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Research and Special Programs Administration

RSPA-98-4952-148

Preemption Determination Nos. PD-8(R), PD-9(R), PD-10(R) and PD-11(R); Docket Nos. PDA-9(R), PDA-7(R), PDA-10(R), and PDA-11(R), respectively

California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials

**PETITION OF
THE CHLORINE INSTITUTE, INC.
AND CHEMICAL MANUFACTURERS ASSOCIATION
TO SUPPLEMENT THE RECORD AND FOR DISCHARGE
OF THE PETITION FOR RECONSIDERATION FILED MARCH 7, 1995**

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Dated at
Washington, D.C.
August 20, 1999

BEFORE THE

UNITED STATES DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Preemption Determination Nos. PD-8(R), PD-S(R), PD-10(R) and PD-11(R); Docket Nos. PDA-9(R), PDA-7(R), PDA-10(R), and PDA-11(R), respectively

California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials

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PETITION OF THE CHLORINE INSTITUTE, INC. AND CHEMICAL MANUFACTURERS ASSOCIATION TO SUPPLEMENT THE RECORD AND FOR DISCHARGE OF THE PETITION FOR RECONSIDERATION FILED MARCH 7, 1995

I. Summary Statement

Between December 22, 1992, and January 20, 1993, four applications for preemption determinations were filed by HASA, Inc. and the Swimming Pool Chemical Manufacturer% Association ("SPCMA"). These applications were decided by the Research and Special Programs Administration ("RSPA") on February 15, 1995. The Chlorine Institute, Inc. ("CI") and Chemical Manufacturers Association ("CMA") filed a Petition for Reconsideration on March

7, 1995. (A copy of that Petition is attached hereto as Appendix A.) As of this date, no action has been taken on that Petition and the 1995 decision, which these Petitioners believe to be legally insupportable, remains the latest word from RSPA regarding the application of the Hazardous Materials Regulations ("HMR") to operations within the plant locations of hazardous materials shippers and receivers.

In part, the RSPA decision at issue was based upon an interpretation of the Clean Air Act ("CAA") and its impact on state and local regulations. In settlement of litigation, the Environmental Protection Agency ("EPA") has recently issued an interpretation of Section 310 of the CAA that bears directly upon the issues involved in this case. In fact, as discussed below, this EPA interpretation is at odds with that used to support the decision herein. (The Settlement Agreement including the interpretative language is attached hereto as Appendix B, and the notification from the U. S. Department of Justice regarding its finality under Section 113(g) of the Clean Air Act is attached as Appendix C.)

This matter has been before RSPA for more than six years, and has been pending on reconsideration for more than four years. The basis for RSPA's decision is that, with the exception of loading and unloading, the HMR do not apply to transportation activities within plant locations because those activities are not in commerce. This interpretation has significant implications for all who ship and receive hazardous materials. Further,

those same shippers and receivers are currently subject to an outstanding interpretation by RSPA that seriously misconstrues the Federal Hazardous Materials Transportation Laws without having had an opportunity to challenge that interpretation.

On June 21, 1999, the EPA Risk Management Plan Regulations became fully effective. It is quite likely that state and local officials will respond to the additional information contained in the Risk Management Plans by adopting new regulations affecting operations within the plants of shippers and receivers of hazardous materials. The appropriate resolution of the issues contained in the Petition for Reconsideration would be of great assistance in determining the proper scope of such new regulations. Certainly, the outstanding, and in Petitioners' opinion erroneous, rationale of RSPA's decision, will lead to significant confusion, and most probably litigation.

In view of the foregoing, and the more complete discussion that follows, RSPA should promptly issue a final decision in this matter and resolve the outstanding Petition for Reconsideration. To continue to delay resolution further is to put the parties, and indeed the entire shipping public, in needless jeopardy.

II. Reasons For Supplementing The Record

In its 1995 decision, RSPA held that certain of the regulations at issue were not preempted because they were otherwise authorized by Federal law, namely Section 112(r) of the CAA. In

their Petition for Reconsideration, Petitioners contended that this ruling overlooked Section 310 of that Act which provides:

> Except as provided in subsection (b) of this section [dealing with nonduplication of appropriations], this Act shall not be construed as superseding or limiting the authorities and responsibilities under any other provision of law, of the Administrator or any other Federal officer, department or agency. (42 U.S.C. 7610)

Petitioners argued that while there may be some overlap between EPA and DOT jurisdiction with respect to tank car loading and unloading, and other activities undertaken within a plant location, it does not follow that Congress intended to cede to the states the preemptive powers over hazardous materials transportation that Congress had reaffirmed in the Hazardous Materials Transportation Uniform Safety Act of 1990.

The attached Appendix B clearly demonstrates that EPA's interpretation of the CAA, particularly Section 310 of the Act, is consistent with the position advocated by Petitioners in this proceeding. The operative Settlement Agreement language relied upon by the parties in dismissing two appeals of the Risk Management Plan Regulations insofar as they apply to rail tank car as stationary sources under the CAA concludes:

> Thus, neither CAA section 112(r)(11) (which provides that section 112(r) does not preempt state regulations that are more stringent than EPA's) nor section 112(l) (which allows EPA to delegate the accident prevention regulations to a state if the state's program is no less stringent than EPA's) can be read to authorize a state to regulate in a manner that would be preempted under the Federal Hazmat Law. (Appendix B, Attachment C.)

It could not be more clear. The agency charged with administering the CAA interprets its statute in a manner directly contrary to the interpretation given it by RSPA in this matter. Thus, the RSPA interpretation should be reconsidered and reversed.

III. The Petition For Reconsideration Should Be Discharged, And A Decision In This Matter Should Be Issued Promptly

The core of this proceeding, and particularly of the Petition for Reconsideration that has been pending for more than four years, is purely a matter of statutory construction. RSPA has held that, with the exception of some elements of loading and unloading of transport vehicles, the Federal hazmat laws do not apply to all movement, handling and storage of hazardous materials on non-carrier private property because such activities on private property are not in commerce.

Petitioners believe that this statutory construction, as well as other constructions of SARA Title III and the CAA, are incorrect. But, whether correct or incorrect, they are interpretations of the various laws, and issues that could not possibly warrant four years to address.

While the decision pending on reconsideration is not a final determination of the issues, it is the most recent statement by RSPA regarding its jurisdiction. State and local officials will undoubtedly look to this interpretation in crafting whatever regulations they may seek to adopt. The longer this matter

remains unsettled the greater the likelihood that state and local officials will rely upon it, and adopt regulations that Petitioners believe are preempted by the Federal hazmat laws.

Petitioners are aware that RSPA has an open docket, HM-223, titled "Applicability of Hazardous Materials Regulations to Loading, Unloading, and Storage," in which RSPA is exploring the extent of its statutory and regulatory jurisdiction. Petitioners understand that the issues under review in Docket HM-223 are also relevant in this petition for reconsideration. However, petitioners believe that RSPA should no longer delay decision on this petition because of another docket. Docket HM-223 was first issued as an advance notice of proposed rulemaking in July 1996. RSPA also hosted three public meetings in Docket HM-223, more than 200 persons participated in the public meetings, and over 100 written comments were received in response to the advanced notice. Most recently, RSPA has issued a supplemental advance notice of proposed rulemaking (64 FR 22718, April 27, 1999) on Docket HM-223, three years after the first advance notice. Notwithstanding the pendency of Docket HM-223, the facts of this petition are clear, and the Hazardous Materials Transportation law is clear. RSPA should now issue a decision on this petition for reconsideration.

In short, there is every reason to discharge the Petition for Reconsideration and finally decide this matter. At the same time, there is no good reason further to continue delaying the disposition of an important matter.

Accordingly, Petitioners pray that RSPA issue a final decision in this matter.

Respectfully submitted,

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APPENDIX A

BEFORE THE

UNITED STATES DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Preemption Determination Nos. PD-8(R), PD-9(R), PD-10(R) and PD-11(R); Docket Nos. PDA-9(R), PDA-7(R), PDA-10(R), and PDA-11(R), respectively

California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials

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PETITION FOR RECONSIDERATION ON BEHALF OF THE CHLORINE INSTITUTE, INC. AND CHEMICAL MANUFACTURERS ASSOCIATION

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Dated at
Washington, D.C.
March 7, 1995

BEFORE THE

UNITED STATES DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Preemption Determination Nos. PD-8(R), PD-9(R), PD-10(R) and PD-11(R); Docket Nos. PDA-9(R), PDA-7(R), PDA-10(R), and PDA-11(R), respectively

California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials

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PETITION FOR RECONSIDERATION
ON BEHALF OF
THE CHLORINE INSTITUTE, INC.
AND
CHEMICAL MANUFACTURERS ASSOCIATION

I. Summary Statement

The above-captioned preemption determinations(60 F.R. 8774 et seq.) while by their terms limited to specific statutes and regulations adopted within the State of California, have nation-wide consequences. In fact, the determinations, if allowed to stand, would substantially undermine the uniform system of Federal hazardous materials transportation regulation that Congress sought to create by enacting the Hazardous Materials Transportation Act, as amended by the Hazardous Materials Trans-

portation Uniform Safety Act (hereinafter HMTA or HMTUSA respectively, 49 U.S.C. 5101 et seq.).

As recently as 1990, in enacting HMTUSA, the Congress recognized that the most effective way to protect the public from the dangers inherent in the transportation of hazardous materials was to promote consistency and uniformity in the laws and regulations governing the movement, loading, unloading and incidental storage of those materials. The California and Los Angeles County laws and regulations that are the subject of the preemption determinations here at issue are clearly and admittedly at variance with the uniform Federal regulations. Nevertheless, in most cases, RSPA has determined that those inconsistent requirements are not preempted by the Federal law.

With the curious and unexplained exceptions of loading and unloading, RSPA has held that all movement, handling and storage of hazardous materials on non-carrier private property is not in commerce and is therefore not subject to the HMTA. In recognition of the fact that 49 CFR Parts 174 and 177 set forth detailed regulations for the loading and unloading of hazardous materials on private property, loading and unloading on private property are held to be in commerce even though they clearly cannot be accomplished in commerce as that term is now being construed by RSPA. RSPA holds that transportation is in commerce "when it takes place on, across, or along a public road."(60 F.R. 8777). There is no citation or support given for such a unique construction of the term commerce and, in fact, the construction is: (1)

contrary to an unbroken line of judicial interpretations of the Constitution and various Federal statutes and regulations; (2) internally irrational in that commerce allegedly ends at loading, begins again at the shipping location's plant gate, ends at the receiver's property line, and begins again at unloading; and (3) contrary to numerous Hazardous Materials Regulations (HMR) that regulate various activities upon private property and within plant locations. Further, the construction is contrary to the very provisions of SARA Title III and the Clean Air Act upon which they rely.

For these reasons, and for the more complete facts and arguments recited below, the preemption determinations should be reconsidered in light of a proper interpretation of the governing laws.

II. The Parties

The Chlorine Institute (CI) is a non-profit trade association of chlor-alkali producers and associated manufacturers whose mission is to promote safety in the manufacture, transportation and handling of chlorine, sodium and potassium hydroxide, and sodium hypochlorite plus the use and distribution of hydrogen chloride. Its North American producer members account for more than 98% of the U.S./Canada/Mexico total chlorine capacity of 14 million tons annually. The Institute's 142 associate and pack-

ager members represent equipment suppliers and other firms concerned with the safe distribution of chlorine.

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals within this country. A significant portion of the hazardous materials manufactured in this country are routinely transferred into and out of tank cars and tank trucks, and offered for transportation or received in transportation by companies that are members of CMA.

III. Factual Background

The essential facts surrounding the various preemption determination applications here at issue are recited in RSPA's rulings thereon (60 F.R. 8774) and need not be extensively repeated here. Suffice it to say that each of the four applications relates to a California State statute or a Los Angeles County regulation applicable to the "on-site" transportation and handling of hazardous materials. While the applications deal primarily with chlorine and cryogenic fluids, the decision of RSPA would apply to all regulation of all hazardous materials whether moving in interstate, intrastate or foreign commerce and whether moving by highway or railroad. The legal conclusion upon which the determinations are based, namely that transportation and handling of hazardous materials on private property is not in

commerce and therefore not subject to the HMTA or the HMR, would have widespread consequences to all shipping, transporting or receiving hazardous materials--throughout the United States.

IV. Reasons For Reconsidering The Determinations

A. The RSPA Preemption Determinations Are Based On An Unsound Definition Of Transportation In Commerce.

The legal conclusion serving as the basis for the determinations here at issue is repeated throughout the RSPA opinion. One example of this conclusion appears at 60 F.R. 8792:

> Federal hazmat law and the HMR apply to transportation in commerce. Ground transportation is "in commerce" when it takes place on, across, or along a public way. Ground transportation of hazardous material that takes place entirely on private property is not transportation "in commerce," and is not regulated by Federal hazmat law and the HMR.

Similar statements are made with respect to the storage of hazardous materials. For example RSPA holds: "Federal hazmat law and the HMR do not apply to :(1) hazardous materials that are stored at a consignee's facility...." (Ibid.)

While the above quoted holdings and similar statements appear throughout and serve as the basis for the determinations, they are recited without legal authority or citation. That is hardly surprising for there is none. One searches in vain for any controlling authority to support the proposition that goods

moving in commerce are suddenly removed from that commerce simply because they move onto private property.

The scope of the HMTA and HMR is far broader than other Federal regulatory schemes. While most Federal regulation is based upon the Commerce Clause and limited to interstate and foreign commerce, the HMTA applies to all commerce, interstate, foreign and intrastate. Notwithstanding this broad jurisdiction, RSPA now has interpreted its statute as conferring much narrower regulatory power than those statutes limited to interstate and foreign commerce.

Little purpose would be served by an extensive review of the hundreds of Federal statutes that regulate commerce, including transportation and storage, that occurs predominantly and even exclusively on private property. A few examples follow. Under the Packers and Stockyards Act (7 U.S.C. 181 et seq.) the Department of Agriculture regulates activities that occur at packing plants, at poultry farms, at stockyards and livestock sale facilities, all on private property. The activities at private warehouses are regulated under 7 U.S.C. 241 et seq.

Under the Shipping Act of 1916 (46 U.S.C. App. 801) and the Shipping Act of 1984 (46 U.S.C. App. 1701) the Federal Maritime Commission and its predecessor agencies have long regulated the activities of marine terminal operators who provide terminal services in connection with ocean common carriers. These activities take place solely upon private property, and in many cases occur after completion of the ocean transportation and the

delivery of the cargo to the consignee, or before delivery of the cargo to the ocean carrier. In short, terminal operators handle cargo that is being stored on private property prior to or following actual movement by ocean carriers. Nonetheless, that storage and related activities are regulated by the Shipping Acts as being in commerce.

Under the Interstate Commerce Act (49 U.S.C. 10101 et seq.), the Interstate Commerce Commission long has regulated transportation in commerce, including in the not too distant past, the transportation of hazardous materials. The Commission has consistently held that activities occurring on private property may be in commerce and subject to regulation. Moreover, transportation occurring solely on private property (intraplant switching) specifically has been regulated. See, e.g. Increased Switching Charges, 318 I.C.C. 485, 488-9 (1962). Transportation performed at private terminal facilities serving interstate commerce but occurring solely on private property have been regulated. See, e.g. Southern Pacific Terminal Co. v. I.C.C. 219 U.S. 498 (1911), and services performed on private property at a privately owned stock yard were held to be regulated. United States v. Union Stockyard and Transit Co. 226 U.S. 286 (1912).

B. In Addition To Being Contrary To The Long Established Definition Of "In Commerce", RSPA's Decision Is Inter-ally Inconsistent And Inconsistent With Its Current Regulations.

RSPA's preemption determination decision states that its

authority to issue regulations with respect to hazardous materials is provided for at 49 U.S.C. 5103(b) which gives the Secretary the authority to "prescribe regulations for the safe transportation of hazardous material in intrastate, interstate and foreign commerce." The decision continues, "transportation" is defined as "the movement of property and any loading, unloading, or storage incidental to the movement." The opinion then goes on to find that transportation can be in commerce only if it takes place "on, across, or along a public road." It is then concluded that since movement within a consignee% plant or storage at that plant is on private, not public property, it is not in commerce and not subject to HMTA regulation.

For reasons that are unexplained, RSPA then states:

> On the other hand, Federal hazmat law and the HMR regulate certain specific carrier and consignee handling of hazardous materials, including unloading of railroad tank cars, incidental to transportation in commerce, even when that unloading takes place exclusively at a consignee's facility. See, 49 CFR 174.67.

Under what authority does the Secretary regulate unloading? It must be the same 49 U.S.C. 5103(b) that RSPA concludes does not permit regulation of activities on private property because they are not in commerce.

Clearly, if unloading may be incidental to the movement of hazardous materials and therefore constitute transportation in commerce subject to DOT regulation under HMTA, then storage immediately following movement and preceding the unloading must also be incidental to the movement. Similarly, if loading is

incidental to the movement of hazardous materials, then storage following loading and preceding common carrier pick-up must also be incidental to the movement and in commerce. In addition, the movement to position the tank car or tank truck for unloading or for pick-up also are incidental to the movement and subject to the HMR.

The RSPA interpretation of its regulatory authority is inconsistent and at odds with its current regulations. Subpart G of Part 172 of Title 49 CFR applies to all persons who offer for transportation, accept for transportation, transfer or otherwise handle hazardous materials during transportation. Section 172.600(a):

> [P]rescribes requirements for providing and maintaining emergency response information during transportation and at facilities where hazardous materials are loaded for transportation, stored incidental to transportation or otherwise handled during any phase of transportation.

Section 172.602(a) specifies what information must be maintained, 172.602(b) specifies the location at which that the information must be maintained, and 172.602(c) specifies who must maintain the information. Carriers are subject to the provisions of 172.602(c)(1), and (c)(2) then provides:

> (2)Facility operators. Each operator of a facility where a hazardous material is received, stored or handled during transportation, shall maintain the information required by paragraph (a) of this section whenever the hazardous material is present. This information must be in a location that is immediately accessible to facility personnel in the event of an incident involving the hazardous material.

There is no question that the provisions of Subpart G were intended to apply and do apply to the very facilities that RSPA herein states are beyond the scope of the HMR. Further, Subpart G deals with the very same subject matter, namely, emergency response information,as does the California statute and Los Angeles County regulations that are here at issue.

Subpart H of Part 172 deals with training of "hazmat employees" who are, among others, plant employees of the shippers and receivers of hazardous materials. Each employee is required to have a knowledge of the DOT regulations governing hazardous materials as they may affect the functions of that employee. There is no question that these training requirements are applicable to those employees who perform loading, unloading, handling, and in plant movement of hazardous materials on private property.

Subparts G and H demonstrate that DOT has regulated and continues to regulate those very activities that RSPA now finds are beyond its jurisdiction.

C. Since The SARA Title III And The Clean Air Act Do Not Apply To Activities That Are Already Subject To Regulation Under HMTA, The Statute And Regulations Here At Issue Are Not "Otherwise Authorized By Federal Law."

The preemption determination decision holds that several of the statutory and regulatory requirements at issue are not

preempted because they are otherwise authorized by Federal law within the meaning of the HMTA. This holding is incorrect.

At the outset it must be noted that if, as RSPA holds, the on-site transportation and storage of hazardous materials are not in commerce and therefore not subject to DOT regulation, the fact that the California statutes and regulations at issue allegedly closely follow requirements of the Clean Air Act or SARA Title III is not relevant. If DOT may not regulate, then, of course, states and local authorities may, and the issue of "otherwise authorized by Federal law" that RSPA extensively discusses is in no way germane.

As noted above, however, the RSPA holding with respect to the on-site transportation, handling and storage of hazardous materials is incorrect legally and inconsistent with current regulations. Accordingly, the question remains as to whether the statute and regulations are otherwise authorized by Federal law. The answer is no.

The decision cites certain provisions of SARA Title III and observes that certain requirements under that Act are similar to the requirements being impose under the California statute at issue. Accordingly, the decision concludes, the statute is "otherwise authorized by Federal law" within the meaning of the HMTA. This conclusion overlooks the plain language of SARA Title III. Section 327 of SARA Title III states:

> Except as provided in section 304 [dealing with emergency notification of releases] this title does not apply to the transportation, including the storage incident to such

> transportation, of any substance or chemical subject to the requirements of this title, including the transportation of natural gas. (42 U.S.C. 11047)

As discussed above, the provisions of 49 CFR 172.600 et seq. already regulate the requirements for the maintenance of emergency response information. Clearly, the emergency response planning requirements of SARA Title III do not regulate the on-site transportation, handling or storage of hazardous materials. The provisions of the HMR apply and, accordingly, conflicting state regulations must be preempted.

The above discussion is in no way altered by the provisions of 40 CFR 355.40(b)(4)(ii) upon which RSPA relies. (See 60 F.R. 8780). RSPA construes this EPA regulation issued under SARA Title III as holding that a substance is stored "incident to transportation" if it is still under active shipping papers and has not reached the ultimate consignee. RSPA then holds: "[R]egulated materials that have been delivered to the ultimate consignee% facility are not stored 'incident to transportation,' as that term is defined by EPA, and are subject to SARA Title III requirements." There is a serious problem with this reasoning.

The regulation cited is relied upon out of context. The regulation states:

> An owner or operator of a facility from which there is a transportation-related release may meet the requirements of this section by providing the information indicated in paragraph (b) (2) to the 911 operator, or in the absence of a 911 emergency telephone number, to the operator. For purposes of this paragraph, a transportation-related release means a release during trans-

> portation, or storage incident to transportation if the stored substance is moving under active shipping papers and has not reached the ultimate consignee. (Emphasis supplied)

Obviously, the definition cited by RSPA deals with the one particular situation, emergency notification of releases, that is excepted from the provisions of Section 327. It is entirely reasonable to permit emergency notification by 911 call when the incident occurs in transit far from the shipping or receiving location. That is the entire scope of the permissive regulation. To expand that unique definition into circumstances that are not the subject of its concern is in error.

When Congress used the phrase "transportation including storage incident to such transportation" in Section 327 of SARA Title III, it was using almost identical language to that found in the HMTA. This was no accident. Congress obviously intended to leave the regulation of hazardous materials transportation and storage incident to that transportation within the province of the DOT. Even if EPA had intended to intrude into the area already regulated by DOT, such an intrusion would have been contrary to its enabling legislation and therefore improper. RSPA should not assume that EPA would have intended such error.

RSPA also states that the California statute and the Los Angeles County regulations are authorized by the Clean Air Act. This holding overlooks the plain language of Section 310 of that Act which provides:

> Except as provided in subsection (b) of this section [dealing with nonduplication of appropriations], this Act shall not be con-

> strued as superseding or limiting the authorities and responsibilities under any other provision of law, of the Administrator or any other Federal officer, department or agency. (42 U.S.C. 7610)

While CI and CMA recognize that there may be some overlap of DOT and EPA regulatory authority for operations conducted within chemical plants, the above quoted language reflects a clear Congressional intent to require that EPA's Clean Air Act jurisdiction shall not automatically divest the DOT of its HMTA jurisdiction. The preemption determinations here at issue, however, ignore the continuing responsibility that DOT has with respect to hazardous materials transportation. Simply because there is a potential regulatory overlap, it does not follow that Congress intended to cede to the states the preemptive powers over hazardous materials transportation that it had so recently reaffirmed in the HMTUSA.

Accordingly, the holdings of RSPA that the state and local requirements at issue are otherwise authorized by the Clean Air Act are not consistent with the HMTA or the Clean Air Act. Any regulatory overlap must be resolved by joint EPA/DOT action and not by unilateral actions of RSPA.

D. RSPA Should Preempt Any Statute Or Regulation That Is Sufficiently Ambiguous So As To Permit Any Local Enforcement Official To Interpret And Enforce It In A Way The Would Be Preempted.

With respect to several issues that were the subject of HASA or SPCMA petition as to preemption determination, RSPA concludes

that there is not sufficient information in the record to make a determination. While the petitions have been pending for more than two years, RSPA has never indicated, and does not now indicate what additional information it might require to arrive at the requested determinations. The parties are therefore at a loss as to what steps should now be taken.

More importantly, however, there is an implied holding that unless the petitioner can demonstrate that a statute or regulation is presently being enforced in a way that would conflict with the HMTA or HMR, it is not entitled to a preemption determination. This implied holding, and the explicit holding that certain Los Angeles County regulations are not being enforced in an offending way, even though by their terms they could be, is error. It is incumbent upon the agency drafting a statute or regulation to do so with sufficient clarity so that enforcement officials and regulated parties know what their respective obligations are. Any ambiguity must be resolved against the enacting entity, and any statute or regulation that could be enforced in such a way as to be preempted, must be held to be preempted.

V. Conclusion

In view of the foregoing, CI and CMA request that RSPA reconsider its preemption determinations in this matter. Upon reconsideration, Petitioners urge that legal conclusions consis-

tent with those set forth herein be adopted by RSPA as a basis for the preemption determinations here involved and for all future determinations.

Respectfully submitted,

Paul M. Donovan
Attorney for Petitioners

Dated: March 7, 1995

Certificate of Service

I hereby certify that I have served the foregoing document upon all commenters and parties of record in these dockets, by mailing a copy thereof by first-class mail.

Paul M. Donovan

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHLORINE INSTITUTE, INC., Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY Respondent, THE FERTILIZER INSTITUTE, et al., Intervenors.	No. 964279 (consolidated cases 96 1284, 96-1287. 9611288, 964289 & 96-1290)
CHLORINE INSTITUTE, INC., . Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 98-1085

SETTLEMENT AGREEMENT

WHEREAS Petitioners The Chlorine Institute ("TCI"), American Petroleum Institute ("API"), National Propane Gas Ass'n ("NPGA"), the International Institute of Ammonia Refrigeration ("IIAR"), The Fertilizer Institute ("TFI"), and the Chemical Manufacturers Ass'n ("CMA") filed the above captioned petitions for review challenging the final regulations titled "Accidental Release Prevention Requirements: Risk Managexnent Programs Under Clean Air Act Section 112(r)(7)," 61 Fed. Reg. 31,668 (June 20, 1996) (hereinafter referred to as the "RMP Rule"), and the Court consolidated these petitions for review under lead docket No. 964279;

WHEREAS NPGA, IIAR, and TFI intervened in each of the actions;

WHEREAS petitioner TCI alone filed the above captioned petition for review No. 98-1085 that challenges the related regulation titled "List of Regulated Substances and Threshold for Accidental Release Prevention; Amendments," 63 Fed. Reg. 640 (Jan. 6, 1998) (hereinafter referred to as the "List Rule");

WHEREAS each of these regulations was promulgated under the Clean Air Act by the U.S. Environmental Protection Agency ("EPA"), the respondent in each of the petitions for review captioned above;

WHEREAS EPA intends to undertake rulemaking to amend certain regulations or to provide guidance or its interpretation regarding certain regulations that may resolve the claims raised by Petitioners in their respective petitions for review;

WHEREAS the EPA, TCI, API, NPGA, TFI, IIAR, and CMA (collectively the "Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

WHEREAS NPGA is a party to this Agreement, and as set forth herein agrees to be bound by this Agreement; but this Agreement does not resolve the claims reserved in NPGA's petition for review (No. 96-1287);

NOW, THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. EPA shall as expeditiously as practicable publish a notice or notices of proposed rulemaking on the issue of whether 40 C.F.R. §§ 68.25(e) and (f) should be amended, as set forth in Attachment A to this Agreement.

2. If and when EPA promulgates in final form an amendment to 40 C.F.R. §§ 68.25(e) and (f) that includes a change of substantially the same substance as the proposed amendment attached as Attachment A to this Agreement, then Petitioner API shall promptly file a stipulation of dismissal with prejudice of petition for review No. 96-1284 in accordance with Rule 42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees. Any of the Parties that are intervenors in that petition for review consents to such dismissal on such terms, together with the dismissal of their intervention in that petition, and all Parties stipulate that such dismissal shall also dismiss from their respective petition(s) for review the issues settled by Attachment A.

3. If and when EPA issues either guidance and/or an interpretation (by letter and/or in some other document) that includes substantially the same substance as that in Attachment B to this Agreement, then Petitioner TFI shall promptly file a stipulation of dismissal with prejudice of its petition for review No. 96-1288 in accordance with Rule 42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees, Any of the Parties that are intervenors in that petition for review consents to such dismissal on such terms, together with the dismissal of their intervention in that petition, and all Parties stipulate that such dismissal shall also dismiss from their respective petition(s) for review the issues settled by Attachment B.

4. Based upon its review of the current EPA guidance 'Risk Management Program Guidance for Ammonia Refrigeration" (November

1998), and the inclusion therein of the section entitled "Guidance on Effectiveness of Building Mitigation for Worst Case Scenarios," Petitioner IIAR has elected not to pursue its petition for review, and thus agrees to file a stipulation of dismissal. with prejudice of petition for review No. 96-1289 in accordance with Rule 42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees, within 14 days of the date that this settlement is finalized. Any of the Parties that are intervenors in that petition for review consents to such dismissal on such terms, together with the dismissal of their intervention in that petition, and all Parties stipulate that such dismissal shall also dismiss from their respective petition(s) for review the issues raised by IIAR.

5. CMA agrees to file a stipulation of dismissal with prejudice of petition for review No. 96-1290 in accordance with Rule -42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees, within 14 days of the date that this settlement is finalized. Any of the Parties that are intervenors in that petition for review consents to such dismissal on such terms, together with the dismissal of their intervention in that petition, and all Parties stipulate that such dismissal shall also dismiss from their respective petition(s) for review the issues raised by CMA.

6. If and when EPA publishes in a supplemental notice or preamble to a rule language that includes substantially the same substance as that in Attachment C to this Agreement, then Petitioner TCI shall promptly file a stipulation of dismissal with prejudice of

petition for review Nos. 964279 and 984085 in accordance with Rule 42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees. Any of the Parties that are intervenors in those petitions for review consents to such dismissal on such terms, together with the dismissal of their intervention in that petition and all Parties Stipulate that such dismissal shall also dismiss from their respective petition(s) for review the issues settled by Attachment C.

7. None of the Parties shall challenge in any court or administrative proceeding the validity of any rule change, interpretation or guidance that is of substantially the same substance as that contained in Attachments A, B or C to this Agreement.

8. EPA shall undertake reasonable efforts to issue the aforementioned actions within a reasonable period of time. If EPA does not promulgate a final rule amendment as described in paragraph 2 or issue guidance and/or interpretations as described in paragraphs 3 and 6 that is in substance substantially the same as the proposed language in Attachments A, B or C, then the sole remedy of Petitioner API (in the case of Attachment A), Petitioner TFI (in the case of Attachment B), and Petitioner TCI (in the case of Attachment C) under this Agreement shall be the right to reactivate their respective petitions for review, and to seek imposition of a schedule for briefing and oral argument for that petition for review, on the issue (or issues) that corresponds to the respective Attachment for which EPA has not taken the described action.

9. The terms of this Agreement provide for the complete resolution of petition Nos. 96-1279, 96-1284, 96-1288, 96-1289, 96-1290 and 98-1085 brought by petitioners and/or intervenors TCI, API, IIAR, TFI, and CMA, and solely for purposes of its intervention in such petitions, NPGA, including all of the issues raised in those petitions, except as otherwise reserved by NPGA as set forth in this paragraph. This Agreement does not provide for the resolution of petition No. 96-1287 brought by petitioner NPGA. The Parties agree that petitioner NPGA and respondent EPA are the only parties to that petition,[1] and that the only issues and request for relief that NPGA may raise in case No. 96-1287 for adjudication by the Court are as follows:

A. Whether EPA's decision to list flammable substances for purposes of the RMP rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

B. Whether EPA's failure to promulgate a "fuel use exemption" in the RMP rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

C. Whether, with respect to the impacts on propane users and retailers, EPA complied with applicable notice and comment requirements when it promulgated the worst-case release scenario applicable to propane for flammable substances as part of the RMP rule. Notwithstandingthe previous sentence, NPGA agrees that neither this nor any other issue will include a challenge regarding the RMP rule's distinctions between the regulation of refrigerated flammable substances and refrigerated toxic substances for purposes of performing the required worst-case and alternative release, scenario analyses.

[1] Petitioners TFI and IIAR moved on or about May 17, 1999, to voluntarily dismiss their intervention in case No. 96-1287.

D. Whether EPA's failure to promulgate guidance for sources using propane at the time that the Agency promulgated the RMP rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

E. Whether, with respect to the impacts on propane users and retailers, EPA violated the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, when it promulgated the RMP rule.

With regard to each issue identified in this paragraph, NPGA further agrees that it shall affirmatively state in its brief that-it requests relief that would apply only to propane retailers and users. NPGA shall not request that such relief apply to any other entities regulated by the rule.

Nothing in this paragraph shall be construed in any way to limit the defenses or arguments that EPA may raise in opposition to the issues, arguments or requests for relief raised by NPGA.

10. The Parties agree and acknowledge that before this Agreement is final, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA shall submit said notice of this Agreement to the Federal Reaister for publication as expeditiously as possible. After this Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her consent to the Agreement, in accordance with section 113(g) of the Clean Air Act, This Agreement shall become final on the date that EPA provides written notice of such finality to the Parties.

11. Nothing in this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law. Also, nothing in this Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise the regulations and/or guidance and/or interpretations identified in Paragraphs 3 - 5 from time to time or to promulgate or issue superseding regulations and/or guidance and/or interpretations.

12. Except as expressly provided in this Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have.

13. The undersigned representatives of each party certify that they are fully authorized by the party that they represent to bind that respective party to the terms of this Agreement.

Respectfully submitted,

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Assistant Attorney General

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For Respondent EPA in each petition for review

Dated: 5/12/97

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Dated: 5/17/99

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Dated: 5/14/99

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For Petitioner IIAR in petition No. 96-1289

Dated: 5/14/99

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For Petitioner CMA in petition No. 96-1290

Dated: 5-19-99

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For Petitioner TFI in petition No. 96-1288

Dated: 5/14/99

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For Petitioner NPGA in petition No. 96-1280

Dated: 5/14/99

ATTACHMENT A

968.25 (e) and (f) would bc as follows:

(e) Worst-case release scenario - flammable gases. The owner or operator shall assume that the quantity of the substance, as determined under paragraph (b) of this section and the provisions below, vaporizes resulting in a vapor cloud explosion. A yield factor of 10 percent of the available energy released in the explosion shall be used to determine the distance to the explosion endpoint if the model used is based on TNT equivalent methods.

(1) For regulated flammable substances that are normally gases at ambient temperature and handled as a gas or as a liquid under pressure, the owner or operator shall assume that the quantity in the vessel or pipe, as determined under paragraph (b) of this section, is released as a gas over 10 minutes. The total quantity shall be assumed to be involved in the vapor cloud explosion.

(2) For flammable gases handled as refrigerated liquids at ambient pressure:

(i) If the released substance is not contained by passive mitigation systems or if the contained pool would have a depth of one centimeter or less, the owner or operator shall assume that the total quantity of the substance is released as a gas in 10 minutes, and the total quantity will be involved in the vapor cloud explosion.

(ii) If the released substance is contained by passive mitigation systems in a pool with a depth greater than 1 centimeter, the owner or operator may assume that the quantity in the vessel or pipe, as determined under paragraph (b) of this section, is spilled instantaneously to form a liquid pool. The volatilization rate (release rate) shall be calculated at the boiling point of the substance and at the conditions specified in paragraph (d) of this section. The owner or operator shall assume that the quantity which becomes vapor in the first 10 minutes is involved in the vapor cloud explosion.

(f) Worst-case release scenario - flammable liquids. The owner or operator shall assume that the quantity of the substance, as determined under paragraph (b) of this section and the provisions below, vaporizes resulting in a vapor cloud explosion. A yield factor of 10 percent of the available energy released in the explosion shall be used to determine the distance to the explosion endpoint if the model used is based on TNT equivalent methods.

(1) For regulated flammable substances that are normally liquids at ambient temperature, the owner or operator shall assume that the entire quantity in the vessel or pipe, as determined under paragraph (b) of this section, is spilled

instantaneously to form a liquid pool. For liquids at temperatures below their atmospheric boiling point, the volatilization rate shall be calculated at the conditions specified in paragraph (d) of this section.

(2) The owner or operator shall assume that the quantity which becomes vapor in the first 10 minutes is involved in the vapor cloud explosion.

ATTACHMENT B

DRAFT/FOR **SETTLEMENT PURPOSES**

Chris S. **Leason**
McKenna and Cuneo, L.L.P.
1900 **K.** Street, N.W.
Washington, **D.C.,** 20006

RE: TFI v. EPA, No. 96-1288 (D.C. Cir.)

Dear Mr. **Leason:**

You have raised a number of issues on behalf of The Fertilizer lnstitute **(TFI)** regarding the appropriate interpretation of **EPA's** Risk Management Program **(RMP)** rule at 40 CFR part 68. In particular, you **have** asked for our interpretation of the **RMP** rule with regard to the following TFI issues: 1) surface roughness, 2) passive mitigation systems, 3) **modeling** of distances to endpoints, 4) revised PHA or hazard reviews, and 5) predictive filing with regard to "Nurse Tanks." In addition, you have **asked** for our review of the look-up tables for aqueous and **anhydrous** ammonia **contained** in **TFI's** ***Model RMP Plan for Agricultural Retailers.*** The following discussion represents EPA's interpretation of its **RMP** regulations and related guidance regarding the issues that you have raised. In this letter, EPA also discusses ***the*** modeling ***results in*** **TFI's** ***Model RMP Plan for Agricultural Retailers.***

1. Surface Roughness

The **RMP** rule currently **requires** sources subject to the rule to **perform** an **"off-site consequence** analysis." This analysis includes both a **"worst-case"** and "alternate **release" scenario (40 C.F.R. §§ 68.25, 68.28).** In performing the off-site consequence analysis, EPA specifies the use of "urban" or "rural" topography, as appropriate. **40 C.F.R. §§** 68.22(e), 68.25(f), 68.28(c). "Urban" means "many **obstacle&** the immediate area," whereas "rural" means "no buiidings in the immediate area and the terrain is generally flat and unobstructed." 40 **C.F.R. §** 6822(e).

When **performing** the required off-site consequence analysis, the term "urban" does not **necessarily** connote a city or metropolitan area. For purposes of conducting the required worst-case and alternative release **scenari**o analysis, "urban" may include a location where the terrain near a storage tank, pipeline, or **other** vessel containing a regulated substance is obstructed due to the presence of buildings, trees, or other obstacles.

Therefore, when performing the worst-case and alternative release scenario analysis, it would be appropriate in some cases, and consistent with good modeling practices, to consider a remote facility or a facility located in an agricultural or silvicultural area as "urban," if obstacles such as buildings or trees are present in the immediate area.

2. Passive Mitigation Systems

In the RMP rule, EPA permits facilities to consider "passive mitigation" systems when conducting the worst-case release scenario modeling if "the mitigation system is capable of withstanding the release event triggering the scenario and would still function as intended." 40 C.F.R. § 68.25(g). For purposes of the RMP rule, "passive mitigation" is defined as "equipment, devices, or technologies that function without human, mechanical, or other energy input." 40 C.F.R. § 68.3. Under current EPA guidance, facilities are required to assume that passive mitigation systems with connections to the environment, such as drain valves, fail. 60 Fed. Reg. 13,526, 13,531 (March 13, 1995).

However, the current RMP rule does permit owners and operators of stationary sources that are required to perform an off-site consequence analysis to account for pooling and evaporation of a regulated substance from a dike, provided the dike, assuming failure of a drain valve, retains at least one centimeter of the released substance. In other words, assuming the drain valve fails and the passive mitigation system retains at least one centimeter of the regulated substance, the owner or operator of such a source may conduct a worst-case and alternative release scenario analysis by considering pooling of the regulated substance in the dike, as well as the quantity of material that is also being released over time from the drain valve.

3. Distance to the Endpoints Based on Available Models

Clean Air Act *Section* 112(r)(7) requires EPA to provide owners and operators of sources subject to the RMP rule with guidanceto assist them in complying with the rule. EPA has developed guidance for sources to use to ensure compliance with the RMP rule, including EPA's *Off-Site Consequence Analysis Guidance* and *RMP Guidance for Ammonia Refrigeration*, among *others.* These documents contain "look-up" tables for sources to use when conducting the RMP rule's required off-site consequence analysis. In preparing the look-up tables for dense gases in these documents, EPA relied on two air dispersion models: SLAB and SACRUNCH.

In preparing these look-up tables for dense gases, it was not EPA's intent to endorse one particular air dispersion model over any other, or to suggest or imply that any reporting of results that differ from those obtained through using the look-up tables contained in the aforementioned documents, necessarily constitutes a violation of the RMP rule. To illustrate this point, EPA intends to use other commercially or publicly available air dispersion models as examples in the look-up tables in the *Off-Site Consequence Analysis Guidance* for conducting the required analysis.

4. Revised PHA or Hazard Review

Under EPA's RMP rule, an owner or operator of a stationary source is required to revise and resubmit a "risk management plan" with six months of, *inter alia*, a change in a covered process that requires "a revised [process hazard analysis] or hazard review." 40 C-F-R. § 68.1290(b)(5). A process hazard analysis (PHA) is required for a covered process satisfying the requirements of Program 3 in the RMP rule (40 C.F.R § 68.67) and a hazard review is required for a covered process satisfying the requirements of Program 2 in the RMP rule (40 C.F.R. § 68.50).

Both the PHA and hazard review must be updated at least once every five years. See 40 C.F.R. §§ 68.50(d), 68.67(f). However, each must be updated more frequently if a "major" change occurs in the covered process. Id.

EPA understands from TFI that fertilizer companies conduct periodic "voluntary" PHAs or hazard reviews (i.e., PHAs and hazard reviews that are not prompted by a major change to the covered process or any other requirement for an update) to ensure the safety of their processes. EPA recognizes the usefulness of these "proactive" prevention measures. Accordingly, consistent with the requirements of the RMP rule, EPA believes that such voluntary PHAs or hazard reviews would not trigger the requirement in the RMP rule to revise and resubmit the risk management plan within six months of a required PHA or hazard review.

5. Predictive Filing

Agricultural retail facilities may be subject to the RMP rule due to their storage and/or handling of anhydrous ammonia, aqueous ammonia and/or propane in excess of their corresponding threshold quantities in a process. These quantities may vary significantly throughout the course of the year, such that a facility may only be subject to the RMP rule for a few weeks a year.

EPA also understands from TFI that anhydrous ammonia is transported from fertilizer manufacturing and retail facilities in U.S. Department of Transportation (DOT) approved containers (referred to as "nurse tanks") to its ultimate point of application. According to TFI, the major movements of ammonia occur during the fall and spring planting seasons, usually during a very short time interval.

During these busy seasons, nurse tanks are periodically filled and stored together in staging areas so that they may be promptly connected to motive power and transported to the point of application on short notice. Under EPA's RMP rule, when these nurse tanks are disconnected from motive power, the nurse tanks may be subject to the RMP rule for relatively short periods of time, depending upon the amount of ammonia and/or propane that is present.

Similarly, EPA understands from TFI that portable ammonium polyphosphate reactors are frequently situated at a customer's location in the field to make fertilizer. As part of this process, anhydrous ammonia is present. The ammonia may be stored in a vessel in a sufficient quantity to

exceed the corresponding RMP rule threshold quantity for the substance. The ammonium polyphosphate production may only occur for a week or two in the fall and in the spring, During this period of time, the process may be subject to the RMP rule.

To minimize the impact of the RMP rule on entities with highly variable, but predictable, types and/or quantities of regulated substances, EPA has recognized "predictive filing," as described in EPA's General *Guidance for Risk Management Programs,* for purposes of satisfying the RMP rule's requirement to prepare, submit, and occasionally revise a source's risk management plan (Plan). Predictive filing is an option that allows a source to submit an RMP Plan that includes a regulated substance that may not be held at the facility at the time of submission. Under 40 CFR § 68.190(b)(3), a source is required to update and resubmit its Plan no later than the date on which a new regulated substance is first present in a covered process above a threshold quantity. By using predictive filing, a source is not required to update and resubmit its Plan when it receives a new regulated substance, if that substance was included in its latest predictive Plan submission (as long as it receives the substance in a quantity that does not trigger a revised off-site consequence analysis).

As explained in the *General Guidance, a* source using predictive filing must implement its Risk Management Program and prepare its predictive Plan exactly as it would if it actually held all of the substances included in the Plan. This means that it must meet all rule requirements for each regulated substance for which it files, whether or not that substance is actually held on site at the time it submits its Plan or thereafter. Depending on the substances for which it files, predictive filing may require the source to perform additional worst- and alternative-case scenario analyses and to implement additional prevention program elements.

Just as predictive filing relieves a source from resubmitting its Plan when it receives a regulated substance in an amount covered-by its RMP, it also relieves a source from revising its registration (pursuant to 40 CFR § 68.190(c)) for those predicted periods of time when the source has no wvered substance above threshold quantities on- site. As long as the source maintains its Risk Management Program as reflected in its predictive Plan, it need not revise its Plan (or the registration portion of its Plan) to reflect the periodic absence of a covered substance. However, such a source remains subject to other update requirements under 40 CFR § 68.190 (b), including the requirement under 40 CFR § 68.190 (b)(1) to revise and update its Plan (including a predictive Plan) within five years of its initial submission or most recent update.

6. Toxic Endpoint Distance Look-up Tables in TFI's *Agricultural Retailers RMP Plan*

EPA understands that TFI *has* prepared an *Agricultural Retailers RMP Plan* (hereinafter referred to as the "*TFI RMP Plan*") to assist agricultural retailers in complying with the RMP rule, in general, and the off-site consequence analysis requirement, in particular. As part of this *TFI RMP Plan,* TFI developed look-up tables of toxic endpoint distances to be used in conducting the worst-case and alternative release scenarios for aqueous ammonia and anhydrous ammonia. EPA notes that these look-up tables provide endpoint distances that are significantly shorter (for comparable release rates) than those contained in EPA's *Offsite Consequence Analysis Guidance* and *RMP Guidance*

for Ammonia Refrigeration. In other words, the endpoint distances specified in EPA's estimates are more conservative than the estimates to the toxic endpoint in the ***TFI Model Plan.***

Nevertheless, EPA acknowledges that there are inherent uncertainties associated with the use of any atmospheric dispersion model, and that, accordingly, EPA's estimates are intended to be conservative. EPA also acknowledges that consistent with sound modeling practices and the requirements specified in the rule (40 C.F.R. § 68.22), different models may be used as appropriate. Therefore, although TFI has generated look-up tables for aqueous and anhydrous ammonia with shorter distances to the toxic endpoint than those specified in EPA's *Offsite Consequence Analysis Guidance* and *RMP Guidance* for *Ammonia Refrigeration, using* a less-conservative modeling methodology in producing the lookup tables in the ***TFI RMP Plan, the*** worst-case and alternative release modeling performed by TFI, *as* contained *in the TFI RMP Plan,* appears to have been conducted in accordance with the requirements of the Risk Management Program rule. Thus, the results of this modeling may be appropriate for some facilities covered by the rule, depending upon each facility's particular circumstances.

The foregoing discussion applies only to the worst-case and alternative release scenario look-up tables contained in the ***TFI RMP Plan,*** and not to the remainder of the ***TFI RMP Plan, regarding*** which EPA expresses no position at this time.

Sincerely,

A - c

In our amendments to 40 CFR Part 68 (63 FR 640, January 6, 1998) we dealt with the issue of the relationship between Part 68 and statues administered by and regulations promulgated by the Department of Transportation (DOT), such as the Federal Hazardous Materials Transportation Law ("Federal Hazmat Law") and the Hazardous Materials Regulations ("HMR"). We noted therein that: "EPA's regulations do not supersede or limit DOT's authorities and, therefore, are in compliance with CAA section 310."

The definition of stationary source finalized in that rule generally provides that containers that are in transport&ion or storage incident to transportation are not part of a stationary source or a process at the stationary source. On the other hand, the definition of stationary source does provide that such containers are part of a stationary source under certain circumstances, most notably when they are being loaded, unloaded or on site for storage not incidental to transport&on. Because a transportation container may at times function as a storage container or a process at a stationary source, or may function as part of operations at a stationary source, EPA is specifically directed by statute to address these activities (CAA section 112(r)(7)(B)(i)) ("The regulations shall cover storage, as well as operations"). To the extent that DOT is also authorized under the Federal Hazmat Law to regulate activities that are at a stationary source, nothing in the CAA prohibits both agencies from exercising concurrent jurisdiction over these activities. As EPA has said in the context of the RMP Rule, compliance with Federal Hazmat Law and HMR requirements may satisfy parallel requirements of Part 68. This approach to implementation reflects the coordination between the agencies that is called for under CAA section 112(r)(7)(D). The exercise of concurrent jurisdiction preserves the applicability of the Federal Hazmat Law and HMR and does not supersede or limit DOT's jurisdiction. CAA section 310 provides that the CAA shall not be construed as superseding or limiting the authority

or responsibilities of any Federal agency. Thus, neither CAA section 112(r)(11) (which provides that section 112(r) does not preempt state regulations that are more stringent than EPA's) nor section 112(l) (which allows EPA to delegate the accident prevention regulations to a state if the state's program is no less stringent than EPA's) can be read to authorize a state to regulate in a manner that would otherwise be preempted under the Federal Hazmat Law. A state that, for purposes of obtaining delegation under section 112(l), adopts Part 68 or a program that is substantively the same as Part 68 will not be considered by EPA to regulate in a manner that would otherwise be preempted under the Federal Hazmat Law.

U.S. Department of Justice

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July 19, 1999

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Re: Chlorine Institute, Inc. v. EPA, No. 964279 (and consolidated cases 96-1284, 96-1287, 96-1288, 96-1289 & 96-1290)

Dear Counsel:

Please note that the Settlement Agreement in this case has undergone the notice and comment process pursuant to CAA § 113(g) and paragraph 10 of the Settlement Agreement. This letter serves as notice that that settlement is final. See Settlement Agreement ¶ 10.

Sincerely,

David J. Kaplan, Attorney
Environmental Defense Section

CC: Nancy Ketcham-Colwill (fax 260-0586)