



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Docket Number: PHMSA–RSPA–2004–18730

Docket Operations
U.S. Department of Transportation
West Building, Ground Floor, Room W12–140
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William T. Pound
Executive Director

May 16, 2008

RE: Interim Final Rule on Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments

Dear William Schoonover:

I am writing to you on behalf of the National Conference of State Legislatures (NCSL) to provide our recommendations regarding the above-referenced interim final rule regarding the routing of hazardous materials shipments and to discuss our concerns with consultation on the same.

NCSL believes it was incumbent on PHMSA to follow-up with public sector organizations by phone or e-mail to verify that the information was sent to the correct address and to establish a point of contact with our organization. Interestingly, no other member of our state and local government coalition (which includes the National Governor's Association, the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors) recalls receiving any follow-up about this proposed rule from PHMSA. PHMSA did not conduct any follow-up contact with any of these organizations and then construed our silence as some sort of acquiescence.

The purpose of Executive Order 13132 is to prevent this type of situation from occurring. E.O. 13132 makes it incumbent upon the agency to engage in meaningful consultation with state and local officials or their national associations who are impacted by the potentially preemptive nature of the proposed rule or by its intergovernmental ramifications. NCSL does not believe that one mailing constitutes meaningful consultation as contemplated by E.O. 13132. In sum, PHMSA's attempts at meaningful consultation were feeble at best and disingenuous at worst.

NCSL offers the following for inclusion in a final rule.

- There should be explicit language assuring that no sort of legal immunity is granted to or assumed on behalf of rail carriers for negligence or other wrongdoing following from an accident causing environmental damage, death or other harm. Final language should expressly state that rail carriers shall be responsible for negligent acts resulting from the

transport of hazardous materials should a court of competent jurisdiction make that determination.

- Consultation with states in the consideration of alternative routes should be mandatory. On page 20771 (c) (2) of the interim final rule, it states that rail carriers “must seek relevant information from state, local, and tribal officials, AS APPROPRIATE, when performing their route analyses. NCSL feels that making consultation mandatory would reduce or eliminate any prospect for overlooking or withholding any relevant information.
- On page 20772, (g), the interim final rule stipulates that rail carriers’ safety and security plans include procedures for consulting with offerors and consignees regarding storage or transit delays of hazardous materials. NCSL believes that these plans should also include procedures for consulting with states to ensure that plans of all private entities involved conform to and respect state law, regulations and HazMat procedures.
- The section on Recordkeeping, p. 20772 (h), requires rail carriers to maintain and reasonably make available to the Department of Transportation (DOT) and the Department of Homeland Security (DHS) copies of the information required in the rule. States, local officials and emergency personnel should also have access to these records under the same terms as DOT and DHS. NCSL strongly suggests the addition of this records’ access to a final rule.

If you have any questions or requests for further information, please contact Michael Bird (Michael.Bird@ncsl.org) or Susan Parnas Frederick (Susan.Frederick@ncsl.org) at the NCSL D.C. office at (202)624-5400 or by fax at (202)737-1069.

I look forward to working with you on this issue in the future.

Respectfully,

A handwritten signature in black ink, appearing to read "Carl Tubbesing". The signature is fluid and cursive, with a large loop at the end.

Carl Tubbesing
Deputy Executive Director
National Conference of State Legislatures