



**Before the United States House of Representatives
Transportation and Infrastructure Committee
Surface Transportation Subcommittee**

**HEARING ON THE REAUTHORIZATION OF THE
HAZARDOUS MATERIALS TRANSPORTATION PROGRAM**

**Statement of
Southern California Edison Company
and the
Edison Electric Institute**

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**STATEMENT OF THOMAS GROSS
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SURFACE TRANSPORTATION SUBCOMMITTEE
ON BEHALF OF THE
SOUTHERN CALIFORNIA EDISON COMPANY
AND THE EDISON ELECTRIC INSTITUTE**

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Good morning, Mr. Chairman and Members of the Subcommittee. My name is Tom Gross and I am an environmental specialist with the Southern California Edison Company. I also serve as chairman of the Utility Solid Waste Activities Group's Department of Transportation Committee. USWAG is an informal consortium of the Edison Electric Institute (EEI), the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), and approximately 80 electric utility operating companies, whose members -- taken together -- service more than 95 percent of the nation's consumers of electricity. My committee is responsible for addressing hazardous materials transportation issues for the electric utility industry. I am testifying today for Southern California Edison and the Edison Electric Institute (EEI) and as a member of the Interested Parties coalition.

It is a pleasure to appear before you today to discuss the reauthorization of the Hazardous Materials Transportation Act (HMTA). As you know, Congress has not focused on the HMTA since the Act was last substantively amended in 1990. Generally speaking, the Act -- coupled with the Department of Transportation's (DOT's) implementing regulations -- has been largely successful in establishing a system for the safe and efficient transportation of hazardous materials in commerce. Nevertheless, the reauthorization of the HMTA provides an opportunity for Congress to

refine the Act to address new problems that have emerged and to incorporate the lessons learned over the last seven years.

EEL has a unique perspective on hazardous materials issues because our member companies are both shippers and carriers of hazardous materials. Based on this experience, we have identified four areas where the HMTA can be enhanced.

Specifically, Congress should:

- (1) reaffirm DOT's ability to preempt state and local rules that pose an obstacle to compliance with the Federal Hazardous Materials Regulations,
- (2) ensure that modifications to DOT's inspection, enforcement and emergency order authority do not create new legal, practical and safety concerns,
- (3) clarify the respective responsibilities of DOT, EPA and OSHA in prescribing and enforcing hazardous materials transport rules, and
- (4) reduce compliance costs by streamlining the HMTA permitting and recordkeeping requirements.

I. DOT's Preemption Authority

Reaffirming DOT's ability to maintain uniform, national regulations is critical to the safe and efficient transportation of hazardous materials and therefore is our top priority in HMTA reauthorization. Rules that promote the safe transport of hazardous materials in one state will promote safety in every state. Although other Federal agencies, states and localities are responsible for regulating the non-transportation related aspects of hazardous materials, the risks posed by hazardous materials in transportation can only be addressed through consistent nationwide rules. Subjecting shippers and carriers of hazardous materials to varying requirements as the goods travel down the highway increases the risks of an unintentional release in another jurisdiction and adds unnecessary and expensive burdens on the regulated industry.

For these reasons, Congress in 1990 codified DOT's preemptive authority, specifically stating in the statute's legislative findings that state and local rules that vary from the Federal Hazardous Materials Regulations create "the potential for unreasonable hazards in other jurisdictions and confound shippers and carriers that attempt to comply with the multiple and conflicting registration, permitting, routing, notification and other regulatory requirements." Pub. L. 101615, § 2, 104 Stat. 3244 (1990).

Yet last year, the U.S. Court of Appeals for the District of Columbia Circuit significantly curtailed DOT's ability to maintain uniform, national rules by prohibiting the Department from relying on the purposes of the HMTA as a basis for preempting inconsistent state or local regulations. In Massachusetts v. United States Department of Transportation, 93 F.3d 890, 895 (D.C. Cir. 1996), the court concluded that DOT could only preempt "state rules that otherwise pose an obstacle to fulfilling explicit provisions, not general policies, of the HMTA." The decision opens the door for states and municipalities to enact of host of new rules in areas where DOT has decided that safety regulations are not needed. Such rules have the potential to impair safety in other jurisdictions and impede the efficient movement of hazardous materials in transportation.

Congressional action is necessary to reaffirm DOT's preeminent authority over the regulation of hazardous materials in transportation. We therefore urge Congress to legislatively reverse the D.C. Circuit's 1996 decision and clarify that the obstacle test of section 5125(a) applies whenever a state or local rule poses an obstacle to the purposes of the Act, regardless of whether there is an express DOT provision directly addressing the issue. Legislative language to achieve this end has been proposed by Senators McCain and Hollings. We support this bi-partisan proposal and understand that this language also is acceptable to DOT. In addition, Congress should adopt a

technical amendment to sections 5125(d) and (e) to clarify that DOT has the authority to issue administrative preemption decisions on state and local fees and permits (section 5125(g) and 5119(c)(2) respectively). For your convenience, a copy of the proposal is attached to my written statement.

II. DOT's Inspection, Enforcement and Emergency Order Authority

In an effort to address undeclared shipments of hazardous materials, the Administration has proposed providing DOT with virtually unrestricted inspection, enforcement and emergency order authority. We would support granting DOT narrowly tailored authority to address the Department's legitimate concerns about undeclared and misclassified hazardous materials. However, the Administration's proposal would grant DOT sweeping new powers that raise serious legal, practical and safety issues.

For example, these provisions would violate the privacy expectations of the general public whose packages (containing non-hazardous materials) inevitably will be opened by Federal inspectors and provide an insufficient standard for a warrantless search. The provisions also would be ripe for abuse as inspectors would merely be required to have "an objectively reasonable and articulable belief that the package may contain a hazardous material." Further, the provisions would allow DOT to bypass minimal due process protections and open shipments of *declared* hazardous materials that are in full compliance with all applicable regulations.

We are also concerned about the proposal's lack of safeguards to ensure that only qualified, trained personnel are empowered to exercise the expanded inspection authority. Practical issues, such as the safety of the inspectors opening such packages and the liability for the packages once opened, also need to be addressed.

Consequently, we urge Congress to reject the proposal as being overly broad and work with the Administration and the interested stakeholders to develop a more carefully tailored plan to address the problem of undeclared and misclassified hazardous materials.

We have similar concerns about the Administration's proposal to authorize DOT to issue "emergency orders" without providing shippers or carriers prior notice or an opportunity for a hearing. DOT already has ample authority to address emergency situations under the existing "imminent hazard" provisions. 49 U.S.C. § 5122(b). Further, the Department's justifiable concern about shipments of undeclared hazardous materials can be addressed by a narrow, targeted expansion of DOT's inspection and enforcement authority. As a result, there is no reason for Congress to grant DOT additional emergency authority that would chip away at such basic due process protections as prior notice and an opportunity for a hearing.

III. Role of Various Federal Agencies In Regulating Hazardous Materials

Several Federal agencies, including the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), share the responsibility with DOT to regulate hazardous materials. In theory, each Agency addresses a discrete aspect of hazardous materials management, with OSHA having responsibility for worker safety, EPA focusing on the off-site impacts to human health and the environment, and DOT addressing the transportation related aspects of hazardous materials in commerce. In practice, however, uncertainty about the respective jurisdiction of each Agency has led to overlapping regulations and duplicative inspection authority. Congress therefore should clarify that DOT has preeminent jurisdiction to regulate hazardous materials in transport, while OSHA and

EPA retain their authority to regulate non-transportation related activities involving hazardous materials.

First, Congress should amend section 5107(f)(2) to provide that DOT and OSHA share jurisdiction over hazardous materials training, but delete references that extend OSHA's authority to hazardous materials transportation handling criteria (section 5106), registration (section 5108), and motor carrier safety permits (section 5109). These erroneous references apparently were included as a result of a clerical error in 1990. Legislative language to eliminate these inadvertent references was proposed by Senators McCain and Hollings, although the citation to section 5109 again is mistakenly retained. We support deleting all three of the erroneous references and understand that DOT agrees. We therefore urge Congress to make this clarifying amendment.

We oppose, however, the Administration's proposal to eliminate DOT's explicit authority to establish hazardous materials handling criteria. 49 U.S.C. § 5106. The Administration asserted in its legislative proposal that the section is "unnecessary" and "has the potential to create confusion about the respective responsibilities" of DOT, OSHA and EPA. We disagree. These provisions illustrate DOT's authority to regulate the transportation-related aspects of hazardous materials handling, and do not prevent other Federal agencies (such as EPA and OSHA) from regulating activities that are not related to transportation. We therefore recommend that Congress retain these provisions or, at a minimum, move the six handling criteria from section 5106 to section 5103(b)(1)(B) as examples of DOT's authority to govern the safety aspects of the transportation of hazardous materials.

IV. Streamlining DOT's Hazardous Materials Program

The proposals to reauthorize the HMTA contain a variety of relatively non-controversial provisions that would reduce compliance costs by streamlining, updating and/or clarifying the statutory framework governing the transportation of hazardous materials. These provisions include lengthening from two to four years the maximum effective period of exemptions (which are renamed "special permits"), clarifying that shippers and carriers are to retain shipping papers for one year after the papers are provided to the carrier, creating new criminal enforcement provisions, increasing the maximum civil penalties, and clarifying the judicial review process for DOT compliance, enforcement and civil penalty orders. We support each of these provisions and urge them to be included in HMTA reform legislation.

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In sum, we appreciate the leadership of this Committee in reauthorizing and reforming the HMTA. In amending the statute, Congress should seize the opportunity to (1) reaffirm DOT's ability to preempt state and local rules that pose an obstacle to compliance with the Federal Hazardous Materials Regulations, (2) ensure that modifications to DOT's inspection, enforcement and emergency order authority do not create new legal, practical and safety concerns, (3) clarify the respective responsibilities of DOT, EPA and OSHA in prescribing and enforcing hazmat transport rules, and (4) reduce compliance costs by streamlining the HMTA permitting and recordkeeping requirements. Such legislative action is necessary to promote uniformity, safety and efficiency in hazardous materials transportation. I thank the Subcommittee for the opportunity to testify before you on this important issue.