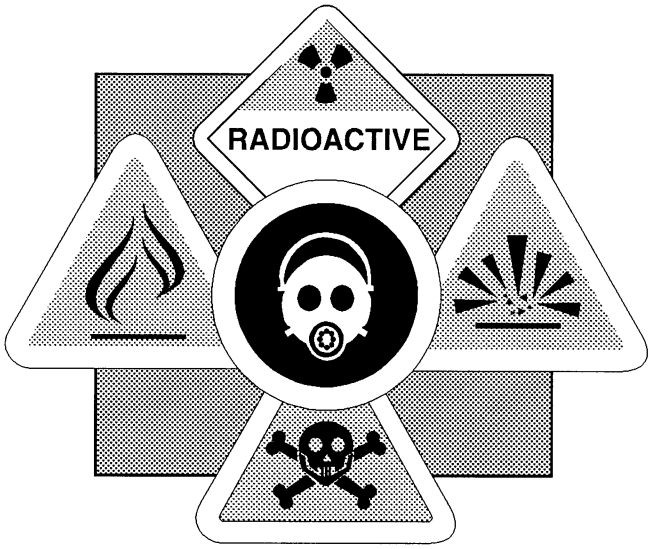
TECHNICAL ASSISTANCE
REPORT

ANALYSIS OF THE PREEMPTIVE EFFECT OF FEDERAL HAZARDOUS MATERIAL LAWS ON VIRGINIA'S BRIDGE-TUNNEL REGULATIONS



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Abstract

In May 1988, the Virginia Department of Transportation (VDOT) adopted regulations that govern the transportation of hazardous materials through seven highway tunnel facilities. Recently, the validity of these regulations have been called into question on two separate grounds. First, since the federal government has been active in regulating the transportation of hazardous materials, the Commerce and Supremacy Clauses of the U. S. Constitution may preclude states from adopting hazardous material transportation regulations. Second, regulations promulgated under the Hazardous Materials Transportation Act (HMTA) of 1975 may preclude state regulatory activity in the hazardous material transportation area. This study evaluates the legality of the VDOT tunnel regulations in light of the above challenges to their validity.

As to the first challenge to the VDOT regulations, it is highly unlikely a court would find the regulations preempted. VDOT's regulations, however, are more problematic when tested against the preemption provisions outlined in the HMTA. The HMTA expressly preempts state regulations which:

1. make compliance with the federal regulations an impossibility;
2. are an obstacle to the accomplishment of the federal regulations; or
3. which are preempted under 49 App. U.S.C. 1804(a)(4) (which preempts state regulations that deal with a subject covered by the HMTA and which are not substantively identical to the HMTA provisions) or 49 App. U.S.C. 1804(b) (which excludes certain state regulations that deal with hazardous material routing).

The analysis conducted in this study seems to indicate that the HMTA preempts VDOT's attempt to regulate hazardous material shipments through the state's tunnels. However, the HMTA also includes a number of exceptions to the general preemption rules. One of these regulations, 49 C.F.R. 177.810 (1992) provides that:

> nothing contained in [the regulations promulgated under the HMTA] shall be so construed as to nullify or supersede regulations established...under authority of State statute...regarding the *kind, character,* or *quantity* of any hazardous material permitted by such regulations to be transported through any *urban vehicular tunnel used for mass transportation.*

In summary, the VDOT tunnel regulations are almost certainly preempted to the extent they apply to non-urban tunnels, and may further be preempted to the extent they reclassify hazardous materials. Consequently, it is recommended that VDOT submit its regulations to the Research and Special Programs Administration (RSPA) of the Department of Transportation for a preemption determination.

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(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

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EXECUTIVE SUMMARY

On May 25, 1988, the Virginia Department of Transportation (VDOT) adopted a set of regulations that govern the transportation of hazardous materials through seven highway tunnel facilities.[1] Recently, the validity of these regulations have been called into question on two separate grounds. First, the federal government has been very active in regulating the transportation of hazardous materials. Consequently, the Commerce[2] and Supremacy[3] Clauses of the U.S. Constitution may preclude states from adopting hazardous material transportation regulations. Second, regulations[4] promulgated under the Hazardous Materials Transportation Act (HMTA) of 1975[5] may similarly preclude state regulatory activity in the hazardous material transportation area. This study evaluates the legality of the VDOT tunnel regulations in light of the above two challenges to their validity.

As to the first challenge to the VDOT regulations, it is highly unlikely a court would find the regulations preempted under the Commerce Clause. The VDOT regulations were developed and implemented "for the safety and protection of the public."[6] While state regulations are sometimes preempted if the federal government becomes intricately involved in regulating a particular area, the Supreme Court has been very reluctant to constitutionally preclude states from adopting transportation safety regulations.[7] This deference appears to be particularly strong in the hazardous material transportation area — every court addressing the issue held that the Commerce Clause does not bar states from regulating hazardous material movements concurrently with the federal regulations promulgated under the HMTA.[8] Thus, despite the extensive federal involvement in hazardous material transportation, it is likely that the VDOT regulations are constitutionally valid.

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1. *Hazardous Materials: Transportation Rules and Regulations at Bridge Tunnel Facilities*, Virginia Department of Transportation, May 25, 1988. The authority for promulgating these regulations is provided by Va. Code Ann. 33.12(3) and 33.1-49 (Michie 1990 & Supp. 1993) (providing that the Commonwealth Transportation Board is empowered to promulgate highway regulations).
2. U.S. Const. art. I, section 8, cl. 3.
3. U.S. Const. art. VI, section 2.
4. 49 C.F.R. 171 *et seq* (1992).
5. 49 U.S.C. 1801-13 (1988). As amended by the Hazardous Material Transportation Uniform Safety Act of 1990, 49 App. U.S.C. 1801-19 (Supp. 1991).
6. *Hazardous Materials: Transportation Rules and Regulations at Bridge-Tunnel Facilities*, supra note 1, at iii.
7. See *Raymond Motor Transportation v. Rice*, 434 U.S. 429, 443 (1978) (stating "in no field has . . . deference to state regulation been greater than that of highway safety regulation").
8. *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2nd Cir. 1982); *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp 509 (D. R.I. 1982).

The VDOT regulations, however, are more problematic when tested against the preemption provisions outlined in the HMTA. The HMTA (49 U.S.C. 1811(a)) expressly preempts state regulations which:

1. make compliance with the federal regulations an impossibility;

2. are an obstacle to the accomplishment of the federal regulations; or

3. which are preempted under 49 App. U.S.C. 1804(a)(4) (which preempts state regulations that deal with a subject covered by the HMTA and which are not substantively identical to the HMTA provisions) or 49 App. U.S.C. 1804(b) (which excludes certain state regulations that deal with hazardous material routing).[9]

A comparison of the VDOT tunnel regulations with the federal hazardous material transportation regulations reveals that the VDOT regulatory scheme (1) classifies hazardous substances differently than the federal classification scheme and (2) specifies more restrictive shipment allowances than are provided for in the federal regulations. Numerous federal administrative rulings have held that state hazardous material regulations which reclassify or otherwise modify the federal system of defining hazardous materials are an obstacle to the goals of the federal regulations since they undermine the federal goal of achieving a uniform classification system.[10] Consequently, the VDOT regulations are almost certain to be preempted under the "obstacle test" specified in 49 App. U.S.C. 1811(a)(2). Furthermore, the use of a separate hazardous material classification scheme is expressly prohibited by the "covered subject test" of 49 App. U.S.C. 1804(a)(4), and therefore 49 App. U.S.C. 1811(a)(3) provides a second, independent ground for preempting the VDOT regulations.

The above analysis seems to indicate that the HMTA preempts VDOT's attempt to regulate hazardous material shipments through the state's tunnels. However, the HMTA also includes a number of exceptions to the general preemption rules, which provide for limited state regulation of hazardous material transportation. One of these regulations, 49 C.F.R. 177.810 (1992) provides that:

> nothing contained in [the regulations promulgated under the HMTA] shall be so construed as to nullify or supersede regulations established . . . under authority of State statute . . . regarding the *kind, character, or quantity* of any hazardous material permitted by such regulations to be transported through any *urban vehicular tunnel used for mass transportation.* (emphasis added).

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9. See 49 App. U.S.C. 1811(a) (Supp. 1991). See also 49 C.F.R. 107.202(b) (1992). The HMTA does specify a number of exceptions to this broad preemption rule.

10. See infra note 46.

Thus to the extent the VDOT tunnel regulations fit within 49 C.F.R. 177.810 (1992), the HMTA preemption provisions are inapplicable. In analyzing whether or not Section 177.810 authorizes the VDOT regulations, note that the section contains two clauses (italicized above) which limit the scope of its operation.[11] The first of these clauses limits the exemption to state and local regulations which relate to the *"kind, character, or quantity of any hazardous materials."* While the VDOT regulations which specify lower maximum shipment sizes than the federal regulations appear to fit within this exception (since they relate to *quantity*), it is arguable that this limitation does not cover VDOT's reclassification of hazardous materials.[12] Consequently, it is possible that a court would find the VDOT regulations preempted to the extent they specify a classification scheme which differs from the federal classification standards.

Second, Section 177.810 only exempts state regulations applying to *"urban vehicular tunnels."* While all seven of the facilities covered by the VDOT regulations are vehicular tunnels, both the Big Walker Mountain and the East River Mountain tunnels on I-77 are clearly *rural* facilities, and an argument can be made that the Chesapeake Bay Bridge-Tunnel is rural as well. Thus it is almost certain that a court would preempt the VDOT regulations as they apply to the I-77 tunnels, and possibly preempt them as they apply to the Chesapeake Bay Bridge-Tunnel.

In summary, the VDOT tunnel regulations are almost certainly preempted to the extent they apply to non-urban tunnels, and may further be preempted to the extent they reclassify hazardous materials. Consequently, it is recommended that VDOT submit its regulations to the Research and Special Programs Administration (RSPA) of the Department of Transportation for a preemption determination. The procedure by which the state can apply for a preemption determination is set out in the Code of Federal Regulations[13] and is summarized in Chapter 5 of this report.

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11. The analysis presented below is based entirely on an interpretation of the regulatory language. Such a "plain language" analysis is necessary here due to the lack of legislative history or judicial opinions that expand on the scope or meaning of the vehicular tunnel exception.

12. See Gary Bowman, "Inconsistency of Proposed Virginia Hazardous Materials Transportation Bridge and Tunnel Regulations with Federal Hazardous Material Regulations," Virginia Transportation Research Council (memo to James Phillips, Assistant Attorney General, August 31, 1987).

13. 49 C.F.R. 107.201-27 (1992).

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CHAPTER 1 - INTRODUCTION

1.1 Background

In 1986, the Virginia Department of Transportation (VDOT) contracted with the Virginia Polytechnical Institute and State University (VPI) for the development of new regulatory standards governing the transportation of hazardous materials through Virginia's highway tunnels. VPI completed the development of these standards in 1987, setting out the quantities, packaging, and modes of transportation permitted for various hazardous materials. The major innovations in the VPI regulatory approach were (1) the reorganization of hazardous materials into different classes than the federal hazardous material transportation regulations and (2) the addition of new chemicals to the list of hazardous substances regulated in Virginia.

Subsequent to the completion of these regulatory standards, but prior to their adoption, Gary Bowman of the Virginia Transportation Research Council (VTRC) circulated a memorandum which concluded that the proposed VPI regulatory approach was inconsistent with, and hence preempted by, the federal Hazardous Materials Transportation Act (HMTA) of 1975[1] and the regulations promulgated thereunder. This conclusion was based on 49 U.S.C. 1811(a) which preempts any state regulations that are inconsistent with the federal regulations promulgated under the HMTA.[2] VPI Professor A. G. Hobeika replied to Bowman's memoranda in a letter[3] that claimed the proposed regulatory standards were not preempted, since the HMTA creates an exception for state regu-

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1. 49 U.S.C. 1801-13 (1988). This statute was later amended by the Hazardous Material Transportation Uniform Safety Act of 1990, 49 App. U.S.C. 1801-19 (Supp. 1991).

2. The pre-1990 version of 49 U.S.C. 1811(a) read:

"Except as provided in subsection (b) of this section, any requirement, of a state or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted."

3. Letter from Professor A. G. Hobeika, Professor of Civil Engineering, Virginia Polytechnic Institute and State University, to J. L Butner, Virginia Department of Transportation (August 12, 1987).

lations covering hazardous material transportation through urban vehicular tunnels.

In 1988, VDOT adopted the regulatory standards proposed in the VPI study, which are set out in a publication titled *Hazardous Materials: Transportation Rules and Regulations at Bridge- Tunnel Facilities.* The validity of these regulations, however, has recently been called into question again by members of the Virginia Trucking Association (VTA). In response to the VTA inquiry, the VTRC undertook a review of the VDOT tunnel regulations and their interplay with federal regulation of hazardous material transportation. The results of this study are contained in this report.

1.2 Purpose and Scope

The purpose of this study is to determine whether or not VDOT's regulations governing the transportation of hazardous materials through its tunnels are valid and enforceable in light of the extensive federal regulatory activity in this area. Specifically, the study addresses the following three issues:

1. Whether the VDOT regulations are preempted under the Commerce Clause of the U.S. Constitution.

2. Whether the VDOT regulations are preempted under the federal HMTA or the regulations promulgated thereunder (49 C.F.R. 171 et seq. (1992)).

3. Whether any exceptions to the HMTA, including the exception (cited by Professor Hobeika) in 49 C.F.R. 177.810 (1992) regarding state regulation of hazardous materials transported through urban tunnels authorize the VDOT regulations.

These three issues are addressed, sequentially, in Chapters 2-4 of this report.

CHAPTER 2 - COMMERCE CLAUSE ANALYSIS

The Commerce Clause of the U.S. Constitution[4] grants the federal government the power to regulate interstate commerce through legislation. In so doing, the Commerce Clause forbids states from enacting regulations that create an *unreasonable* burden on interstate commerce.[5] Further, by exerting its regulatory authority in an area, Congress can even preempt *reasonable* state regulations that affect commerce, since under the Supremacy Clause of the U.S. Constitution,[6] federal law preempts state regulations if Congress has indicated an intent to exercise exclusive authority.[7] Consequently, state transportation regulations are preempted, and hence invalid, if (1) they unreasonably burden interstate commerce or (2) if Congress manifests an intention to exert exclusive authority over the field.

Applying this test to VDOT's hazardous material tunnel-transportation regulations is straightforward. To avoid preemption under the first prong of the test — whether a state regulation unreasonably burdens interstate commerce — the courts have held that state regulations must meet three requirements. First, the regulations must involve an area in which uniform national regulations are not required. In this regard, while the Department of Transportation (DOT) has clearly indicated it believes uniform national hazardous material transportation standards are desirable,[8] the federal regulations also clearly state that the states are authorized to promulgate safety regulations with regard to unique local safety hazards such as tunnels.[9] Second, the regulations must not discriminate against out-of-state interests. Virginia's regulations clearly meet this requirement — there are no allegations that they were drafted with either the intention or effect of discriminating against out-of-state entities. Finally, the public interests promoted by the regulation (typically the improvement of public safety and welfare) must outweigh any negative impact the regulation has on interstate commerce. Virginia's tunnel regulations also meet this requirement. While differing state regulations undoubtedly are a burden to interstate transporters, the availability of alternate routes (around the tunnels)

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4. U.S. Const. art. I, section 8, cl. 3.
5. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774-75, 781-82 (1945).
6. U.S. Const. art. VI, section 2.
7. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31, 236 (1947).
8. See, e.g., DOT Inconsistency Ruling IR-5, 47 Fed. Reg. 51,991, 51,994 (1982).
9. See 49 C.F.R. 177.810 (1992) (permitting state hazardous material regulations for urban tunnels used for mass transportation); DOT Inconsistency Ruling IR-20, 52 Fed. Reg. 24,396, 24,397 (1987) (stating "to the extent nationwide regulations do not adequately address a uniquely local safety hazard, state or local governments can regulate narrowly for the purpose of eliminating or reducing the hazard"); IR-3, 46 Fed. Reg. 18,918, 18,920 (1981) (stating "a general reliance on state law to regulate activities affecting public health and safety is not inconsistent with the HMTA. . . . [b]oth the HMTA and [the federal hazardous material regulations] presume some state and local regulation, particularly in the areas of traffic control and emergency response, since both functions are necessarily local in nature").

alleviates much of the negative impact. When compared to the safety hazards posed by the transportation of large quantities of hazardous materials through narrow tunnels it seems likely courts would weigh the balance of interests in favor of the state regulations. Consequently, it seems highly unlikely that a federal court would find that the VDOT tunnel regulations "unreasonably" burden interstate commerce.

As to the second prong of the Commerce Clause preemption analysis, the courts have recognized a number of different ways in which Congress can manifest an intent to exert exclusive authority over an area. The most direct method is where Congress expressly indicates in either the statutory language or the legislative history such an intention.[10] This type of preemption is dealt with in Chapter 3 of this study, which examines whether the HMTA directly preempts the VDOT regulations. Preemption may also arise when compliance with both a federal and a state regulation is physically impossible,[11] or where a state law is found to impede the "execution of the full purposes and objectives of Congress."[12] Finally, preemption may occur where the federal regulatory scheme is "so persuasive as to make reasonable the inference that Congress left no room to supplement it."[13]

While these decisions seem to imply that Congressional adoption of the HMTA is sufficient to preempt all local hazardous material transportation regulations, in fact the courts have been extremely hesitant to preempt state transportation-related laws and regulations.[14] In *Raymond Motor Transport v. Rice*,[15] the Supreme Court stated that "in no field . . . has deference to state regulation been greater than that of highway safety regulation" and concluded that highway safety regulations had a strong presumption of validity. Thus in the transportation safety area the courts have basically refused to apply the second prong of the preemption test, focusing instead on the "balance of interests" inquiry (in the first prong of the test) to determine the constitutionality of the statute.

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10. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).
11. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).
12. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
13. *Pacific Gas & Electric Co. v. State Energy Commission*, 461 U.S. 190, 204 (1983).
14. See, e.g., *American Trucking Associations, Inc. v. Larson*, 683 F.2d 787 (3rd Cir. 1982) (upholding a Pennsylvania motor vehicle safety inspection statute against a Commerce Clause challenge since there was ample evidence the statute was enacted as a safety measure); *Ruiz v. Department of Transportation of the City of New York*, 679 F. Supp 341 (S.D.N.Y. 1988) (upholding a city ordinance setting weight limits on trucks using city streets despite federal regulations withholding highway funds from states which do not permit heavier trucks to use federal highways within their borders); *Specialized Carriers & Rigging Assoc. v. Virginia*, 795 F.2d 1152 (4th Cir. 1986) (upholding a Virginia statute requiring flashing lights on overdimensional loads despite federal regulations requiring "steady-burning" lights).
15. 434 U.S. 429, 443 (1978).

The two courts that have addressed preemption of local hazardous material transportation regulations confirm the above analysis, both holding that the Commerce Clause did not preempt the local regulation. In the first decision, *National Tank Truck Carriers, Inc. v. City of New York*,[16] the Second Circuit held that the New York City Fire Department's general ban on the transportation of hazardous gases by tank trucks (during certain hours) did not unconstitutionally burden interstate commerce since the inconvenience of having to drive around the city (or wait for the curfew to lift) was not unconstitutionally disproportionate when balanced against the public interest in avoiding catastrophic hazardous material accidents. Similarly, in the second decision, *National Tank Truck Carriers, Inc. v. Burke*,[17] a federal district court held that several state highway safety regulations (some of which *were* preempted by the HMTA) did not contravene the Commerce Clause. Thus, given these decisions, as well as the high degree of deference courts have shown to state highway safety regulations in Commerce Clause cases, it appears the VDOT regulations would almost certainly withstand a Commerce Clause challenge.

16. 677 F.2d 270 (1982).
17. 535 F. Supp 509 (D. R.I. 1982).

CHAPTER 3 - PREEMPTION UNDER THE HMTA

3.1 Background

In addition to Commerce Clause preemption, state regulations can also be expressly preempted by federal statutes or regulations. Consequently, the VDOT tunnel regulations must also be tested against the preemption provisions of the federal hazardous material transportation statutes (or regulations). The applicable statute is the Hazardous Material Transportation Act (HMTA) of 1975,[18] as amended by the Hazardous Material Transportation Uniform Safety Act (HMTUSA) of 1990.[19]

The HMTA mandated the promulgation of extensive hazardous material regulations by the Department of Transportation's Research and Special Programs Administration (RSPA), many of which address the transportation of hazardous substances by motor vehicle. These regulations are set out in title 49 of the Code of Federal Regulations.[20] The HMTA gives the Secretary of Transportation the authority to make preemption determinations,[21] and the Secretary has delegated this authority to the RSPA.[22] Upon receiving an application requesting that DOT make a preemption ruling, RSPA analyzes the state (or local) regulations and issues an "inconsistency ruling." Prior to the passage of the HMTUSA these inconsistency rulings were advisory, non-binding opinions; however, under the HMTUSA amendments, they are now legally binding (but subject to judicial review).[23]

3.2 HMTA Preemption Analysis

The original version of the HMTA preempted any state or local regulations which were inconsistent with the regulations promulgated under the HMTA.[24] This very general standard was used "to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation."[25] It was under this section

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18. 49 U.S.C. 1801-13 (1988).
19. 49 App. U.S.C. 1801-19 (Supp. 1991).
20. 49 C.F.R. 107 et seq (1992). Most of these regulations predate the HMTA and were previously authorized by the Explosives and Other Dangerous Articles Act. They were reissued under the authority of the HMTA, effective January 3, 1977. IR-2, 44 Fed. Reg. 75,566, 75,566-67 (1979).
21. 49 App. U.S.C. 1811(c)(1) (Supp. 1991).
22. 49 C.F.R. 107.203 (1992).
23. See 49 App. U.S.C. 1811(c) and (e) (Supp. 1991). These inconsistency rulings are helpful in interpreting the regulations promulgated under the HMTA, since they provide a further gloss on the regulatory language, and since there have been far more inconsistency rulings issued than court decisions interpreting the federal hazardous material regulations.
24. 49 U.S.C. 1811(a) (1988).
25. S. Rep. No. 1192, 93rd Cong., 2nd Sess. 37 (1974).

that Gary Bowman concluded that the VDOT tunnel regulations were preempted by federal law.

In 1990, Congress passed the Hazardous Material Transportation Uniform Safety Act, which amended the HMTA. Under the HMTUSA, the preemption test specifies that:

> [A]ny requirement of a state . . . is preempted if —
>
> 1. compliance with both the state . . . requirement and any requirements of this title or of a regulation issued under this title is not possible,
>
> 2. the state . . . requirement as applied or enforced creates an obstacle to the accomplishment and execution of this title or the regulations issued under this title, or
>
> 3. it is preempted under [49 U.S.C. 1804(a)(4) or 1804(b)].[26]

This codified the "dual compliance" (or "impossibility") test (in subsection 1) and the "obstacle" test (in subsection 2) that courts had developed for performing the inconsistency analysis under the 1975 version of the HMTA. [27] The "covered subject" test in subsection 3 (preemption under 49 App. U.S.C. 1804(a)(4)) then further extended the preemptive reach of the HMTA by preempting any state regulation dealing with specific subjects covered by the HMTA, including regulations concerning the:

> (i) designation, description, and classification of hazardous materials;
>
> (ii) packing, repacking, handling, labeling, and placarding of hazardous materials;
>
> (iii) preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents;
>
> (iv) written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and
>
> (v) design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of hazardous material containers.[28]

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26. 49 App. U.S.C. 1811(a) (Supp. 1991).

27. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 510, 526, 540-41 (1977).

28. 49 App. U.S.C. 1804(a)(4)(A) and (B) (Supp. 1991).

The following section applies each of the three preemption tests to the VDOT regulations.

3.2.1 *Dual Compliance Test*

A state regulation is preempted under the dual compliance test when "compliance with both federal and state regulations is a physical impossibility."[29] Thus, to analyze the VDOT regulations under this preemption test it is necessary to determine (1) what the differences are between the state and federal regulatory schemes and (2) whether or not these differences make compliance with both schemes physically impossible.

Performing this analysis is straightforward. The primary differences between the VDOT tunnel-regulations and the applicable provisions of the federal hazardous material transportation regulations are (1) VDOT's use of a different classification scheme than the one specified in the federal regulations[30] and (2) the VDOT regulations often require smaller shipments than are allowed in the federal regulations.[31] Neither of these differences appear to violate the dual compliance test. Different classifications do not make compliance with the federal regulations impossible, for they do not interfere with the substantive (packaging, labeling, shipping, notification, etc.) federal requirements.[32] Similarly, smaller VDOT maximum shipment sizes fail to make dual compliance impossible, since a transporter who limits hazardous material shipments to the amount allowed under the VDOT regulations will be in compliance with both the state and federal regulations. Thus it is unlikely the VDOT regulations will be preempted under the dual compliance test, since shippers will be able to comply with both sets of regulations simultaneously.

3.2.2 *Obstacle Test*

The obstacle test is much broader than the dual compliance test, preempting any state or local regulation that "creates an obstacle" to accomplish-

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29. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

30. The federal classification scheme is specified at 49 C.F.R. 173.2 (1992) and is reprinted in the left hand column of the table in Appendix A. The VDOT classification scheme is specified at page 24 of *Hazardous Materials: Transportation Rules and Regulations at Bridge-Tunnel Facilities*, and is also reprinted in Appendix A. Comparing the two classification schemes reveals several differences. These differences, of course, result in different hazardous materials falling into different categories under these regulations. By way of example, both turpentine and diisobutyl ketone fall into class 3 (Flammable and Combustible Liquid) under the federal regulations, whereas under the VDOT regulations turpentine is classified as a class 4 (Flammable Liquid) material, and diisobutyl ketone as a class 1 (Combustible Liquid) material. (see continuation)

31. See Bowman, supra note 12, at 2.

32. Cf. IR-5, 47 Fed. Reg. 51,991 (1982) (ruling that New York City's use of hazardous material classifications that differ from the federal classification scheme was *not* inconsistent under the dual compliance test).

ment of the HMTA or the regulations promulgated thereunder. Thus, under this test, the VDOT regulations (or more specifically, their two differences from the federal standards) must be analyzed to determine if they impede the accomplishment of the HMTA. As to the first of the differences, VDOT's use of a different hazardous material classification scheme, the U.S. Department of Transportation has consistently held that "definitions and classifications which result in regulating the transportation of more, fewer, or different hazardous materials than the federal regulations are obstacles to uniformity, and hence are preempted."[33] Thus there is ample authority that VDOT's use of its own classification scheme is sufficient to preempt the VDOT regulations. Furthermore, it is likely that the VDOT regulations which limit the shipment size for some materials below the federal maximums will also be found to create an obstacle to the accomplishment of the HMTA. One of the primary purposes of the HMTA was to avoid "the potential for varying as well as conflicting regulations in the area of hazardous material transportation."[34] The VDOT regulations clearly present an obstacle to this goal, since they specify conflicting rules regarding maximum shipment size. Consequently, it is very likely that the

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33. The first DOT inconsistency ruling to directly address state/local hazardous material class definitions that differed from the federal definitions was IR-5. In that case New York City had enacted hazard class definitions for "gas under pressure," "combustible or flammable gas," "combustible mixture," and "inflammatory mixture." The New York City definitions differed somewhat from the definitions in the federal hazardous material regulations so that (1) a number of materials would be classified differently under the New York City regulations and (2) the New York City regulations would apply to a number of materials not covered by the federal regulations.

DOT found the New York City classification system failed the obstacle test because (1) they thwarted the general Congressional purpose of prompting uniformity in hazardous materials transportation and (2) they were an obstacle to the more specific purpose of achieving the maximum level of compliance with the federal regulations. With regard to this second rationale, DOT noted that:

> The hazardous material regulations are, in and of themselves, a comprehensive and technical set of regulations which occupy approximately 1000 pages of the Code of Federal Regulations. The complexity of this regulatory scheme is often cited as a significant cause of noncompliance. . . . [A] major thrust of [DOT's] rulemaking activities in recent years has been to simplify the regulations. For the City to impose additional requirements based on differing hazard class definitions adds another level of complexity to this scheme. Thus, shippers and carriers doing business in the City must know not only the classifications of hazardous materials under the HMR and the regulatory significance of those classifications, but also the City's classifications and their significance. Such duplication in a regulatory scheme where the Federal presence is so clearly pervasive can only result in making compliance with the HMR less likely, with an accompanying decrease in overall public safety.

Reiterating this theme in IR-20, RSPA spoke of "DOT's exclusive authority to define and classify hazardous materials." 52 Fed. Reg. 24,396, 24,401 (1987). For similar statements, see IR-6, IR-12, IR-16, IR-28, IR-29, IR-31, and IR-32.

34. S.Rep. No. 1192, 93rd Cong., 2nd Sess. 37 (1974).

VDOT regulations are preempted under the obstacle test, both because they specify a different classification scheme and because they specify different maximum shipment sizes than provided for in the federal regulations.

3.2.3 *Covered Subject Test*

The final HMTA preemption test is the covered subject test. This test preempts (among other things) any state law or regulation that specifies hazardous material classifications which are not substantively the same as provided for by the federal regulations. Since the VDOT regulations set out a classification scheme, which (as seen earlier), is not substantively the same as the federal classification scheme, they are also preempted under this prong of the preemption test.

3.2.4 *Preemption Analysis Conclusions*

The above analysis shows, that to the extent they are not subject to any exceptions in the federal regulatory scheme, the VDOT regulations are likely to fail both the obstacle test and the covered subject test. As discussed earlier, regulations which fail either of these tests are preempted, and hence invalid, by operation of the HMTA.[35] While this seems to indicate that the VDOT regulations are preempted, several exceptions in the federal hazardous material regulations trump the preemption provisions of the HMTA. The following section examines the extent to which two of these exceptions save all or part of the VDOT regulations from preemption.

35. 49 App. U.S.C. 1811(a) (Supp. 1991).

CHAPTER 4 - IMPACT OF THE PREEMPTION EXCEPTIONS

4.1 The Urban Tunnel Exception

An exception in the federal regulations provides states with limited authority to regulate hazardous material shipments through vehicular tunnels. Specifically, 49 C.F.R. 177.810 (1992) specifies that:

> nothing contained in [the regulations promulgated under the HMTA] shall be so construed as to nullify or supersede regulations established under authority of State statute . . . regarding the kind, character, or quantity of any hazardous material permitted by such regulations to be transported through any urban vehicular tunnel used for mass transportation.

To the extent that 49 C.F.R. 177.810 (1992) authorizes state hazardous material regulations, federal preemption is inapplicable.[36] Consequently, it is necessary to interpret the language of this exception to determine whether or not a court is likely to rule it authorizes the VDOT regulations. This is accomplished by determining the intended scope of the regulations, and then evaluating whether or not the VDOT regulations fall within this intended scope.

In determining the scope and meaning of a statute or regulation, courts typically look to several sources. First and foremost, they rely on the plain meaning of the statutory language, and prior court decisions interpreting the statute. However, if the language is ambiguous (as the language of Section 177.810 arguably is), and if clarifying judicial decisions are unavailable, courts will often refer to any legislative history that accompanied the enactment of the statute (or regulation). Unfortunately, no court has yet interpreted Section 177.810. Further, the legislative history does not turn out to be particularly helpful.[37] Thus, the analysis of the regulation presented in the following section is based entirely on this author's interpretation of the statutory language.

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36. If the federal regulations authorize the state regulations, then clearly the state regulations are not an obstacle to the accomplishment of the federal regulations, nor are they preempted under 49 U.S.C. 1804(a)(4)(A) since the covered subject test exempts regulations authorized by federal law.

37. Section 177.810 was first promulgated on December 29, 1964 (33 Fed. Reg. 18797) (as Section 77.810), without any expanding or clarifying comments. Although the section has been amended several times, the language of the original regulation is nearly identical to the current version. Legislative history did accompany the 1981 amendment to this regulation. However, since this amendment was simply concerned with removing radioactive materials from the scope of Section 177.810, the legislative history does not turn out to be helpful in interpreting the scope of Section 177.810.

As an aside, Gary Bowman relied heavily on the legislative history accompanying the 1981 amendment to Section 177.810 in concluding that Section 177.810 does not allow states to reclassify hazardous materials differently than the federal categories. Bowman, however, mistakenly interpreted the 1981 amendment to Section 177.810 (which removed radioactive materials from the scope of Section 177.810, covering them instead in Section 177.825) as being the original enactment of the section, and thus concluded from the legislative history (which understandably focused on radioactive materials) that Section 177.810 was not intended to exempt reclassification.

4.2 Application of the Urban Tunnel Exception to the VDOT Regulations

On its face, 49 C.F.R. 177.810 (1992) contains three clauses which limit the scope of its operation. First, the section only exempts from the federal regulations state and local regulations which relate to the "kind, *character, or quantity of any hazardous materials.*" The VDOT regulations which specify different maximum shipment sizes than the federal regulations appear to fit within this exception (they relate to quantity), thus avoiding federal preemption. However, it is less clear as to whether this limitation permits regulations which *classify* hazardous materials differently than the federal scheme - thus it is at least possible that a court would preempt the VDOT regulations because they impermissibly reclassify hazardous materials for transportation purposes.[38] Second, section 177.810 only authorizes differing state regulations that relate to *"urban vehicular tunnels."* The VDOT regulations, however, apply at all the interstate highway tunnels within the state,[39] and two of these, the Big Walker Mountain and East River Mountain tunnels, are clearly not urban tunnels. Moreover, the Chesapeake Bay Bridge-Tunnel arguably[40] is not. Thus, the VDOT regulations are likely to be found preempted to the extent they apply to these two (or three) tunnel facilities.

Finally, Section 177.810 only exempts state regulations which apply to tunnels *"used for mass transportation."* It is simply unclear as to what traffic levels are required to meet this "mass transportation" requirement. Thus conceivably, some of the urban tunnels may fall outside this exception if they support insufficient traffic. However, it is likely that courts will focus on the urban/rural distinction (since it is clearer) instead of the (vague) mass transportation requirement, and thus it is unlikely that the VDOT regulations will be preempted with respect to any of the urban tunnels for failing to support mass transportation.

4.3 The Routing Exception

A second exception to the preemption provisions of the HMTA is specified in 49 U.S.C. App. 1804(b)(4). This section specifies that state highway *routing*

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38. Professor Hobeika claims that this exception covers reclassification. See supra note 16.
39. The VDOT regulations apply to the following facilities:

Big Walker Mountain Tunnel
Chesapeake Bay Bridge-Tunnel
East River Mountain Tunnel
Elizabeth River Tunnel - Downtown
Elizabeth River Tunnel - Midtown
Hampton Roads Bridge-Tunnel
Interstate 664 Bridge-Tunnel

40. This tunnel connects the very rural Eastern Shore of Virginia to the urban Tidewater area of the state.

standards are only preempted if they fail to meet the procedural and substantive requirements that are specified by the Federal Highway Administration (FHA) for the highway routing of hazardous materials. Thus, if the VDOT regulations can be presented as routing regulations, as opposed to hazardous material transportation regulations, they will avoid preemption if they meet the FHA standards.[41]

DOT has recognized that "[r]outing requirements are usually associated with . . . specific transportation facilities within a state, such as bridges or toll roads."[42] Consequently, it initially seems plausible that VDOT can avoid preemption by characterizing the tunnel regulations as being routing regulations. However, more in-depth analysis reveals that such an approach is likely to fail for two reasons.

First, DOT has held that for a routing requirement to be consistent with the HMTA, the state issuing the requirement must "act through a process that adequately weighs the full consequences of its routing choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules."[43] Specifically, DOT has held that such a process should consider, among other things, accident rates, population densities, road conditions on alternative routes, and the likelihood of injury or damage associated with the alternative route as opposed to the prohibited route.[44] Since Virginia did not conduct such a process prior to issuing the VDOT tunnel regulations, it is likely RSPA would conclude that VDOT's regulations are invalid. Second, neither VDOT's modified hazardous material classification scheme, nor its specification of smaller maximum shipment sizes, can fairly be categorized as a routing restriction. While both invariably result in rerouting of hazardous material shipments, the VDOT changes really represent substantive modifications to the federal hazardous material transportation structure. For both of the above reasons, it is unlikely Virginia can use the "routing exception" to justify the VDOT tunnel regulations.

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41. See, e.g., *City of New York v. Ritter Transportation, Inc.*, 515 F.Supp 663 (S.D.N.Y. 1981) aff'd, *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2nd Cir. 1982) (holding that city regulations which prohibited transporting bulk gases through the city unless no practical alternative route exists were not preempted by the federal hazardous material regulations); IR-1, 43 Fed. Reg. 16954 (1978) (holding that a New York City ban on the transportation of radioactive materials through the city was a routing requirement and hence not banned by the HMTA).

42. IR-2, 44 Fed. Reg. 75,566, 75,569 (1979).

43. IR-3, 46 Fed. Reg. 18,918, 18,922 (1981).

44. Id. at 18,921-22.

CHAPTER 5 - CONCLUSIONS AND RECOMMENDATIONS

The above analysis leads to the following conclusions:

1. The VDOT regulations clearly fail both "the obstacle" and "covered subject" tests, and thus are preempted by the HMTA except to the extent they fit within any of the exceptions provided in the federal hazardous material regulations.

2. 49 C.F.R. 177.810 (1992), which exempts from the HMTA state regulations relating to urban vehicular tunnels used for mass transportation, probably saves the VDOT regulations to the extent they apply to urban tunnel facilities.

3. It seems likely the VDOT regulations, as they apply to rural tunnels, are preempted.

4. The VDOT regulations may also be preempted, even as they apply to urban tunnels, to the extent that they classify hazardous materials differently than the federal regulations.

5. There is also a slim chance the VDOT regulations could be preempted on "mass transportation" grounds.

6. The VDOT regulations will not be able to avoid preemption via the routing exception.

Given the above problems with the VDOT regulations, it is recommended that the state submit these regulations to the Department of Transportation's Research and Special Projects Administration for a preemption determination. 49 C.F.R. 107.201-11 (1992) specifies the procedure a state or local government should follow to obtain such a determination. The first step is to submit an application to

Associate Administrator for Hazardous Materials Safety
Attention: Hazardous Materials Preemption Docket
RSPA
U.S. Department of Transportation
Washington, D.C. 20590-0001[45]

This application must include:

1. the text of the VDOT regulations;

45. 49 CFR 107.203(a) & (b).

2. the federal statutory section and/or regulations which the VDOT regulations possibly conflict with;[46] and

3. an explanation as to why VDOT believes the Virginia regulations should not be preempted.[47]

Upon receiving the application, the Associate Administrator for Hazardous Materials Safety publishes a notice in the Federal Register.[48] Personal notice may also be sent to persons likely to be affected by the ruling, and RSPA will accept written comments from interested parties.[49] The Associate Administrator for Hazardous Materials Safety then processes the application and issues a determination,[50] which is sent to the state and published in the Federal Register. If VDOT finds this determination adverse, it can petition for reconsideration, seek judicial review of the ruling, or apply to DOT for a waiver of preemption.

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46. In filling out this part of the application, VDOT should list the HMTA preemption provision, 49 App. U.S.C. 1811(a) (Supp. 1991) and the urban tunnel exception, 49 C.F.R. 177.810 (1992).

47. 49 C.F.R. 107.203(b) (1992). A fourth requirement, that the applicant explain how he is affected by the state regulation, is presumably unnecessary when the state itself requests the preemption determination.

48. 49 C.F.R. 107.205(b) (1992).

49. *Id.*

50. Of course, an RSPA preemption determination only examines whether or not the state regulations are preempted by the HMTA - DOT does not have the authority to determine if state regulations are preempted under the Commerce Clause of the U.S. Constitution. Cf. IR-2, 44 Fed. Reg. 75,566, 75,567 (1992) (stating that DOT inconsistency rulings only determine statutory preemption, not Commerce Clause preemption). However, a statutory preemption determination should be sufficient for VDOT's purposes since this study concludes that it is unlikely the VDOT regulations fall afoul of the Commerce Clause.

APPENDIX A

COMPARISON OF THE FEDERAL CLASSIFICATION SCHEME WITH THAT OF VDOT

Federal Regulations		**VDOT Regulations**	
Class	*Substances*	*Class*	*Substances*
1.1	Explosives (mass explosion hazard)	10	Explosives
1.2	Explosives (projection hazard)		Class A
1.3	Explosives (fire hazard)		Class B
1.4	Explosives (no blast hazard)		Class C
1.5	Very Insensitive Explosives		
1.6	Extremely Insensitive Detonating Substances		
2.1	Flammable Gas	2	Compressed Gases
2.2	Non-flammable Compressed Gas		Flammable
			Non-flammable
3	Flammable and Combustible Liquid	4	Flammable Liquids
4.1	Flammable Solid	5	Flammable Solids
4.2	Spontaneously Combustible Material		
4.3	Dangerous-When-Wet Material		
5.1	Oxidizer	6	Oxidizing Materials
5.2	Organic Peroxide		
6.1	Poisonous Materials	8	Poisons
6.2	Infectious Substances		Class A
			Class B
			Irritating Materials
7	Radioactive Materials	7	Radioactive Materials
8	Corrosive Material	3	Corrosive Materials
9	Miscellaneous Hazardous Material	1	Combustible Liquids
None	ORM-D	9	ORM (Classes A-E)
None	Forbidden Explosives		
None	Forbidden Materials		