Selection of recycling facilities was included in the 2000 Congressional amendments to section 6(c)(1) of the National Maritime Heritage Act (NMHA), which directed the Maritime Administration to dispose of all obsolete vessels ''in the manner that provides the best value to the Government'' (Pub. L. 106–398, section 3502(a)). In addition, it provided subsection (b) Selection of Scrapping Facilities, which stated that:

The Secretary of Transportation may recycle obsolete vessels pursuant to Section 6(c)(1) of the NMHA of 1994 [16 United States Code (U.S.C.) 5405(c)(1)] through qualified dismantlement facilities, using the most expeditious recycling methodology and location practicable. Dismantlement facilities shall be selected under that section on a best value basis consistent with the Federal Acquisition Regulation (FAR), as in effect on the date of the enactment of this Act * * * taking into consideration, among other things, the ability of facilities to dismantle vessels: (1) At least cost to the Government, (2) in a timely manner, (3) giving consideration to worker safety and the environment, and (4) in a manner that minimizes the geographic distance that a vessel must be towed when towing a vessel poses a serious threat to the environment (Pub. L. 106–398, section 3502(b), 114 Stat. 1654a–490 (2000)).

An electronic version of this document and all documents entered into this docket are available at *http://www.regulations.gov* at Docket ID MARAD–2008–0060.

Dated: September 2, 2009.

By Order of the Maritime Administrator.

Murray Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E9–21814 Filed 9–9–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Upper Cumberland Regional Airport, Sparta, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comment.

SUMMARY: The Federal Aviation Administration is requesting public comment on the release of land at the Upper Cumberland Regional Airport, Sparta, TN.

This property, approximately 3.48 acres, will change to a non-aeronautical use. This action is taken under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before October 13, 2009.

ADDRESSES: Documents are available for review at the Tennessee Department of Transportation, Division of Aeronautics, 424 Knapp Blvd, Bldg 4219, Nashville, TN 37217 and the FAA Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. Written comments on the Sponsor's request must be delivered or mailed to: Mr. Phillip J. Braden, Manager, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. In addition, a copy of any comments submitted to the FAA must be mailed or delivered to Mr. Bob Woods, Director, TDOT, Division of Aeronautics, P.O. Box 17326, Nashville, TN 37217.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Thompson, Program Manager, Federal Aviation Administration, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. The application may be reviewed in person at this same location, by appointment.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the request to release property at the Upper Cumberland Regional Airport, Sparta, TN. Under the provisions of AIR 21(49 U.S.C. 47107(h)(2)).

On August 21, 2009, the FAA determined that the request to release property at Upper Cumberland Regional Airport, submitted by the airport board, meets the procedural requirements of the Federal Aviation Administration. The FAA may approve the request, in whole or in part, no later than October 13, 2009.

The following is a brief overview of the request:

The Upper Cumberland Regional Airport Board, owner of the Upper Cumberland Regional Airport, is proposing the release of approximately 3.48 acres of airport property to the County of White, Tennessee so the property can be used to accommodate the construction of an Industrial Park access road along the eastern airport property line.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon appointment and request, inspect the request, notice and other documents germane to the request in person at the Tennessee Department of Transportation, Division of Aeronautics.

Issued in Memphis, TN on August 24, 2009.

Tommy L. Dupree,

Acting Manager, Memphis Airports District Office, Southern Region.

[FR Doc. E9–21704 Filed 9–9–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2007–28444 (PDA–32(R))]

Maine Department of Environmental Protection Requirements on Transportation of Cathode Ray Tubes

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

ACTION: Notice of administrative determination of preemption.

Local Laws Affected: Title 06–096, Maine Code of Regulations (MCR) Chapters 850, 851, 853 & 857 (For convenience, provisions in Title 06–096 MCR are referred to herein simply by the Chapter and section number, e.g., ''MCR 850 section 3(A)'').

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, and 40 CFR Chapter I, subchapter I (Solid Wastes).

Modes Affected: Highway.

SUMMARY: Federal hazardous material transportation law does not preempt MDEP's regulations on classification of used cathode ray tubes (''CRTs'') as ''universal waste'' and broken CRTs and glass removed from CRTs (''CRT glass'') as a State ''hazardous waste'' and the marking, labeling, shipping documentation, and transporter requirements, because these requirements do not apply or pertain to materials regulated under Federal hazardous materials transportation law and the HMR or otherwise constitute an obstacle to accomplishing and carrying out Federal hazardous materials transportation law and the regulations issued under that law.

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

SUPPLEMENTARY INFORMATION:

I Background

A. Application

In this determination, PHMSA considers whether the Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts the following requirements of the Maine Department of Environmental Protection (''MDEP'') relating to CRTs and broken CRTs and CRT glass destined for reuse, repair, or recycling (as those requirements are presently applied):[1]

(1) ''Whole, intact, and unbroken'' CRTs are classified as ''universal waste'' in MCR 850 section 3(A)(13)(b)(i)[2] and, for transportation of intact CRTs:

(a) The generator must prepare and a transporter must carry one of the following documents: (i) A ''hazardous waste manifest''; (ii) the ''Maine Recyclable Material Uniform Bill of Lading''; or (iii) ''a log system of tracking'' shipments to a central accumulation facility within Maine from an instate small universal waste generator, or to a consolidation facility within Maine from an instate small universal waste generator or central accumulation facility. MCR 857 sections 4–8 & 13 (as amended effective June 12, 2008).

(b) The generator must mark and label each package with the words ''Waste Cathode Ray Tubes.'' MCR 850 section 3(A)(13)(e)(xxii)(e).

(c) The transporter must meet certain conditions (in order to be exempt from obtaining a license) including maintaining (i) at least $1,000,000 in liability insurance, and (ii) ''a plan for the cleanup of discharges'' in the possession of the vehicle operator. MCR 853 sections 10, 11(H) & (K).

(2) Broken CRTs and CRT glass are classified as a State ''hazardous waste,'' in MCR 850 section 3(A) and, for transportation of broken CRTs and CRT glass:

(a) The generator must prepare and the transporter must carry a ''hazardous waste manifest.'' MCR 857 sections 4–8.

(b) The generator must mark and label each transportation package ''in accordance with the applicable Federal Department of Transportation regulations on hazardous materials under 49 CFR Part 172'' and also mark ''each container of 110 gallons or less'' with the following:

State Hazardous Waste—State Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the Maine Department of Environmental Protection (1–800–482–0777).

Generator's Name & Address _____

_____

Manifest Document Number _____

MCR 851 § 8(A) (as amended effective June 12, 2008).

(c) The transporter must obtain a license from MDEP and meet additional conditions including maintaining (i) at least $500,000 in liability insurance, and (ii) ''a plan for the cleanup of discharges'' in the possession of the vehicle operator. MCR 853 sections 4(A)(1), 5(B)(9), 8(B) & (F).

In its application for an administrative preemption determination, the Electronic Industries Alliance (Alliance) contends that MDEP's classification, shipping paper, and marking or labeling requirements are not ''substantively the same as'' requirements in the HMR, and that both these requirements and the additional requirements on transporters ''cause confusion, interfere with the flow of trade, and otherwise serve as an obstacle to the purposes of the Federal hazmat law.''

On May 6, 2008, PHMSA published a notice in the **Federal Register** inviting interested persons to submit comments on the Alliance's application. 73 FR 25079. In response to this notice, comments were submitted by MDEP, environmental agencies of eight States (Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, North Carolina, South Carolina, and Washington), the New Hampshire Attorney General, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), Ecomaine, the Electronics TakeBack Coalition, the Maine Pulp and Paper Association (MPPA), the Natural Resources Council of Maine, and the Utility Solid Waste Activities Group (USWAG). The Alliance and MDEP submitted rebuttal comments.

B. Federal Regulation of CRTs and CRT Glass

A CRT is ''a vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device.'' 40 CFR 260.10. Examples are televisions, computer monitors, medical, automotive, and oscilloscope devices. CRTs are built of a specialized glass that often contains lead. Under regulations of the U.S. Environmental Protection Agency (EPA), solid waste containing lead is considered toxic if ''the extract from a representative sample of the waste'' contains greater than 5 mg lead per liter, ''using the Toxicity Characteristic Leaching Procedure, test Method 1311 in 'Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,' EPA Publication SW–846.'' 40 CFR 261.24.

In general, black and white monitors (or ''monochrome CRTs'') do not have sufficient lead to meet the toxicity characteristic for a hazardous waste under EPA's regulations, but the more significant quantities of lead used to make color cathode ray tubes exceed the ''toxicity characteristic regulatory level of 5 milligrams per liter that is used to classify lead-containing wastes as hazardous (40 CFR 261.24(b)).'' EPA Notice of Proposed Rulemaking (NPRM), ''Modification of the Hazardous Waste Program; Cathode Ray Tubes,'' 67 FR 40508, 40510 (June 12, 2002). A note to MCR 850 section 3(A)(13)(a)(ii) states that, according to information in a 1996 Tufts University masters thesis, ''CRTs are believed to represent 75% of the lead in the solid waste stream. Lead, which is used to shield harmful radiation in the CRT, comprises more than 10 percent of a CRT's mass.''

Until recently, some used CRTs were potentially subject to regulation as EPA hazardous wastes unless covered by the exclusions for household waste and conditionally exempt small quantity generators (a person who generates less than 100 kg of non ''acute'' hazardous waste in a calendar month). *See* 40 CFR 261.4(b)(1), 261.5, as discussed at 67 FR at 40511 and in EPA's final rule, 71 FR 42928, 42929 (July 28, 2006). Accordingly, used CRTs not covered by the exclusions for household waste and conditionally exempt small quantity generators might be subject to regulation in transportation as a hazardous material because they were a hazardous waste ''subject to the Hazardous Waste Manifest Requirements of the U.S. Environmental Protection Agency specified in 40 CFR part 262.'' *See* 49

[1] In June 2008, MDEP added or revised ''notes'' to its regulations and revised guidance materials to advise that (1) it had revised its Recyclable Material Uniform Bill of Lading form to delete the word ''Hazardous'' from the title of the form; (2) the shipping document should clearly indicate whether the ''particular material is regulated by DOT'' and suggested describing CRTs as ''Non-DOT regulated material (CRT) for recycle as universal waste''; and (3) the marking specified in 40 CFR 262.32 (''HAZARDOUS WASTE—Federal Law Prohibits Improper Disposal'') did not apply to ''State-only hazardous wastes [that] are not DOT regulated hazardous materials.'' *See* the Notes to MCR 851 sections 8(A)(4), 853 section 11(Q), and 857 sections 4, 6.

[2] According to MDEP, ''CRTs are primarily treated as universal waste'' and ''nearly all CRTs leave the State as universal waste'' under the guidance set forth in MDEP's Universal Waste Handbook that ''[i]ncidental breakage of ten (10) or fewer * * * CRTs may still be handled as universal waste.''

CFR 171.8 (definitions of ''hazardous material'' and ''hazardous waste'').

However, in its July 28, 2006 final rule, which became effective January 29, 2007, EPA addressed the ''mounting volumes of outdated computer and electronics equipment'' and the concern that there has been ''a barrier to CRT recycling created by some existing hazardous waste management regulations.'' 71 FR at 42931. First, EPA explained in the preamble to that final rule that its hazardous waste management regulations, including the Uniform Hazardous Waste Manifest requirements in 40 CFR part 262, do not apply to unused CRTs, because ''EPA does not regulate unused chemical products that are reclaimed,'' and that the existing exemptions from Federal hazardous waste management requirements for household waste and small quantity generators remained applicable. 71 FR at 42929.

Second, EPA adopted a ''conditional exclusion'' from its waste management regulations for the following categories of CRTs and CRT glass because they are not ''solid wastes'': [3]

(a) Used intact CRTs sent for recycling (40 CFR 261.4(a)(22)(i));

(b) Broken CRTs sent for recycling that are transported in a container (including a vehicle) constructed, filled, and closed to minimize releases of CRT glass to the environment and labeled ''Do not mix with other glass materials'' and one of the following: ''Used cathode ray tube(s)-contains leaded glass'' or ''Leaded glass from televisions or computers'' (40 CFR 261.4(a)(22)(iii), 261.39(a)(1)–(4)). *See* 71 FR at 42929, 42948.

(c) CRT glass destined for recycling at a CRT glass manufacturer or a lead smelter after processing (40 CFR 261.4(a)(22)(iv), 261.39(c)). *See* 71 FR at 42829, 42948.

Accordingly, since January 29, 2007, used CRTs, broken CRTs, and CRT glass that are not subject to EPA's hazardous waste management regulations, including the Uniform Hazardous Waste Manifest requirements in 40 CFR part 262, are not hazardous materials for purposes of the HMR. As the Alliance notes, these items are not hazardous substances, marine pollutants, elevated temperature materials, designated as hazardous in the Hazardous Materials Table (49 CFR 172.101), or materials that meet ''the defining criteria for hazard classes'' in the HMR. *See* 49 CFR 171.8 (definition of a ''hazardous material'').[4] The primary risk during transportation of used CRTs appears to be ''the risk of injury to personnel [from] breakage of the items,'' according to an exchange of emails among MDEP staff, provided with MPPA's comments.

C. Related Proceedings

The Alliance participated in EPA's CRT rulemaking. In its comments on the June 12, 2002 NPRM (which have been placed in the public docket of this preemption determination), the Alliance endorsed and proposed expanding ''the proposed conditional exclusions for'' used CRTs, broken CRTs, and CRT glass. Under the heading ''Transportation Issues,'' the Alliance stated that it:

> believes that the benefits of the proposed rules for * * * CRTs * * * can be enhanced significantly by noting that, once finalized, they will preempt more stringent state rules regarding transportation of these items. Although the RCRA regulatory scheme generally allows state programs to be more stringent than the federal program, EPA and the courts have long recognized that there is an exception in the case of transportation-related requirements (*e.g.,* manifesting, packaging, labeling, and transportation registration requirements), unless preemption is explicitly waived by the federal government. In the present case, preemption would be an important step forward in ensuring uniform nationwide rules that could facilitate development of a recycling infrastructure.

In the preamble to the July 28, 2006 final rule, EPA stated that ''authorized states'' which ''administer and enforce a hazardous waste program within the state in lieu of the federal program'' under 42 U.S.C. 6926 ''are not required to adopt federal regulations * * * that are considered less stringent than previous federal regulations.'' 71 FR at 42943. Accordingly, ''States currently regulating CRTs as hazardous waste, including under the universal waste rule, would not have to amend their programs, since their programs are more stringent than the federal requirements.'' *Id.* at 42944. EPA discussed scenarios ''when used CRTs or processed CRT glass [are] transported to and from states with different regulations governing these wastes'' and stated that, ''for the portion of the trip through * * * states that do not consider the waste to be excluded, the transporter must have a manifest, except as provided by the universal waste rules, and must move the waste in compliance with 40 CFR Part 263.'' *Id.* In a separate document in the public docket responding to comments, EPA stated that issues of preemption of state transportation requirements were outside the scope of the EPA rulemaking.

On October 25, 2006, the Alliance petitioned the United States Court of Appeals for the District of Columbia for review of EPA's July 28, 2006 final rule. *Electronic Industries Alliance* v. *U.S. Environmental Protection Agency,* Case No. 06–1359. In its Preliminary and Non-Binding Statement of Issues (which has been placed in the public docket), the Alliance stated that the issues to be raised in the judicial review proceeding include ''[w]hether EPA's determination on transport of CRTs and CRT glass within and between states was contrary to the Hazardous Materials Transportation Act ('HMTA') and its implementing regulations, which provide that federal requirements for transport of hazardous materials, including hazardous wastes, generally preempt state requirements that differ.'' On May 18, 2007, that Court granted the Alliance's motion to hold the petition for review in abeyance pending further order of the Court and directed the parties ''to file motions to govern future proceedings in this case within 30 days of the completion of the Department of Transportation's proceedings'' on the Alliance's application for a preemption determination.

II. Federal Preemption

PHMSA's May 6, 2008 notice discussed the express preemption provisions in 49 U.S.C. 5125 that are relevant to this proceeding. 73 FR at 25081–82. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2320), 49 U.S.C. 5125(a) provides that—in the absence of a waiver of preemption by DOT under § 5125(e) or specific authorization in another Federal law—a requirement of a State, political subdivision of a State, or Indian tribe is preempted if

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive

[3] This exclusion does not apply to CRT materials that are sent for disposal or that are speculatively accumulated. 40 CFR 261.1(c)(8). Additional notification and consent requirements apply when used, intact CRTs or broken CRTs are exported for reuse or recycling. 40 CFR 261.39(a)(5), 261.40, 261.41. *See* 71 FR at 42948–49.

[4] USWAG also states that the HMR do not classify the lead in CRTs as a hazardous material but notes that the HMR do ''classify several other forms of lead as hazardous materials including specific lead compounds (*e.g.,* lead azide, lead cyanide and lead nitrate), other lead compounds when soluble in water, and lead having a diameter less than 100 micrometers. *See* 49 CFR 172.101 Table & Appendix A, Table 1.''

issued by the Secretary of Homeland Security.

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

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

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

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

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

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

(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

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

III. Preemption Determinations

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

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

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

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled ''Federalism'' (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on ''Preemption'' (74 FR 24693 (May 22, 2009)). Section 4(a) of Executive Order 13132 authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy ''that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.'' Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations and which PHMSA applies in making administrative preemption determinations.

IV. Standing of the Alliance To Apply for a Preemption Determination

At the time of its May 8, 2007 application, the Alliance was ''a non-

[5] These revisions are contained in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, which is Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1891 (Aug. 10, 2005).

profit trade association consisting of both associations and individual companies in the electronics and 'high technology' industries.'' It stated that the activities of its ''member companies include[d] manufacturing, sale, and distribution of CRTs, use of CRTs, and collection and recycling of used CRTs and CRT glass,'' and that its Environmental Issues Council ''is specifically designed to address the electronics industry's environmental and related regulatory concerns and to actively work to reduce the environmental impacts of the electronic industry's products through their entire life cycle, from design, through use, to end of life.''

According to its comments, MDEP performed ''background research'' which indicates that the Alliance is now ''a very different organization than the one which existed at the time of [its] application.'' In response to MDEP's request ''for an explanation,'' the Alliance wrote PHMSA on May 19, 2008, to advise that it had ''undergone a realignment'' so that ''under the current structure, EIA's only direct members are the four constituent trade associations; through its representation of them, EIA continues to represent the interests of member companies of the associations on relevant issues, such as the Maine CRT transport rules.'' The Alliance also stated that its Environmental Issues Council had been dissolved, but asserted that it ''continues to be involved in environmental issues (e.g., those raised by the Maine rule requiring used CRTs to be transported as hazardous wastes), as necessary and appropriate to represent the four constituent trade associations and their members.''

MDEP argues that the Alliance's application should be dismissed on the grounds that (1) the Alliance failed to identify any specific members directly affected the MDEP requirements it challenges, and (2) following the Alliance's ''realignment,'' its only members are trade associations. The Alliance replies that MDEP ''does not actually dispute that EIA represents the interests of electronic companies that are directly affected by the Maine rules for CRT transport'' and the ''Maine 'takeback' program for CRTs [which] explicitly requires manufacturers to transport, and/or pay for transport of the CRTs they produced (when they reach the end of life) as well as a *pro rata* share of 'orphan' CRTs.''

To the extent that 49 U.S.C. 5125(d)(1) contains a ''standing'' requirement for applying for a preemption determination, PHMSA has interpreted that requirement broadly and found that an industry association may raise issues of preemption when the association's members are ''directly affected'' by a non-Federal requirement. PD–6(R), ''Michigan Marking Requirements for Vehicles Transporting Hazardous and Liquid Industrial Wastes,'' 59 FR 6186, 6189 (Feb. 9, 1994). PHMSA has also noted the ''all parties engaged in hazardous materials transportation or the regulation of that transportation will be served by [PHMSA] addressing [preemption] issues.'' PD–2(R), ''Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest,'' 58 FR 11176, 11181 (Feb. 23, 1993), quoting from IR–32, ''City of Montevallo, Alabama Ordinance on Hazardous Waste Transportation,'' 55 FR 36736, 36741 (Sept. 6, 1990). Accordingly, when an administrative proceeding has been initiated in response to a proper application, PHMSA has declined to terminate the proceeding because of a change in circumstances. In PD–25(R), ''Missouri Prohibition against Recontainerization of Hazardous Waste at a Transfer Facility,'' 66 FR 37089, 37090 (July 16, 2001), the applicant for a preemption determination purported to ''withdraw'' its application, but PHMSA stated that it

> believes that the value in deciding whether a non-Federal requirement is inconsistent with (or preempted by) Federal hazardous material transportation law ''goes beyond the resolution of an individual controversy. At a time when hazardous materials transportation is receiving a great deal of public attention, the forum provides [PHMSA] an opportunity to express its views on the proper role of State and local vis-a-vis Federal regulatory activity in this area.'' IR–2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas, etc., decision on appeal, 45 FR 71881, 71882 (Oct. 30, 1980).

This same important purpose exists when State or local requirements apply to individual companies that are members of one or more associations that, in turn, belong to an overall association. In actual practice, an industry association is just as ''directly affected'' by a State or local requirement on its ''second-level'' members, and DOT has not hesitated to consider issues of preemption raised in those circumstances. See, most recently, PD–31(F), ''District of Columbia Requirements for Routing of Certain Hazardous Materials,'' 71 FR 18137 (April 10, 2006); and Docket No. FMCSA–2008–0204 [PDA–33(F)], ''City of Boston's Hazardous Materials Routing Designation,'' 73 FR 46349 (Aug. 8, 2008), 51335 (Sept. 2, 2008). For purposes of this administrative proceeding, PHMSA finds that the Alliance had ''standing'' to submit its May 8, 2007 application for a determination whether Federal hazardous material transportation law preempts the MDEP requirements on used CRT's and CRT glass, and it did not lose that standing because of its ''realignment'' following submission of its application.

V. Requirements on ''State-Only'' Waste

The ultimate question to be decided in this proceeding is the extent to which Federal hazardous material transportation law precludes a State from imposing transportation-related requirements on materials that are regulated as ''hazardous waste'' by a State, but not regulated as ''hazardous materials'' under the HMR. This requires consideration of the statutory and regulatory differences (and overlaps) between (a) *hazardous materials,* as defined in Federal hazardous material transportation law and designated in the HMR, because they pose ''risks to life, property and the environment * * * in transportation * * * in intrastate, interstate, and foreign commerce,'' 49 U.S.C. 5101, and (b) *hazardous wastes,* to which RCRA and EPA's regulations apply, which pose a ''present and future threat to human health and the environment'' when disposed. 42 U.S.C. 6902(b).

A. Application and Comments in Support of Preemption

In its application, the Alliance repeatedly emphasizes that CRTs and CRT glass destined for reuse or recycling are not ''hazardous materials'' for purposes of the HMR. From this predicate, it argues that State or local requirements that apply to more or different materials than covered by the HMR are preempted. It quotes from PD–18(R), ''Broward County, Florida's Requirements on the Transportation of Certain Hazardous Materials,'' 65 FR 81950, 81953–54 (Dec. 27, 2000), that ''non-Federal definitions and classifications that result in regulating the transportation * * * of more, fewer or different hazardous materials than the HMR * * * are preempted''; and IR–32, 55 FR at 36743, that a non-Federal ''definition of 'hazardous waste' that includes not only those materials regulated under the HMR but also other materials not regulated under the HMR * * * is inconsistent with the HMR, and, therefore, preempted.''

The Alliance argues that MDEP may not impose any requirement for shipping documentation with respect to materials that ''are not subject to any shipping paper requirements under the

HMR.'' It asserts that ''state requirements regarding shipping documents are preempted if they are not 'substantively the same' as the corresponding requirements in the HMR'' and that, ''under this standard, state shipping documents must 'conform[] in every significant respect to the Federal requirement. See 49 CFR 107.202(d).'' The Alliance points out that the MDEP requirements for a manifest, bill of lading, or log ''include a number of data elements that are not required in HMR shipping papers.'' It refers to prior determinations in which PHMSA has found that:

—''the shipping paper requirements of the HMR are exclusive and * * * any additional [state] shipping paper requirements are inconsistent under the [Federal hazmat law],'' IR–5, ''City of New York Administrative Code Governing Definition of Certain Hazardous Materials,'' 47 FR 51991, 51994 (Nov. 18, 1982);

—state requirements are preempted which ''instruct the preparer of the * * * Manifest to enter the total quantity of each hazardous waste * * * in a different manner than the HMR,'' PD–2(R), 58 FR at 11182;

—state requirements ''to use a hazardous waste manifest [for] materials that are not hazardous wastes'' are preempted, PD–23(RF), ''Morrisville, PA Requirements for Transportation of 'Dangerous Waste,' '' 66 FR 37260, 37265 (July 17, 2001); and

—a state may not require additional information to be included on the manifest, PD–29(R), ''Massachusetts Requirements on the Storage and Disposal of Infectious or Physically Dangerous Medical or Biological Waste,'' 69 FR 34715, 34719 (June 22, 2004).

In its responsive comments, the Alliance states that the alternative to use a bill of lading, log, or other form approved by MDEP for intact CRTs is ''nothing but an illusion,'' and MDEP is able to track shipments without requiring ''that certain information and shipping papers *accompany* CRT shipments, when there is no such requirement under federal law.'' It asserts that, with respect to broken CRTs and CRT glass, ''[t]he question at issue is not whether a state may allow state-regulated wastes to be included on a manifest [or] how such state-regulated wastes should be indicated on the manifest,'' but rather, ''whether MDEP has the authority to require use of a uniform hazardous waste manifest for non-HMR materials.'' The Alliance quotes from PHMSA's determination in PD–23(RF), that ''additional requirements by States (or localities) for the use of a specific form beyond what is required in Federal regulations create a 'substantial burden for both generator and transporters.' '' 66 FR at 37265.

The Alliance asserts that the MDEP marking and labeling requirements are preempted because ''the HMR does not impose any labeling/marking requirements on intact CRTs,'' or on broken CRTs and CRT glass ''assuming they are handled consistent with the requirements of EPA's conditional exclusions.'' And it states that MDEP may not call broken CRTs or CRT glass ''hazardous waste,'' or intact CRTs ''universal waste'' (a ''special subset of hazardous wastes eligible for management under reduced regulatory requirements''), because these ''materials do not meet the HMR definition of 'hazardous waste.' ''

The Alliance disputes MDEP's ''claim that its 'labeling and marking requirements primarily apply to the Maine generator, not to the transporter, and thus are not a transportation issue.'' It compares the MDEP marking and labeling requirements to the requirements for marking ''liquid industrial waste'' and ''hazardous waste'' that PHMSA found to be preempted in PD–6(R). It contends that the ''newly established label,'' which omits any reference to Federal law, ''still does not save the state marking/labeling requirements from preemption'' because these requirements ''are still substantively different than federal marking/labeling requirements.''

The Alliance further contends that all the MDEP requirements ''serve as an obstacle'' to accomplishing and carrying out the Federal hazardous materials transportation law and the HMR ''by creating substantial regulatory confusion'' and ''inhibit[ing] the free flow of commerce in CRTs for recycling.'' It states that ''shippers and carriers will undoubtedly be confused when broken CRTs and CRT glass are classified and regulated during transportation as 'hazardous wastes' by MDEP, but are not similarly classified or regulated by DOT.'' For example, it attributes confusion to MDEP's requirements that broken CRTs and CRT glass (1) must be ''shipped with a 'Uniform Hazardous Waste Manifest,' which * * * requires a 'Certification of receipt of hazardous materials' ''; (2) ''must be marked during transportation with the words 'HAZARDOUS WASTE' and a reference to federal law''; and (3) may not be offered ''to a transporter who is not licensed as a hazardous waste transporter.'' The Alliance states that ''the added burdens imposed by the Maine regulations'' are a factor that led one of its members to refuse to provide recycling ''services for used CRTs generated in Maine.''

The Alliance also states that differences between the MDEP requirements and those in different States illustrate the ''substantial confusion'' when shipments travel through more than one State. It also argues that a finding of preemption would not ''undermine'' the ability of States ''to regulate hazardous wastes that are not regulated by EPA, to streamline requirements for wastes that have not been designated as federal universal wastes, and to develop collection and recycling programs for CRTs and other electronic wastes.''

Two other industry associations, MPPA and USWAG, submitted comments in agreement with the Alliance's position that Federal hazardous material transportation law preempts the MDEP requirements on CRTs and CRT glass. MPPA states that ''its member mills regularly generate CRTs and arrange for reuse, recycling, or disposal of CRTs, using transporters, and * * * [u]nder some circumstances, MPPA members also transport used and unused CRTs.'' MPPA represents that, in regulating intact CRTs as ''universal waste,'' MDEP has gone

> beyond the federal Universal Waste rules and indeed beyond its own hazardous waste rules in several regards, including transportation requirements. * * * Among the requirements which are ''broader in scope'' than federal Universal Waste regulations are the DEP rules covering employee training, weekly inspections, storage and aisle space, shipment tracking documents, the Maine ''Uniform Hazardous Materials Bill of Lading,'' and Universal Waste transporter operating standards. Maine requires that all used, unused, or unwanted CRTS generated and shipped from Maine facilities ultimately be transported to a recycling facility, whether they are intact or broken. MPPA believes that the DEP attempted in some cases to address the overlap of the HMR and its new scheme, but the DEP adopted an overbroad approach that ultimately conflicts with and frustrates a uniform HMR transportation program.

MPPA attributes ''confusion that the regulated public faces when attempting to wrestle with the DEP's transportation requirements'' to the differences ''from the federal HMR regulations and EPA's regulations.'' It states that this results from Maine's failure to adopt ''the EPA's conditional exclusion for Universal Wastes,'' Maine's classification of broken CRTs and CRT glass as fully regulated State ''hazardous wastes,'' rather than universal wastes, and the ''alternate shipping paper'' requirements for intact CRTs. MPPA emphasizes that, ''to the extent that MPPA or its members

do not understand the requirements, that underscores the confusion generated by these different requirements.'' It attached to its comments an email exchange among MDEP staff during 2003 considering, but not deciding in the absence of any proposal ''submitted for review and approval,'' whether shrink wrapping CRTs for shipment would be acceptable, and states that ''some individuals and companies no longer transport Universal Waste due to an inability or unwillingness to meet the additional requirements adopted by the DEP.'' MPPA also states that it ''believes that the Maine Universal Waste rules, and the transportation rules in particular, provide a 'De Facto' scheme that regulates Universal Waste as it if were hazardous material under the HMR.''

MPPA states that its ''members are also subject to enforcement action by the DEP, which has a vigorous enforcement program including notices of violation and regular assessment of penalties for violations of the DEP hazardous waste regulations.'' While MPPA ''is not aware of enforcement actions taken against its members as transporters or shippers of CRTs,'' it refers to ''DEP enforcement action on [other] Universal Wastes,'' and states it has ''no doubt that DEP would enforce its Universal Waste rules on CRTs if it learned of violations.''

USWAG (an intervenor in the litigation pending in the Court of Appeals for review of EPA's July 28, 2006 final rule) states that ''preemption of Maine's CRT regulations [is] both necessary and critical to ensuring national uniformity in transportation safety.'' It asserts that a finding that State requirements are not preempted because they affect the transportation of ''materials that are not regulated by the HMR/HMTA (i.e., lead in CRTs and CRT glass)'' would ''ignore[] the HMTA statutory scheme whereby DOT is provided with the authority for designating 'hazardous materials.' '' USWAG further contends that

> If DOT's preemption authority is limited to those substances that it has determined pose unreasonable risks, it allows for the development of non-federal transportation standards for all other substances rather than a uniform national set of transportation safety regulations. DOT's conclusions on substances that it determines do not pose an unreasonable risk are rendered meaningless if states can expand this list on their own. Congress' intent will be frustrated if every state (and even every locality) may promulgate transportation standards for any substance in various amounts and forms provided the state's list does not explicitly overlap with DOT-regulated hazardous materials.

USWAG states that ''[a]ll of Maine's particular transportation requirements should be preempted because the state has used a classification system for the materials to be regulated that is inconsistent with the HMR.'' It also refers to PHMSA's prior findings of preemption in cases including:

—PD–23(RF), when a state had ''create[d] a scheme for designating and classifying hazardous material that is not substantively the same as in the HMR'' (66 FR at 38624);

—PD–6(R), where the ''liquid industrial waste'' marking was ''tantamount to the creation of an additional class of hazardous materials with its own marking requirements'' (59 FR at 6192); and

—IR–32, in which PHMSA referred to the statements in prior decisions ''that it considers the Federal rule in definition of hazard classes to be exclusive'' (55 FR at 36742).

B. Comments in Opposition to Preemption

MDEP agrees with the Alliance that, following EPA's CRT rulemaking, intact and broken CRTs destined for recycling are not a ''hazardous material.'' It emphasizes that it ''regulates CRTs and CRT glass as a state-only waste,'' and it does not attempt ''to regulate CRTs as federal hazardous material.'' It states that both ''DOT and EPA have agreed that States have the right to regulate state-only waste, and EIA's assertions to the contrary are baffling.'' MDEP quotes from *Massachusetts* v. *U.S. Department of Transportation,* 93 F.3d 890, 894 (D.C. Cir. 1996), that ''the regulation of how waste may be picked up or dropped off in a state must be thought an area of traditional state control.'' It also refers to PHMSA's 1996 letter (discussed in the May 6, 2008 **Federal Register** notice, 73 FR at 25083) that waste regulated by the State of Utah, which is not subject to the HMR, may be described on the manifest as ''Utah Regulated Only,'' ''non-RCRA waste,'' ''Utah only waste,'' or ''Utah Hazardous waste, liquid or solid, n.o.s.''

MDEP states that it has been authorized by EPA ''to implement the RCRA hazardous waste program,'' and that, in 2004,

> EPA determined that MDEP's inclusion of CRTs in the State's universal waste rule was different from, but equivalent to the Federal regulations. 69 FR at 64864. Both EPA and MDEP's universal waste rules established streamlined hazardous waste management regulations which were intended to encourage the recycling of certain widely generated wastes. * * * EPA's recent adoption of the final CRT rule in July 2006 changed the federal CRT requirements but reconfirmed MDEP authority, and even specifically addressed how interstate-transportation of state-only regulated materials through States adopting EPA's new conditional exclusion should be handled. 71 FR 42927, 42944. DOT preemption was clearly not contemplated by EPA.

MDEP also argues that its requirements for ''tracking of state-only hazardous waste, whether broken CRTs as hazardous waste or intact CRTs as universal waste, do not create a new classification of federal hazardous materials.'' In its rebuttal comments, it states that, ''to preclude any suggestion or misimpression that MDEP has ever attempted, or is presently attempting, to create a *de facto* DOT hazardous materials classification of this portion of its state-only hazardous waste program, MDEP has recently provided new clarifications and guidance in a number of its materials—e.g., its website, its regulations, and its forms.'' It emphasizes that, ''even prior to such guidance, transporters have understood that, in Maine, broken CRTs, similar to other state-only hazardous wastes, are part of the MDEP's state-only hazardous waste program, and may not be identified or treated as DOT hazardous materials unless they are defined as such by DOT.''

MDEP notes that it has excluded the word ''hazardous'' from the ''Maine Recyclable Material Uniform Bill of Lading'' form. It states that the alternative tracking documents allowed ''to be utilized for universal wastes * * * make even clearer than before that Maine is not attempting to regulate CRTs as federal hazardous materials.''

MDEP contends that its ''labeling and marking requirements apply to the Maine generator, not to the transporter, and thus are not a transportation issue'' because they concern ''non-transportation operations at fixed facilities.'' It also states that ''under both federal and MDEP universal waste rules the word 'waste' may be placed on a package and under both federal and MDEP rules this syntax does not mean that it is a DOT hazardous material.'' It asserts that its marking and labeling requirements do not create confusion because there is no indication that either intact or broken CRTs are federal hazardous materials, stating ''the MDEP approach to state-only universal waste is the antithesis of confusing; rather, in conformance with the practices nationwide for the movement of universal wastes, it carefully delineates a bright line between DOT hazardous materials and universal wastes, including state-only universal waste.''

MDEP argues that its requirements on transporters of intact or broken CRTs are

not obstacles to the goals of Federal hazardous material transportation law or the HMR because ''Maine has not in any way made a *de facto* classification of CRTs as federal hazardous material.'' It states that the Alliance's arguments about possible confusion, hypothetical noncompliance, and risks to transportation safety are ''unsubstantiated and fl[y] in the face of the reality of years of successful state and federal co-operation with state-only hazardous waste programs, including universal waste.''

MDEP states that the preemption determination cases cited by the Alliance and USWAG ''fall into four general fact patterns.'' The first is that in PD–7(R) in which PHMSA found that: ''Operator requirements for the transport of oils that are not hazardous materials are not subject to preemption by the HMTA.'' 59 FR at 28914. According to MDEP, ''operation of the MDEP program'' resembles the circumstances considered in PD–7(R), where an extensive analysis was not required in that determination (as USWAG argues), ''because Maryland's definitions of covered oils were, as here, sufficiently transparent to prevent anyone from incorrectly believing that the vegetable oils were DOT hazardous materials.''

MDEP distinguishes the second fact pattern of PD–6(R) on the ground that there is nothing in the MDEP marking or labeling requirements comparable to the Michigan requirement which was ''sufficiently similar to HMR markings that it appears to be a hazard warning, but that does not conform to HMR markings, [so that] the purposes of the HMR are undermined.''

MDEP states the third and fourth fact patterns involve ''cases where the challenged non-Federal requirements contained language that effectively blurred the definition of items on DOT's designated hazardous materials list'' with items regulated under the non-Federal requirements or ''a non-Federal requirement'' was applied to the same material ''in a different manner,'' including:

—the definitions of gases ''under pressure'' and gases and mixtures considered ''combustible'' or ''flammable,'' IR–5, 47 FR at 51993;
—''a system of classifying hazardous materials which is totally at variance with the system of hazard class definitions on which the Federal hazardous materials regulatory system is based,'' IR–6, ''City of Covington Ordinance Governing Transportation of Hazardous Materials,'' 48 FR 760, 763 (Jan. 6, 1983);
—the definition of ''radioactive materials,'' IR–12, ''St. Lawrence County, New York; Local Law Regulating the Transportation of Radioactive Materials,'' 49 FR 46632, 46651 (Nov. 27, 1984);
—State Police regulations which include ''materials listed in the SARA [Title III] table which are not listed in the HMR Table'' but omit some ''materials listed in the HMR Table but not in the SARA Table'' IR–29, ''State of Maine Statutes and Regulations on Transportation of Hazardous Materials,'' 55 FR 9304, 9308;
—a local definition of ''hazardous waste'' as including ''radioactive waste'' with a lower threshold of activity than subject to the HMR as a ''hazardous material,'' IR–32, 55 FR at 36742;
—the definitions of ''hazardous materials,'' ''combustible liquid,'' ''flammable liquid,'' ''biomedical waste,'' ''discarded hazardous materials,'' and ''sludge'' which were being ''used to regulate a material as a hazardous material,'' but ''were not 'substantively the same as' their counterparts in the HMR or did not have counterparts in the HMR,'' PD–18(R), 67 FR at 35195;
—the definitions of ''infectious waste,'' ''hospital waste,'' and ''dangerous waste'' that ''create a scheme for designating and classifying hazardous material'' that is not substantively the same as the regulation of ''regulated medical waste'' as a hazardous material in the HMR, PD–23 (RF), 66 FR at 37264; and
—''extensive [additional] information and documentation requirements [for the transportation of nuclear materials] * * * are likely to confound the transporters of hazardous materials, thereby increasing the potential for unreasonable hazards throughout the county,'' *Colorado Pub. Util. Comm'n* v. *Harmon,* above, 951 F.2d at 1583.

Eight States, ASTSWMO, Ecomaine, and the Natural Resources Council of Maine submitted comments opposing the Alliance's application. The Connecticut Department of Environmental Protection, Illinois Environmental Protection Agency, Maryland Department of the Environment, New Hampshire Department of Environmental Services, South Carolina Department of Health and Environmental Control, the Washington Department of Ecology, and ASTSWMO all quote the finding in PD–7(R) that wastes that are ''not hazardous materials are not subject to preemption by the HMTA.'' 59 FR at 28914.

These eight states assert that finding that the MDEP requirements are preempted would essentially prevent states from developing state-only regulated wastes or managing state-only universal waste in accordance with their universal waste requirements. Most of them specifically mention that this result would be directly contrary to EPA's March 4, 2005 final rule (70 FR 10789) revising requirements for the Uniform Hazardous Waste Manifest, ''which clearly provides for states to include state only wastes and additional state waste codes (to convey specific state information) providing it does not duplicate information contained in federal codes.''

Five of these states assert that ''the existence of state only hazardous waste has not caused substantial problems or confusion.'' They allege that the Alliance ''is targeting Maine CRT requirements'' because ''Maine has one of the first in the nation manufacturer takeback programs for electronic waste, specifically CRTs. * * * Other states are looking at developing similar programs'' which should ''not be thwarted by a DOT preemption determination.''

The New Hampshire Attorney General's Office submitted a separate comment that there is a ''presumption against preemption in areas of traditional state control, including the regulation of waste and environmental protection'' and, unless the ''dual compliance'' and ''obstacle'' criteria in 49 U.S.C. 5125 apply, ''a state requirement is not preempted merely because the federal scheme has left a substance unregulated in certain respects.''

ASTSWMO states that a finding that the MDEP requirements on intact and broken CRTs are preempted would (1) ''undermine long established legal authorities for States to regulate additional wastes as hazardous beyond those regulated by the U.S. Environmental Protection Agency (EPA) under federal hazardous waste regulations''; (2) ''contradict explicit authority granted to the states by EPA to include additional wastes in the category of 'universal waste' under State regulations''; and (3) ''hinder States' abilities to tailor their regulations to local problems and conditions.'' ASTSWMO asserts that, ''when EPA modifies the federal hazardous waste regulatory program to make it less stringent, States are not required to adopt the changes,'' as discussed in EPA's July 28, 2007 final rule (71 FR at 42944). The fact that ''States may regulate additional categories of wastes as State-only universal waste * * *

provid[es] further evidence that variation among the States' universal waste programs is to be expected,'' which ASTSWMO finds expressed in the preamble to EPA's ''Universal Waste Rule.'' 60 FR 25492 (May 11, 1995).

Ecomaine is ''a quasi-municipal organization owned by 21 municipalities in southern Maine, encompassing a waste-to-energy renewable power plant, single-sort recycling center and an ashfill/landfill.'' It states that ''Maine's eWaste Law'' requires ''that CRTs be recycled'' rather than being disposed at landfills and waste facilities and that MDEP's ''efficient and desirable tracking system * * * is crucial to the effectiveness of their program.'' Ecomaine says it ''shares the strategy that manufacturers take responsibility for their products,'' and states that the Alliance's application for a preemption determination ''seems counterproductive toward a sustainable future.''

The Electronics TakeBack Coalition is ''a national coalition of environmental and consumer groups, who promote green design and responsible recycling of electronics in the U.S.'' It states that the Alliance's application ''is simply a ploy to undermine recently enacted state e-waste recycling legislation that requires EIA's (former) members to participate in the electronics recycling program.'' It compares the MDEP requirements with ''the California e-waste law, which also places several restrictions on the handling and transportation of CRTs in California,'' and notes that the Alliance has not challenged the California law which ''does not require the industry to take any responsibility for recycling.'' It states that ''Maine does not regulate or classify these as hazardous materials, as claimed in the EIA petition,'' and is acting within its authority to designate ''state only hazardous wastes'' and ''universal wastes.''

The Natural Resources Council of Maine, the ''largest environmental advocacy group'' in Maine, states that a finding of preemption ''would eviscerate a highly successful law that is helping to protect Maine's citizens and wildlife from the toxic materials in electronic waste.'' It cites the ''accomplishments'' of Maine's ''electronic waste law'' and states that Maine's regulation of intact CRTs and CRT glass is fully authorized under EPA's CRT regulation and the guidance in EPA's universal waste program.

C. Decision

Ever since enactment of RCRA in 1976, the year following the HMTA, DOT and EPA have worked together to coordinate their respective requirements on the transportation of hazardous waste and to reconcile:

—the authority in 42 U.S.C. 6926 for a State to ''administer and enforce a hazardous waste * * * program'' that is ''equivalent to the Federal program under'' RCRA;

—the authority recognized by EPA and DOT for a State program to include in its hazardous waste management program additional wastes which are not regulated by EPA, under the provision in 42 U.S.C. 6929 that nothing in RCRA ''shall be construed to prohibit any State or political subdivision thereof from imposing any requirements * * * which are more stringent than'' EPA's hazardous waste management regulations;

—the requirement in 42 U.S.C. 6923(b) that, with respect to ''any hazardous waste identified or listed'' by EPA that is subject to Federal hazardous materials transportation law, ''the regulations promulgated by [EPA] shall be consistent with the requirements of such Act and the regulations thereunder''; and

—the original provision in Section 112 of the HMTA that, unless a waiver of preemption is granted, ''any requirement of a State or political subdivision thereof, which is inconsistent with any requirements set forth in this title, or in a regulation issued under this title, is preempted.''

In May 1980, when DOT adopted its initial regulations on the transportation of hazardous waste materials, it noted that ''six EPA–DOT joint public hearings were held in various parts of the United States'' and that PHMSA's predecessor agency (the Materials Transportation Bureau [MTB]) ''worked closely with EPA in the joint development of appropriate transportation requirements.'' 45 FR 34560, 34566, 34567 (May 22, 1980). ''MTB explained that the primary focus of its requirements was to ensure that hazardous wastes are properly identified to carriers and that they are delivered to predetermined designated facilities. Proper identification of wastes is essential in order to implement the transportation aspects of a 'cradle to grave' hazardous waste tracking system.'' 45 FR at 34567.

Accordingly, the scope of ''hazardous waste'' covered by the HMR is limited to ''any material that is subject to the hazardous waste manifest requirements of the EPA specified in 40 CFR Part 262.'' 49 CFR 171.8.[6] PHMSA's May 22, 1980 final rule also added a new Section 171.3(c) which specifically stated that a State or local requirement that applied to a ''hazardous waste *subject to this subchapter''* (emphasis added) was preempted if it ''applies differently or in addition to the requirements in [the HMR] concerning:

''(1) Packaging, marking, labeling, or placarding;[7]

''(2) Format or contents of discharge reports (except immediate reports for emergency response);[8] and

''(3) Format or contents of shipping papers, including hazardous waste manifests.'' *Id.*[9]

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[6] As originally adopted in 1980, the definition of ''hazardous waste'' included any material that would be subject to EPA's hazardous waste manifest requirements ''absent an interim authorization to a state under 40 CFR Part 123, Subpart F.'' 45 FR at 34587. This additional language was deleted in PHMSA's February 18, 1986 final rule, 51 FR 5968, because it was ''no longer necessary due to the change in the applicability of the HMR for hazardous wastes adopted in the final rule under HM–145D (49 FR 10507, Mar. 20, 1984).'' 50 FR 288, 290 (Jan. 3, 1985).

[7] In its separate final rule adopting a hazardous waste manifest system (45 FR 12737, 12740 [Feb. 26, 1980]), EPA stated that

DOT's labeling, marking, and placarding requirements have been in use for several years [and are] widely understood by persons in the transportation industry and by State and local officials in charge of responding to discharges of hazardous materials. Therefore, in developing its regulatory system for transporters of hazardous waste, EPA decided to rely upon DOT's existing system to the fullest extent possible consistent with [RCRA's] statutory mandate to protect human health and the environment during the transportation of hazardous waste. This effort to coordinate the transportation regulations was facilitated by DOT's proposal to extend the applicability of its hazardous materials regulations to transporters of hazardous waste. Upon adoption of DOT's regulations, these two sets of regulations will be fully interlocked, and a transporter of hazardous waste will be required to comply with both DOT and EPA regulations.

EPA's requirements to package, label, mark, and placard shipments of hazardous waste are set forth at 40 CFR 262.30–262.33.

[8] EPA also adopted at 40 CFR 263.30, ''the DOT requirements for reporting of discharges,'' and provided at 49 CFR 263.31 that a ''transporter must clean up any hazardous waste discharge that occurs during transportation or take such action as may be required or approved by Federal, State, or local officials so that the hazardous waste discharge no longer presents a hazard to human health or the environment.'' 45 FR at 12744, 33152.

[9] Four years later, EPA and DOT issued coordinated final rules adopting a uniform hazardous waste manifest (*see* 49 FR 10490 (EPA); 49 FR at 10510 (DOT) [Mar. 20, 1984]). EPA explained that it and DOT ''modified the Uniform Manifest form to allow the entry of certain optional State information items in addition to the federally-regulated items,'' and specifically that the ''Uniform Hazardous Waste Manifest form has been designed to allow the listing of both federally-regulated wastes and wastes regulated solely by the States,'' so long as there is a clear distinction ''between federally-regulated wastes and other wastes, as required by DOT regulations (49 CFR 172.201(a)(1)).'' 49 FR at 10492, 10495. DOT similarly noted that the amendments adopted by it and EPA did not ''prohibit States from requiring additional information from the generator or the

This provision, specific to hazardous waste, was consistent with PHMSA's original regulations which set forth procedures for ''a State or a political subdivision of a State having a requirement pertaining to the transportation of hazardous materials or any person affected by the requirement [to] obtain an administrative ruling as to whether the requirement is inconsistent with the [Hazardous Materials Transportation] Act or regulations issued under the Act.'' Former 49 CFR 107.201(a), adopted at 41 FR 38167, 38171 (Sept. 9, 1976) (emphasis supplied). Accordingly, both the general and specific preemption provisions in PHMSA's regulations were clear that non-Federal requirements that do not ''pertain'' to the transportation of a hazardous material subject to the HMTA are not preempted by the HMTA.

As discussed in Part II, above, the HMTA was amended in 1990 to (1) specifically set forth the ''dual compliance'' and ''obstacle'' standards that PHMSA had applied in issuing administrative rulings on preemption prior to that date; (2) specify that non-Federal requirements in five ''covered subject'' areas must be ''substantively the same as'' requirements in the Federal hazardous material transportation law and the regulations issued under that law; and (3) statutorily authorize PHMSA's administrative process for making preemption determinations. Public Law 101–615 section 105(a)(4), 104 Stat. 3247 (Nov. 16, 1990). Thereafter, PHMSA revised its procedural regulations in subpart C of 49 CFR part 107 (56 FR 8616, 8622 [Feb. 28, 1991]), and deleted former § 171.3(c) as part of the President's Regulatory Reinvention Initiative to eliminate unnecessary provisions because, ''for preemption purposes, [PHMSA] looks as hazardous waste issues together with issues covering all other hazardous materials. RCRA's directive that EPA's hazardous waste requirements be consistent with the Federal hazmat law does not mandate that [PHMSA] establish a separate preemption provision for hazardous waste.'' 61 FR 21084, 21093 (May 9, 1996). *See also* 61 FR 51235, 51236 (Oct. 1, 1996), that ''utilization of the 'covered subjects' preemption authority in the Federal hazardous materials transportation law facilitates harmonization of non-Federal requirements with Federal law'' and ''goes far beyond the limited provisions of 49 CFR 171.3(c). * * * [T]he preemption provisions of the Federal hazardous materials transportation law address all issues pertaining to transportation of hazardous materials, including hazardous waste.''

These amendments to the HMTA and revisions to PHMSA's regulations have not changed the general principle, as expressed in the preamble to a final rule on ''Infectious Substances,'' that the ''HMR do not, however, preempt non-Federal requirements imposed on the transportation of materials that are not hazardous materials as defined in the HMR.'' 60 FR 48780, 48784 (Sept. 20, 1995). As PHMSA explained at that time, there can be exceptions to this general principle, such as the situation in PD–6(R), ''where a non-Federal law or regulation requires a method of hazard communication for non-hazardous materials sufficiently similar to that prescribed by the HMR for a hazardous material that the regulation is 'tantamount to the creation of an additional class of hazardous materials with its own marking requirements.' '' *Id.*

As noted by MDEP, another exception to this general principle is where the non-Federal requirement purports to broaden the category of hazardous materials to include materials that are not regulated under the HMR and, thereby, create ''a system of classifying hazardous materials which is totally at variance with the system of hazard class definitions'' in the HMR. IR–6, 48 FR at 763. *See also, e.g.,* IR–5, 47 FR at 51993 (additional materials included within the definitions of gases ''under pressure'' and ''combustible'' and ''flammable'' gases and mixtures); IR–32, 55 FR at 36742 (using a lower threshold of activity for regulating waste radioactive material as a ''radioactive waste''); PD–18(R), 65 FR at 81953 (''state and local hazard class and hazardous materials definitions differing from those in the HMR and *used to regulate in areas regulated by DOT* are preempted) (emphasis supplied); PD–23(RF), 66 FR at 37263 (the term ''hospital waste'' in a local ordinance encompasses both (1) items that are within the definition of 'regulated medical waste' in the HMR and (2) other items that may not contain any infectious substance and, therefore, are not regulated under the HMR'').

These exceptions do not apply here. As the Alliances itself stresses, MDEP regulates used CRTs and CRT glass solely as a ''State-only'' hazardous or universal waste. There is no evidence that these requirements

—pertain to the ''designation, description, and classification of hazardous material,'' the ''labeling, marking, and placarding of hazardous material,'' or the ''preparation, execution, and use of shipping documents related to hazardous material,'' as the term ''hazardous material'' is used in the Federal hazardous material transportation law and the regulations issued under that law;

—otherwise create any ''obstacle to accomplishing and carrying out'' the Federal hazardous material transportation law and the regulations issued under that law; or

—prevent compliance with any requirement of the Federal hazardous material transportation law and the regulations issued under that law.

Rather, Maine's regulation of intact CRTs as a State-only universal waste, and broken CRTs and CRT glass as a State-only hazardous waste, is done in a manner that does not create any regulatory confusion or jeopardize transportation safety. Maine's approach is consistent with DOT's guidance regarding how to describe State-only hazardous wastes, as set forth in PHMSA's 1996 letter addressing State-only hazardous waste regulated by Utah. Maine's requirements for the manifesting of broken CRTs and CRT glass follow the regulations developed by EPA (in coordination with DOT) for the manifesting of State-only hazardous waste.

VI. Ruling

Federal hazardous material transportation law does not preempt MDEP's regulations on classification of used CRTs as ''universal waste'' and broken CRTs and CRT glass as a State ''hazardous waste'' and the marking, labeling, shipping documentation, and transporter requirements, because these requirements do not apply or pertain to materials regulated under Federal hazardous materials transportation law and the HMR or otherwise constitute an obstacle to accomplishing and carrying out Federal hazardous materials transportation law and the regulations issued under that law.

VII. Petition for Reconsideration/ Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register.** A petition for judicial review of a final preemption

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treatment, storage or disposal facility concerning a hazardous waste shipment,'' but that this information could be submitted ''directly to the appropriate agency of that State.'' 49 FR 10508. Thus, ''while these amendments do not prohibit the transporter from voluntarily carrying such information, they do preclude States from requiring the transporter from doing so.'' *Id. See* also 40 CFR 271.10.

determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

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

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

Issued in Washington, DC, on September 2, 2009.

Sherri L. Pappas,

Acting Chief Counsel.

[FR Doc. E9–21768 Filed 9–9–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee—Open Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Commercial Space Transportation Advisory Committee open meeting.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), notice is hereby given of a meeting of the Commercial Space Transportation Advisory Committee (COMSTAC). The meeting will take place on Thursday, October 29, 2009, starting at 8 a.m. at the Marriott Metro Center Hotel, 775 12th Street, NW., Washington, DC 20005. This will be the 50th meeting of the COMSTAC.

The proposed agenda for this meeting will feature information about 25 years of COMSTAC; and discussions will focus on

—the Committee's work on a White Paper entitled *DoD Impact on U.S. Commercial Launch Services Competitiveness*;

—the Committee's work on the National Space Policy Review;

—the Augustine Panel and the implications for the U.S. commercial space transportation industry; and

—orbital debris mitigation, industry impact, costs, and the role of the FAA.

Interested members of the public may submit relevant written statements for the COMSTAC members to consider under the advisory process. Statements may be concerning the issues and agenda items mentioned above and/or additional issues that may be relevant for the U.S. commercial space transportation industry. Interested parties wishing to submit written statements should contact Brenda Parker, DFO, (the Contact Person listed below) in writing (mail or e-mail) by October 2, 2009, so that the information can be made available to COMSTAC members for their review and consideration prior to the October 29th meeting. Written statements should be supplied in the following formats: one hard copy with original signature and/or one electronic copy via e-mail.

Subject to approval, a portion of the October 29th meeting will be closed to the public (starting at 3:45 pm).

An agenda will be posted on the FAA Web site at *http://ast.faa.gov*. For specific information concerning the times and locations of the COMSTAC working group meetings, contact the Contact Person listed below.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the Contact Person listed below in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Brenda Parker (AST–100), Office of Commercial Space Transportation (AST), 800 Independence Avenue, SW., Room 331, Washington, DC 20591, telephone (202) 267–3674; E-mail *brenda.parker@faa.gov*. Complete information regarding COMSTAC is available on the FAA Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/*.

Issued in Washington, DC, September 4, 2009.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. E9–21905 Filed 9–9–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fourth Meeting—RTCA Special Committee 220/Automatic Flight Guidance and Control

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 220/Automatic Flight Guidance and Control meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 220/Automatic Flight Guidance and Control.

DATES: The meeting will be held October 14–16, 2009. October 14th from 9 a.m. to 5 p.m. and October 16th from 9 a.m. to 2 p.m.

ADDRESSES: The meeting will be held at Wichita Airport Hilton, 2098 Airport Road, Wichita, Kansas, 67209–1941 USA, *Tel:* 1–316–945–5272, *Fax:* 1–316–945–7620.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 220/Automatic Flight Guidance and Control meeting. The agenda will include:

- Welcome/Agenda Overview.
- Review and approve previous plenary minutes.
- Report out from July PMC meeting—Sherif Ali.
- Report from WG1—MOPS: Status, schedule, issues—Review MS Project schedule.
- Report from WG2—Part 23 Installation Guidance: Status, schedule, issues—Review MS Project schedule.
- Report from WG3—Parts 27/29 Installation Guidance: Status, schedule, issues—Review MS Project schedule.
- Common issues discussion including breadth & level of participation, scope with respect to TORs.
- Breakout into individual WGs.
- Report out from each WG: Status, schedule, issues.
- Establish Dates, Location, Agenda for Next Meeting, Other Business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.