PERMISSIBLE STATE PERMIT/FEE SYSTEMS FOR RADIOACTIVE MATERIALS TRANSPORTATION

Lori Friel
Western Interstate Energy Board
3333 Quebec, Suite 6500
Denver, Colorado 80207

ABSTRACT

Many state permit/fee systems for radioactive materials transportation have been ruled inconsistent with federal law or invalidated by the courts. As the date for repository operation, and its associated transportation, draws near, more states can be expected to adopt permit/fee systems. Examination of the U.S. Department of Transportation's advisory rulings and federal court cases on previous permit/fee systems gives general guidance on the type of permit/fee systems most likely to withstand challenges. Such a system would: have a simplified permit application with minimal information requirements; address a federally-defined class of hazardous or radioactive materials; allow access to all shipments conducted in compliance with federal law; charge a fee reasonably related to the costs imposed on the state by the transportation; and minimize the potential for re-directing shipments to other jurisdictions.

INTRODUCTION

States have enacted permit/fee systems for radioactive materials transportation with varying success. Many of these systems have been ruled inconsistent with federal law by the U.S. Department of Transportation (DOT) or invalidated by the courts. As the date for the operation of the high-level waste repository, and its associated transportation, draws near, more states can be expected to adopt permit/fee systems. Therefore, it may be useful to examine the previously adopted systems to determine the characteristics which distinguish a valid transportation permit or fee regulation from an invalid one.

CONSTITUTIONAL PRINCIPLES AND FEDERAL LAW

Several federal statutes and constitutional principles restrict the extent to which states may regulate radioactive materials transportation. The federal courts have responsibility for determining whether a state or local government's permit/fee system violates the U.S. Constitution or whether it is inconsistent with federal statutes, and thus, preempted. The U.S. Department of Transportation issues advisory opinions limited to the issues of: 1) whether a state or local transportation law is inconsistent with the HMTA or the regulations adopted pursuant to the HMTA; and 2) if so, whether the state or local government should be allowed to enforce its inconsistent law.

The U.S. Constitution's Supremacy Clause (U.S. Const., Art, VI, cl. 2) is the basis for federal preemption of inconsistent state laws in general. By declaring that federal law "shall be the Supreme Law of the Land," the Supremacy Clause allows federal courts to preempt a state or local law that is in direct conflict with a federal law (i.e., compliance with both the federal law and the state/local law is impossible). If there is no direct conflict, the courts may find that the state/local law is an obstacle to the goals of the federal law.

The Commerce Clause of the U.S. Constitution (Art. I, sect. 8, cl. 3) gives Congress the authority to regulate commerce among the states. Interstate commerce is a broad term that includes the interstate transportation of radioactive materials and radioactive wastes. By combining the Supremacy Clause and the Commerce Clauses, federal courts can find that a state or local law has been preempted by an Act of Congress regulating interstate commerce, such as the HMTA. In addition to preempting state laws that conflict with federal statutes on commerce, the Commerce Clause has been interpreted by courts to prohibit states from placing undue burdens on interstate commerce. Thus, a state permit system whose benefits are clearly outweighed by the burdens on interstate transportation of radioactive materials could be preempted under the Commerce Clause even if the permit system was compatible with the goals of the HMTA.

The Constitution's Equal Protection Clause (Amendment XIV) prohibits states from treating two groups differently unless the class distinction and the different treatment are justified by a legitimate goal of the state. In a transportation regulation, such as a permit system, the division between two classes regulated in a different manner must be rationally related to a legitimate state goal. In a radioactive materials transportation permit/fee regulation, the most frequent equal protection argument made is that radioactive materials transporters are unfairly singled out from other hazardous materials transporters or that the transportation of radioactive materials is arbitrarily isolated from other activities involving radioactive materials.

The HMTA is the major federal statute that affects states' ability to adopt permit/fee systems. Using the Supremacy Clause, the federal courts can invalidate a state regulation if it is in direct conflict with the HMTA or if the permit/fee law is an obstacle to the HMTA's goals of increasing safety, eliminating unreasonable delays, and promoting uniformity and simplicity in the regulatory system for hazardous materials transportation.

While ruling on the validity of a state or local law under the HMTA or the U.S. Constitution is the responsibility of the federal courts, the U.S.

Department of Transportation (DOT) issues advisory opinions (inconsistency rulings) on the conflict between state/local laws and the HMTA. IF DOT finds the state/local law inconsistent, the affected jurisdiction can apply to DOT for a ruling on whether the state or local government should be allowed to enforce its inconsistent law. DOT will make this "non-preemption determination" if the state or local law provides at least the same level of safety afforded by the HMTA and does not pose an unreasonable burden on interstate commerce. While both the inconsistency rulings and the non-preemption determinations are advisory only, the federal courts will at least consider the DOT's findings if a state law is later challenged in the courts.

DOT'S PERMIT/FEE RULINGS

Eleven of DOT's eighteen inconsistency rulings as of January 1987 have considered state and local (county, city, and bridge authority) governments' permit or fee regulations, as shown in Table I. While most of these rulings concerned radioactive materials transportation, several of the permit systems covered other hazardous materials. DOT found that most of these systems were inconsistent with the provisions or goals of the HMTA. The most notable exception was the Illinois fee which was upheld in the seventeenth inconsistency ruling (IR-17). (The Utilities have appealed the Illinois ruling to the Secretary of Transportation.)

TABLE I

DOT Inconsistency Rulings (IRs) on Permits/Fees

Ruling Number	Enacting Jurisdiction	Federal Register	Date
IR-1	New York City	43 FR 16954	Apr. 20, 1978
IR-2	Rhode Island	44 FR 75566	Dec. 20, 1979
IR-3	Boston	46 FR 13918	Mar. 26, 1981
IR-8	Michigan	49 FR 46637	Nov. 27, 1984
IR-10	New York State Thruway Auth.	49 FR 46645	Nov. 27, 1984
IR-11	Ogdensburg (NY) Bridge and Port Authority	49 FR 46647	Nov. 27, 1984
IR-12	St. Lawrence County, NY	49 FR 46650	Nov. 27, 1984
IR-13	Thousand Island (NY) Bridge Authority	49 FR 46653	Nov. 27, 1984
IR-15	Vermont	49 FR 46660	Nov. 27, 1984
IR-17	Illinois	51 FR 34527	Sep. 29, 1986
IR-18	Prince George's County, MD	52 FR 200	Jan. 2, 1987

As discussed above, these rulings are advisory only. While they are not binding upon the courts or upon the parties involved in the inconsistency ruling, the federal courts are likely to consider DOT's findings. Therefore, DOT's rulings may shed light on the types of permit/fee systems likely to be upheld. The following discussion examines DOT's rulings on individual aspects of permit/fee systems to identify the differences between systems considered by DOT to be consistent with the HMTA and those considered to be inconsistent.

Information Required in Permit Application

DOT has stated in several of its inconsistency rulings that the validity of a permit system is inextricably linked to the process of obtaining the permit, including the information required in a permit application. Two permit systems (Michigan, IR-8; Vermont, IR-15) were held to be inconsistent with the HMTA partly because of the detailed information required in the permit applications. The applications in each case were similar. Information was required on the routes to be taken; name, address and telephone number of the shipper, carrier, and receiver; estimated date and time of departure from the shipment's origin, and of arrival at the state border. Under the federal prenotification rules, the carrier must provide all of this information to the state's governor or the governor's designee. The Michigan rule was held inconsistent because it required the material to be submitted on a different form and to different persons than those designated to receive the federal prenotification. DOT said that this additional paperwork burden was an obstacle to the HMTA's goals of increasing uniformity and decreasing burdens on transportation. The same information requirements under the Vermont application were upheld since the information was required to be supplied to the governor's designee; the state requirement could be complied with merely by providing the prenotification required under federal law.

The Michigan and Vermont rules also required information not required under federal law, such as the estimated date and time of leaving the state, the scheduled stops within the state, and the reason for the stops. DOT found these additional information requirements inconsistent with federal law because they promote the multiplicity of requirements and paperwork burdens the HMTA seeks to avoid.

DOT also found documentation and certification requirements of the Vermont and Michigan systems inconsistent where they sought an additional piece of paper from the carrier stating information that states could obtain independently. For example, both states required copies of all Nuclear Regulatory Commission approvals, such as route approval, which the state could obtain by calling the Nuclear Regulatory Commission.

DOT disapproved of substantive requirements expressed in terms of information requirements. For example, Michigan requested the reason for choosing the proposed route and Vermont required a certification that the chosen route was the shortest, most direct route, and if not, why. These requirements were viewed as impermissible attempts to impose new routing requirements on the carriers by second-guessing the carrier's routing decision or forcing carriers to choose the shortest route rather than one which **reduces** (not minimizes) transit time, as required under the federal rules. Similarly, a requirement that carriers submit emergency response plans was seen as an impermissible attempt to transfer the burden of emergency preparedness from the state to the carrier. (IR-8; IR-15)

Agency Receiving the Permit Application

In some cases, the identity of the agency receiving the permit application affects the validity of the application. For example, Michigan's permit application asked for information that federal law

requires the carriers to submit to state governors or the governors' designees. (IR-8) The Michigan requirement was found inconsistent, however, because the permit application was to be submitted to two agencies, neither of which was the governor's designee for federal prenotification requirements. Not only did this cause an additional paperwork burden, but DOT found that it presented potential security problems since the Nuclear Regulatory Commission's safeguard regulation requires the governor's designee to keep prenotification information secret except under certain circumstances. Similarly, DOT held that a County permit application requirement was inconsistent with federal law because it required the submission of safeguarded information to county officials other than law enforcement officials. (IR-18)

Types of Radioactive Material Addressed

The types of radioactive materials covered under a permit system may affect the permit's validity. DOT has ruled that the federal government has preempted the field of defining hazard classes. Therefore, a state or local regulation which uses different definitions of radioactive materials or groups the materials into different categories than those established under the federal regulations may be held inconsistent. The definitions in Vermont and St. Lawrence County, New York, were held inconsistent with federal law. The County's rule contained several definitions each of which described some radioactive materials which were highway route controlled quantities, as defined in DOT's regulations, and some which were not. Vermont's rule applied to highway route controlled quantities of "radioactive waste" and spent fuel, but not to highway route controlled quantities of other materials. In each case, DOT invalidated the definitions, but examined other aspects of the permit system as though they applied to a federally recognized group of radioactive materials.

As long as states do not redefine hazard classes, DOT may be more inclined to accept certain permit systems if they apply only to spent fuel. In discussing the Illinois transit fee, DOT said that, even if DOT assumed that Illinois denied entry to shipments which had not paid the fee in advance (which is contrary to the actual Illinois practice of allowing shipments to proceed and billing them later), spent fuel carriers were solely to blame for any delays caused by arranging payment at the state border. DOT found that the long lead time in planning spent fuel shipments gave the transporters sufficient time to make advance payment arrangements. (IR-17) DOT contrasted this with the Tucson, Arizona, 48-hour advance prenotification system which DOT invalidated in its sixteenth inconsistency ruling because the Tucson rule applied to radiopharmaceuticals, which are often shipped on a few hours notice. (IR-16, 50 Fed. Reg. 20879)

Treatment of Non-Complying Carriers

DOT does not favor state or local permit systems which deny access to shipments that are in compliance with federal law. For example, DOT found the permit systems of the Ogdensburg (New York) Bridge and Port Authority and St. Lawrence County, New York, inconsistent with federal law because a shipment in full compliance with federal law could not enter the jurisdiction until it had complied with additional local requirements. (IR-11; IR-13)

In contrast, Illinois's system was upheld because the state only stopped shipments which were not in compliance with federal law, such as the motor vehicle safety laws. Carriers who refused to pay Illinois's shipment fee were not denied access. Instead, shipments were allowed to proceed, with the state pursuing its fees later through legal channels. (IR-17)

Size of Fee and Use of Fee Revenues

In order for a state's shipment fee to be valid, the purposes for which the money is collected must be valid. DOT found fault with Vermont's $1000 per shipment fee because the money was to be used for a state monitoring team that accompanied each shipment. The monitoring team was part of a state emergency response system that duplicated the emergency response capabilities of the federal government. DOT said that Vermont could not charge the carriers for the state's wasteful decision to ignore the emergency response assistance available from the federal government. (IR-15)

Illinois's fees are also used for emergency response activities and for state response personnel who accompany each shipment (highway or rail) until it leaves the state. However, DOT upheld Illinois's $1000 per shipment fee because its emergency response system was based on an integration of capabilities available at the federal, state, and local level. (IR-17)

The absolute size of a state's fee is not relevant to DOT's determination of whether the fee is consistent with federal law. As seen above, two identical fees received a different disposition. The only requirement is that the fee is reasonably related to legitimate state costs required because of the transportation.

Potential for Re-Directing Shipments

DOT has invalidated six permit/fee systems because they have the effect of re-directing shipments to other jurisdictions. (IR-8, 10-13, 15) DOT found that such unilateral exporting of risk to other jurisdictions and the possibility of increasing risk by increasing transit time as shipments avoid areas with permit systems were inconsistent with the safety goals of the HMTA. However, DOT upheld the Illinois fee against arguments that the $1000 per shipment fee would encourage carriers to re-route shipments to avoid Illinois. (IR-17)

The difference between the Illinois case and the earlier rulings was that the earlier rulings involved states and local governments on the border between the United States and Canada. No evidence was presented to show that Canada has a radioactive materials routing regulation which would prohibit a carrier from altering its route (even making lengthy detours) to enter the United States at a different point. Only after entering the United States would the DOT's routing rules apply. Therefore, DOT concluded that re-routing shipments to avoid the New York, Michigan and Vermont areas with permit restrictions would be legal and possibly attractive to carriers. However, the Illinois situation was different. Because of the state's central location, DOT found that any highway re-routing to avoid the state would probably be a violation of the federal routing rules requiring carriers to select routes which reduce transit time. For rail shipments (to

which no federal routing rules apply). DOT found that avoiding Illinois would probably cost carriers more than the $1000 fee, so that it was not likely to occur. Furthermore, DOT noted that there was no evidence that carriers were actually detouring around Illinois for highway or rail shipments.

FEDERAL COURT CASES

The federal courts have not had as many opportunities as the DOT to examine a wide range of radioactive materials transportation permits and fees. However, examination of the few cases available, federal law, and general constitutional principles sheds some light on the characteristics which distinguish a valid permit/fee system from an invalid one.

The HMTA has served as the basis for invalidating at least one hazardous materials permit system. A federal district court invalidated Rhode Island's permit system for liquefied energy gases because the requirement that a written permit application be filed at least four hours before entering the state caused unnecessary delay in conflict with the HMTA's goal of speedy transport. National Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509 (D. RI. 1982). The principle behind this ruling may be applicable to radioactive materials transportation, although the exact time limits probably are not. The information required on the Rhode Island permit application was such that the application could not be completed until the truck was loaded and some of the liquefied energy gases were transported in tanks which could only contain the gas safely for five hours. In contrast, a four-hour permit application would not present as serious a delay for radioactive materials, especially if the information required on the application could be obtained before the shipment was loaded. An even greater time limit would be necessary to delay those radioactive materials shipments for which federal law requires seven days advance notice to the states.

More recently, a federal court upheld New Hampshire's permit system against challenges that it violated the Commerce Clause and Equal Protection Clause and that it was inconsistent with the HMTA. New Hampshire Motor Transport Association v. Flynn, 751 F. 2d 43 (1984). The court stated that a user fee for hazardous materials transportation, such as that charged by New Hampshire, is not a violation of the Commerce Clause, "so long as the fee is not excessive when compared to the services the state provides those charged." The court imposed the burden of proving the fee's amount unreasonable on the carrier or shipper challenging the permit fee. The actual purpose for which the funds were used was irrelevant, as long as the amount of money was reasonably related to the costs incurred by the state as a result of the hazardous materials transportation. The court also rejected the carriers' Equal Protection Clause arguments, saying they were merely variations on the Commerce Clause argument.

The Flynn court disagreed with the carriers that the permit system violated the HMTA's goal of eliminating unnecessary transportation delays. The transportation delay was minimal, according to the court, limited to the delay inherent in administering any bare licensing system. The system was designed primarily to raise revenues; no lengthy permit application was required. Carriers could obtain a $15 single trip permit upon entering the state during normal business hours. For only $25, carriers could obtain an annual permit, allowing them to enter at any time.

GUIDELINES FOR A STATE PERMIT SYSTEM

Using the above DOT inconsistency rulings and federal court cases, some general guidelines can be distilled for a state permit/fee system which is most likely to withstand challenges by shippers and carriers.

The permit application would be as short as possible to avoid unnecessary paperwork burdens on the carriers and to minimize transportation delays. Information which is available to the state from other sources, such as the Nuclear Regulatory Commission's advance route approvals or the certification on the shipping papers that the shipment will be conducted in compliance with federal laws, would not be requested on the permit application. Requirements for shipment-specific information, which can create additional paperwork burdens, would be kept to a minimum, ideally limited to the prenotification required under federal law. If additional information is needed for general emergency response planning purposes, a post-notification requirement on an annual basis summarizing shipments conducted over the previous year may meet the states' informational needs without creating a potential for delaying shipments.

Unauthorized personnel would not request shipment-specific information that is required under the Nuclear Regulatory Commission's safeguard rules to be protected from unauthorized disclosure. For example, DOT is not likely to approve of a permit application requiring route and scheduling information to be divulged to a state agency other than the agency designated by the state's governor to receive the prenotification required under federal law.

Substantive requirements expressed in terms of informational requirements are unlikely to be upheld by DOT where the state seeks to impose more stringent requirements on the carrier regarding issues which DOT believes are within the exclusive jurisdiction of the federal government, such as the design and certification of spent fuel casks. Therefore, DOT would probably find inconsistent a permit application which asked the carrier to certify that its cask design had been physically tested or tested to certain standards in excess of the Nuclear Regulatory Commission's requirements.

A permit/fee system which addresses all hazardous materials or some **federally**-defined subset of these materials, such as spent fuel or highway-route controlled quantities of radioactive materials, is most likely to be upheld. If the permit/fee system requires the carrier to know its plans several days in advance, it is more likely to be upheld where it only applies to materials, such as spent fuel, for which the carrier traditionally makes transportation plans far in advance.

A system that only bars shipments which are in violation of federal law (such as the motor vehicle safety laws and the HMTA) is more likely to be upheld than one in which failure to pay a state fee is used to keep shipments out of the state. The Illinois practice of allowing shipments to proceed and billing them later is more likely to be found consistent with the HMTA's goal of minimizing transport delays.

The size of a state transportation fee would be reasonably related to the costs imposed on the state by the transportation of the radioactive materials covered, although it is not necessary to earmark the fee revenues for transportation use. DOT may look at the costs imposed on the state to determine if they are truly imposed by the transportation or if they are a result of a state's decision to incur unnecessary costs. In Vermont, for example, DOT concluded that it was the state's decision to ignore federal emergency response capabilities, rather than the shipment of radioactive materials per se, that caused Vermont to incur heavy emergency preparedness costs.

CONCLUSION

The DOT inconsistency rulings are advisory only, although they are likely to be read and considered by the federal courts. The few federal court cases to date on radioactive materials permit and fee systems are not determinative because various federal courts may develop different approaches to determining the validity of a state permit or fee system. However, the DOT inconsistency rulings, federal court cases, and general constitutional principles are probably the best available guidance to states on the types of radioactive materials permit or fee systems most likely to withstand challenges by shippers and carriers.