail tank cars.

For these reasons, this determination considers the NYSDEC marking and recordkeeping requirements only as applied to motor vehicles and does not address whether Federal hazardous material transportation law preempts these requirements with respect to rail tank cars.

B. Cargo Tank Testing, Marking, and Recordkeeping Requirements in the HMR

The HMR contain requirements for the design, manufacture, and maintenance of the cargo tank on a motor vehicle used to transport gasoline, including marking the cargo tank to indicate when periodic testing has been performed and keeping records that the testing has been successfully performed. The requirements for maintenance and periodic testing of cargo tanks are contained in 49 CFR part 180, subpart E, which was added to the HMR in 1989. Final rule, ''Requirements for Cargo Tanks,'' 54 FR 24982 (June 12, 1989); delay of effective date, response to petitions for reconsideration and revisions, 55 FR 37028 (Sept. 7, 1990); corrections and revisions, 56 FR 27872 (June 17, 1991).

In this final rule, PHMSA required that a cargo tank used to transport gasoline or other petroleum products must undergo a leakage test and an external visual inspection every year, and an internal visual inspection and pressure test every five years. 49 CFR 180.407(c). The person performing or witnessing the required tests and inspections must be a registered inspector, familiar with DOT specification cargo tanks, and trained and experienced in the inspection and testing equipment utilized. 49 CFR 180.409. After completion of the required inspection or test, the cargo tank must be marked durably and legibly with the month and year of the test or inspection and the type of test or inspection performed; the marking must be at least 1.25 inches high and located near the specification plate or on the front head; and the following abbreviations are authorized:

V for external visual inspection and test
I for internal visual inspection
P for pressure test
K for leakage test

49 CFR 180.415.[2] Each test or inspection must be documented in a report containing certain required information, and the owner and the motor carrier (if not the owner) must retain a copy of the test and inspection reports until the next successful test or inspection of the same type. 49 CFR 180.417(b).[3] Records of any repairs to the cargo tank, ''including notation of any tests to verify the suitability of the repair,'' must be retained at the vehicle owner's principal place of business. 49 CFR 180.413(f). Repair records must be provided to a person who purchases or leases the cargo tank for more than 30 days. 49 CFR 180.417(d).

In the June 12, 1989 final rule, PHMSA specifically provided that ''Where applicable, the [EPA Method 27] is an acceptable alternative test'' for performing the leakage test. 49 CFR 180.407(h)(2), as adopted at 54 FR 25037. As revised in PHMSA's further final rule published in the **Federal Register** on April 18, 2003 (68 FR 19258, 19288), § 180.407(h)(2) currently provides that:

> (2) Cargo tanks used to transport petroleum distillate fuels that are equipped with vapor collection equipment may be leak tested in accordance with the Environmental Protection Agency's ''Method 27—Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test,'' as set forth in Appendix A to 40 CFR part 60. Test methods and procedures and maximum allowable pressure and vacuum changes are in 40 CFR 63.425(e)(1). The hydrostatic test alternative, using liquid in Environmental Protection Agency's ''Method 27—Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test,'' may not be used to satisfy the leak testing requirements of this paragraph. The test must be conducted using air.

In the April 18, 2003 final rule, PHMSA also amended the test and inspection marking requirements in § 180.415(b)(2) to add the abbreviation ''K–EPA27 for a cargo tank tested under § 180.407(h)(2) after October 1, 2004.'' *Id.* at 19290. In the preamble *id.* at 19263), PHMSA stated that this

> Special marking will allow an inspector to know the tank was tested using the EPA Method 27 test and also standardize the

[2] Cargo tanks used to transport corrosive materials must also undergo a lining inspection (if the tank is lined) or a thickness test (if the tank is unlined), and be marked ''L'' to indicate the lining inspection or ''T'' for the thickness test. 49 CFR 180.407(c), 180.415(b).

[3] Inspection and test records for Specification MC 330 and MC 331 cargo tanks must be retained by the carrier ''during the period the cargo tank is in the carrier's service and for one year thereafter,'' at the carrier's principal place of business or, with approval of the Federal Motor Carrier Safety Administration (FMCSA), at a regional or terminal office. 49 CFR 180.417(c)(2).

marking for tanks undergoing this test throughout the United States. RSPA's marking requirement will preempt state marking requirements for cargo tanks tested with the EPA Method 27 test, eliminating possible confusion by enforcement personnel attempting to verify that a cargo tank has met the HMR leak test requirements.

C. New York State Requirements

The New York State Commissioner of Transportation has adopted the HMR as state law, including the requirements in 49 CFR part 180 for the maintenance and testing of cargo tanks. 17 NYCRR 820.8(j). Prior to 2004, the requirements in the HMR were incorporated by reference in 17 NYCRR part 507. When the New York State Department of Transportation (NYSDOT) revised and relocated these provisions to 17 NYCRR part 820, it stated that its purpose was:

> To provide consistency, regarding commercial motor vehicles and operational requirements for drivers involved in commerce, with the standards and requirements of the Code of Federal Regulations that have been incorporated by reference and to provide clearer language to describe what is required to better preserve public safety.

NYS Register, Oct. 13, 2004, p. 16. In its earlier notice of proposed rulemaking on these changes, NYSDOT stated that:

> The update to these regulations is essential to prevent jeopardizing the 7 million dollars of federal funding New York State receives annually to perform commercial vehicle safety programs. This update ensures uniformity in enforcement efforts for those motor carriers traveling solely within New York State as well as for those carriers traveling through the State.

NYS Register, June 2, 2004, p. 24.[4] Under its ''Regulatory Flexibility Analysis'' (*id.*) NYSDOT added that:

> The updated regulations will be more consistent with federal requirements which will facilitate a better understanding of what is required of the drivers and motor carriers operating vehicles subject to both NYSDOT and USDOT safety requirements. In most cases, the Department has made its commercial vehicle safety regulations consistent with the current Federal requirements and State statutes. As a result, there will be less confusion for drivers and motor carriers operating in both intrastate and interstate commerce.

Authorized employees of NYSDEC, as well as NYSDOT, police officers (including the New York State Police) and FMCSA, must be afforded ''reasonable opportunity to enter vehicles or any place where hazardous materials are offered into commerce for the purpose of inspection to determine compliance with the provisions of this Part.'' 17 NYCRR 820.8(i).

Nonetheless, NYSDEC has adopted and applies separate regulations to a ''gasoline transport vehicle,'' defined as ''[a]ny tank truck, trailer or railroad tank car, with a capacity of 300 gallons or more, used for the transportation of gasoline.'' 6 NYCRR 230.1(b)(5). These regulations prohibit a gasoline transport vehicle from being filled or emptied unless the vehicle passes an annual vacuum-pressure test performed in accordance with EPA Method 27 and the vehicle ''displays a marking near the U.S. Department of Transportation certificate plate, in letters and numerals at least two inches high, which reads: NYSDEC and the date on which the gasoline transport vehicle was last tested.'' 6 NYCRR 230.4(a)(3), (b). The vehicle owner must retain records of pressure-vacuum testing and repairs for two years, and a ''copy of the most recent pressure-vacuum test results, in a form acceptable to the [NYSDEC] commissioner must be kept with the gasoline transport vehicle.'' 6 NYCRR 230.6(b), (c).

According to NYSDEC, these marking and record keeping requirements are part of its SIP promulgated pursuant to Section 110 of the Clean Air Act (42 U.S.C. 7410) which requires States to implement, maintain and enforce National Ambient Air Quality Standards (NAAQS) for specific pollutants, including ozone. NYSDEC stated that, ''[o]nce a SIP has been approved by EPA it becomes enforceable as a matter of Federal law,'' and the Clean Air Act ''specifically allows EPA to bring an enforcement action against any person who has violated or is in violation of any requirement or prohibition of a SIP.''

NYSDEC stated that part of its ''strategy to attain the NAAQS for ozone'' is the requirement in 6 NYCRR 230.4(b) to perform an annual pressure-vacuum test to determine that a gasoline transport vehicle is ''vapor-tight,'' pursuant to the suggestion in the EPA 1978 CTG. NYSDEC stated that its marking ''requirement had its genesis in the EPA's 1978 CTG document which suggested labeling the tank truck with the date of the vapor tightness inspection and the tank identification number.'' It did not indicate that the EPA 1978 CTG included any recommendation for requiring that the test results must be maintained on the gasoline transport vehicle itself, or that test and repair records must be retained for any specific period of time.

New York is a part of the Northeast ''ozone transport region'' (OTR) encompassing 11 States, the District of Columbia, and part of Virginia. See 42 U.S.C. 7511c(a). NYSDEC submitted copies of these States' regulations to support its assertion that all of the States in the Northeast OTR require gasoline transport vehicles to undergo a pressure-vacuum test and allow or require the use of EPA Method 27 as an acceptable means of performing the pressure-vacuum test. However, contrary to comments by NYSDEC and the Pennsylvania and Delaware environmental agencies, there is a remarkable lack of consistency among the marking and record keeping requirements of the States in the Northeast OTR. First of all, only NYSDEC and two other States in the Northeast OTC (Vermont and Massachusetts) specifically provide discretion to accept an ''equivalent certification in another State.''

In comparison to provisions on the size (2″) and lettering (''NYSDEC'') of the marking requirement in 6 NYCRR 230.4(c),

—Only three other States (Maine, Massachusetts, and Connecticut) specify that the marking on the vehicle include letters referring to the State environmental agency (*e.g.*, ''DEC'' or ''DEP'').
—Only two other States (Maine and Massachusetts) specify the size of the required marking (2″).
—Two States (Virginia and Maryland) specify that the marking contain the test expiration date, rather than the date that the most recent test was performed.
—One State (Maine) requires the marking in two places (on ''both the left and right bulkhead of the tank truck'').

In comparison to the NYSDEC record keeping requirements in 6 NYCRR 230.6(b) and (c), only four other States in the Northeast OTR (New Hampshire, Pennsylvania, New Jersey, and Delaware) require a copy of the test results to be carried on the vehicle. A total of seven states (including New York) require retention of repair records, and the retention period for test records in other States in the Northeast OTR varies from one year (Pennsylvania) to five years (Connecticut); three States do not specify a time period that test records must be retained.

II. Federal Preemption

As discussed in the June 2, 1998 notice, 49 U.S.C. 5125 contains express

[4] In accordance with 49 CFR part 350, States which adopt and enforce ''State safety laws and regulations that are compatible with'' the Federal Motor Carrier Safety Regulations, 49 CFR parts 390–397, and the HMR qualify for grants under the Federal Motor Carrier Safety Assistance Program (MCSAP). 49 CFR 350.201. FMCSA has advised that New York State received $7,399,535 in Basic and Incentive MCSAP grant awards for fiscal year 2008.

preemption provisions that are relevant to this proceeding. 63 FR at 30033–34. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2320), 49 U.S.C. 5125(a) provides that—in the absence of a waiver of preemption by DOT under § 5125(e) or specific authority in another Federal law—a requirement of a State, political subdivision of a State, or Indian tribe is preempted if

(1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) The requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria that PHMSA had applied in issuing inconsistency rulings (IRS) prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Public Law 93–633 § 112(a), 88 Stat. 2161 (1975). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151 (1978).

Subsection (b)(1) of 49 U.S.C. 5125, as slightly revised in 2005,[5] provides that a non-Federal requirement concerning any of the following subjects is preempted—unless authorized by another Federal law or DOT grants a waiver of preemption—when the non-Federal requirement is not ''substantively the same as'' a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Secretary of Homeland Security:

(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 designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing of a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

To be ''substantively the same,'' the non-Federal requirement must conform ''in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted.'' 49 CFR 107.202(d).

The 2002 and 2005 amendments to the preemption provisions in 49 U.S.C. 5125 reaffirmed Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. More than thirty years ago, when it was considering the HMTA, the Senate Commerce Committee ''endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.'' S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). When Congress expanded the preemption provisions in 1990, 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.

Public Law 101–615 § 2, 104 Stat. 3244. A United States Court of Appeals has found that uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those that concern highway routing (which have been delegated to FMCSA). 49 CFR 1.53(b).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the **Federal Register**. Following the receipt and consideration of written comments, PHMSA publishes its determination in the **Federal Register**. See 49 CFR 107.209. A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled ''Federalism.'' 64 FR 43255 (Aug. 10, 1999). 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 that Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which

[5] These revisions are contained in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, which is Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119. Stat. 1891 (Aug. 10, 2005). Further editorial corrections to § 5125 were made in Section 302 of the SAFETEA–LU Technical Corrections Act of 2008, Public Law 110–244, 122 Stat. 1618 (June 6, 2008).

PHMSA has implemented through its regulations.

III. Discussion

The central issue to be resolved in this proceeding is whether the NYSDEC marking and recordkeeping requirements are ''authorized by another law of the United States.'' 49 U.S.C. 5125(a), (b)(1). While NYSDEC asserted that there are ''four issues'' to be considered, all of them appear to relate to and depend on the argument that its requirements are ''authorized by another law of the United States.'' NYSDEC stated that (1) there is ''no Federal right of action'' when its requirements are authorized by another law of the United States; (2) PHMSA lacks ''subject matter jurisdiction'' and ''the only valid action [PHMSA] can take here is to dismiss *or* deny the application on the basis that the challenged regulations are federally authorized''; (3) NTTC lacks standing because it has not shown that it or its members ''have a legally protected interest in avoiding compliance with the Clean Air Act''; and (4) the 1990 Clean Air Act Amendments ''left room for states to regulate, recognizing the important role they historically played in protecting the public health and welfare through air pollution measures.'' [6]

The three State environmental protection agencies and Region 2 also contend that the NYSDEC marking and record keeping requirements are ''authorized by another law of the United States.'' The Pennsylvania Department of Environmental Protection stated that ''an EPA approved SIP is federal law and enforceable as such.'' The Connecticut Department of Environmental Protection stated that ''compliance by all states with EPA CAA requirements is essential for improvements in the levels of ozone experienced by citizens of all states.'' The Delaware Department of Natural Resources and Environmental Control stated that all states in the Northeast OTR ''have adopted rules substantially equivalent'' to the EPA 1978 CTG for gasoline tank trucks, and ''these states relied on the provisions of the Clean Air Act as a basis for these rules.'' Region 2 stated that the NYSDEC marking and recordkeeping requirements responded to the EPA 1978 CTG and were approved by EPA ''based on the fact that they adequately addressed the requirements for control of gasoline tank trucks as identified in EPA's December 1978 CTG.''

The Clean Air Act, itself, does not specifically authorize the NYSDEC marking and record keeping requirements. Rather, that Act requires each State to adopt and submit to EPA ''a plan which provides for implementation, maintenance, and enforcement of'' the national ambient air quality standards within that State. 42 U.S.C. 7410(a)(1). While the EPA 1978 CTG specifies the use of a pressure-vacuum test to assure that the gasoline tank is leak tight, that CTG does not require—or authorize—the specific NYSDEC marking and record keeping requirements. Rather the EPA 1978 CTG contains only two provisions under ''Record Keeping and Reporting Requirements.''

First, in Section II.D.1, ''Each truck must have a sticker displayed on each tank indicating the identification number of the tank and the date each tank last passed the pressure and vacuum test. This sticker must be located near the Department of Transportation Certification plate.'' The K–EPA27 marking added to 49 CFR 180.415(b)(2) in PHMSA's April 18, 2003, final rule clearly fits the standard of ''a sticker'' with ''the date each tank last passed the pressure and vacuum test * * * located near the Department of Transportation Certification plate.''

Second, in Section II.D.2, ''Bulk terminal, bulk plant and service station owners or operators must keep records for two years indicating the last time the vapor collection facility passed'' the standards for these fixed facilities and ''identifying points at which VOC leakage exceeded a prescribed level.'' The EPA 1978 CTG contains no provision specifically authorizing—or even suggesting—that a State require that records of the vacuum-pressure test must be carried on the gasoline transport vehicle or that test and repair records must be retained for two years.

The Clean Air Act does require a State to include ''a program to provide for the enforcement of'' the ''emission limitations and other control measures, means, or techniques'' in its SIP, 42 U.S.C. 7110(a)(2)(A), (C), but those provisions do not insulate from preemption under 49 U.S.C. 5125 any enforcement measures that NYSDEC asserts are ''effective and practicable * * * to implement and ensure compliance with the air pollution standards set forth in [6 NYCRR] Part 230 and * * * necessary for the Department to get approval from EPA for its SIP revisions containing Part 230.'' Rather, the Clean Air Act and Federal hazardous material transportation law must be read in a manner that carries out the provisions of both, if at all possible. This is made clear by Section 310 of the Clean Air Act which provides, with an exception that is not relevant here, that ''Act shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of * * * any other Federal officer, department, or agency.'' 42 U.S.C. 7610(a).

EPA has previously stated that its authorization of a State hazardous waste program does not resolve issues of preemption under Federal hazardous material transportation law. Rather, ''preemption issued under other Federal laws * * * do not affect the State's RCRA authorization.'' EPA's Final Authorization of State Hazardous Waste Management Program for California, 57 FR 32726, 32728 (July 23, 1992). ''In addition, EPA does not believe that an individual State's authorization application is the appropriate forum to resolve problems which clearly affect a large number of States. * * * [A] process is already in place intended to address the problem pursuant to'' Federal hazardous material transportation law. *Id.* See also the discussion of this authorization and other EPA letters in PD–12(R), ''New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation,'' 60 FR 62527, 62534 (Dec. 5, 1995), decision on petition for reconsideration, 62 FR 15970 (Apr. 3, 1997), petition for judicial review dismissed, *New York* v. *U.S. Dep't of Transportation*, 37 F. Supp. 2d 152 (N.D.N.Y 1999).

The same principle applies here. Region 2's approval of New York's SIP does not address or resolve issues of preemption under 49 U.S.C. 5125 with respect to the enforcement measures in

[6] Separate from the issue whether the NYSDEC marking and record keeping requirement are ''authorized by another law of the United States,'' the explicit language of 49 U.S.C. 5125(d) resolves the issues of a ''Federal right of action,'' ''standing,'' and ''subject matter jurisdiction,'' in providing that any person ''directly affected'' by the NYSDEC's requirements (as NTTC's members are) may apply to DOT for an administrative preemption determination and for DOT to issue a determination on that application. The Court of Appeals for the Sixth Circuit held that the ''unique * * * structure'' of the administrative determination procedure ''does not mirror * * * civil litigation'' but rather ''falls within the rule-making process lying at the center of the responsibilities of federal executive agencies.'' *Tennessee* v. *U.S. Dep't of Transportation*, 326 F.3d 729, 734, 735, 736 (6th Cir. 2003). Thus, doctrines of a ''right of action,'' ''standing,'' and ''jurisdiction'' simply do not apply. In PD–20(RF), ''Cleveland, Ohio Requirements for Transportation of Hazardous Materials,'' 66 FR 29867, 29869 (June 1, 2001), PHMSA and FMCSA addressed, and rejected, arguments that the historic ''police power'' of States and localities can trump ''DOT's authority to regulate the transportation of hazardous materials in commerce and to find, by regulation or other process, that a non-Federal requirement on transportation conflicts with the Federal hazardous material transportation law and is preempted.''

the SIP. This was made clear in PHMSA's April 18, 2003, final rule, which was coordinated with EPA. As we stated in the preamble to the final rule, the additional K–EPA27 ''marking requirement will preempt state marking requirements for cargo tanks tested with the EPA Method 27 test, eliminating possible confusion by enforcement personnel attempting to verify that a cargo tank has met the HMR leak test requirements.'' 68 FR at 19263.

The portion of 6 NYCRR 230.4(a)(3) which requires marking the ''date each tank last passed the pressure and vacuum test * * * near the U.S. Department of Transportation certificate plate,'' is ''substantively the same as'' requirements in the HMR. Otherwise, however, the provisions that specify that the marking be a minimum 2″ size and include ''NYSDEC'' clearly go beyond—and are not substantively the same as—requirements in 49 CFR 180.415(b) for the marking of a packaging or container that is ''represented, marked, certified, or sold as qualified for use in transporting hazardous material.''

Similarly, the recordkeeping requirements in 6 NYCRR 230.6(b) and (c) are substantively different from specific requirements in the HMR on ''inspecting,'' ''maintaining,'' ''repairing'' and ''testing a package [or] container * * * that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.''

A State requirement for additional markings on the cargo tank itself increases the potential that the markings required by the HMR will not be complete or clear and that shipments will be delayed by State inspectors who are familiar only with their own State's requirements, or by Federal inspectors who cannot discern which markings are those required by the HMR. The inconsistencies among the gasoline tank truck marking requirements of the different States in the Northeast OTR and these States' lack of complete reciprocity amply demonstrate the need for a uniform Federal marking system to eliminate confusion whether a cargo tank has undergone the required inspections and tests.

Confusion and non-compliance are also created by the requirement in 6 NYCRR 230.6(b) to maintain a copy of the pressure-vacuum test results on the transport vehicle. In the *Harmon* case, the Court of Appeals found that the HMR ''require only that a limited amount of documentation be carried in the vehicle, which avoids carrier confusion and promotes quick access to critical documentation. Colorado's requirement of additional information [to carry an inspection report on the vehicle] could create confusion in an emergency situation and could thereby increase the potential hazard'' during transportation. 951 F.2d at 1583.

Contrary to the assertion of the Pennsylvania Department of Environmental Protection, a requirement to carry the test and repair records on the vehicle does not eliminate ''the need to place a copy of the results in archived files.'' The FMCSA (or NYSDOT) inspector who visits a carrier's principal place of business or regional or terminal office will be frustrated when the test results are not maintained at that location, but only on the vehicle. As NPGA commented, ''the vehicle file is the primary source of information regarding the vehicle's qualifications for continued use,'' and the requirement to maintain test and repair records on the vehicle ''would seem to cause the vehicle owner to not comply with these DOT requirements.'' The differences among the States within the Northeast OTR make confusion and lack of compliance with the HMR's requirements inevitable.

NYSDEC's two-year retention period for records of pressure-vacuum testing and repairs in 6 NYCRR 230.6(c) also creates confusion and potential non-compliance. Most seriously, this provision tells cargo tank owners that they may discard repair records after two years, but the HMR require that records of repair must be retained ''during the time the cargo tank motor vehicle is in service and for one year thereafter.'' 49 CFR 180.413(f). In addition, the requirement to retain more than one set of pressure-vacuum test records (covering the last two or more annual tests, depending on the State) will inevitably lead to confusion as to which set of records cover the most recent testing.

IV. Ruling

Federal hazardous material transportation law does not preempt that part of 6 NYCRR 230.4(a)(3) requiring that a gasoline transport vehicle must be marked, near the U.S. DOT specification plate, with the date on which the tank was last tested for vapor tightness. However, that marking must be substantively the same as specified in 49 CFR 180.417(b): ''K–EPA27'' in association with the date (month and year) of the most recent test.

Federal hazardous material transportation law preempts (1) the provisions in 6 NYCRR 230.4(a)(3) which require that the marking be a minimum two inches and contain ''NYS DEC''; (2) the requirement in 6 NYCRR 230.6(b) for maintaining a copy of the most recent pressure-vacuum test results with the gasoline transport vehicle; and (3) the requirement in 6 NYCRR 230.6(c) to retain pressure-vacuum test and repair results for two years, because these requirements are not substantively the same as requirements in the HMR on the marking, inspecting, maintaining, repairing, or testing of a package or container that is represented, marked, certified, or sold as qualified for transporting hazardous material.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register**. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the **Federal Register**, the action by PHMSA's Chief Counsel on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

Issued in Washington, DC on January 15, 2009.

David E. Kunz,

Chief Counsel.

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2008–0333]

Pipeline Safety: Requests for Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.