Annual Burden: 175.

Comments: Send all comments regarding this information collection to Charles Ou, Small Business Administration, Office of Advocacy 409 3rd Street, S.W., Washington, D.C. 20416. Phone No.: 202–205–6966. Send comments regarding whether these information collections are necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Title: Small Business Administration Applicant Survey.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals Seeking Employment.

Annual Responses: 7,500.

Burden: 1,275.

Comments: Send all comments regarding this information collection to Carol Cordova, Small Business Administration, Office of Human Resources, Suite 4000, 409 3rd Street, S.W., Washington, D.C. 20416: Phone: 202–205–6162.

Title: Procurement Automated Source.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Small businesses interested in federal procurement opportunities.

Annual Responses: 219,500.

Annual Burden: 48,000.

Comments: Send all comments regarding this information collection to Glen Harwood, Small Business Administration, Office of Government Contracting, Suite 8000, 409 3rd Street, S.W., Washington, D.C. 20416, Phone: 202–205–6469.

Title: Request for Financial Statements.

Type of Request: Extension of a currently approved collection.

Description of Respondents: 8(a) Participating Firms.

Annual Responses: 3,100.

Annual Burden: 3,100.

Title: SBDC On Site Review and Record keeping Requirements.

Type of Request: Extension of a currently approved collection.

Annual Responses: 29.

Annual Burden: 3,976.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 96–6599 Filed 3–18–96; 8:45 am]

BILLING CODE 8025–01–M

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Comments should be submitted on or before May 20, 1996.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Management Analyst, Small Business Administration, 409 3rd Street, SW., Suite 5000, Washington, DC. 20416. Phone Number: 202–205–6629. Copies of these collections can also be obtained.

SUPPLEMENTARY INFORMATION:

Title: SBA Guaranty Lender's Customer Satisfaction.

Type of Request: New Information collection.

Description of Respondents: Guaranty Lenders.

Annual Responses: 8337.

Annual Burden: 2779.

Comments: Send all comments regarding this information collection to George Price, Office of Marketing and Customer Service, Small Business Administration, 409 3rd Street, SW., Washington, DC. 20416. Phone No.: 202–205–7124. Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 96–6715 Filed 3–19–96; 8:45 am]

BILLING CODE 8025–01–M

SOCIAL SECURITY ADMINISTRATION

Rescission of Social Security Ruling SSR 82–43 Relationship—Presumption of the Validity of the Last Marriage

AGENCY: Social Security Administration.

ACTION: Notice of rescission of Social Security Ruling SSR 82–43.

SUMMARY: The Commissioner of Social Security gives notice of the rescission of SSR 82–43.

EFFECTIVE DATE: March 20, 1996.

FOR FURTHER INFORMATION CONTACT: Joanne K. Castello, Division of Regulations and Rulings, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1711.

SUPPLEMENTARY INFORMATION: Social Security Rulings make available to the public precedent final decisions, opinions, and orders relating to the Federal old-age, survivors, disability, supplemental security income, and black lung benefits programs. Social Security Rulings may be based on claim decisions made at all administrative levels of adjudication, Federal court decisions, Commissioner's decisions, opinions of the Office of the General Counsel, and other policy interpretations of the law and regulations.

SSR 82–43, issued in 1982, was published in the 1981–1985 Cumulative Edition of the Rulings on page 92. SSR 82–43 involves Kansas law on the presumption of the validity of the last marriage and rebutting the presumption. The Ruling holds that whether the presumption is rebutted depends on knowledge of divorce records about the worker from all places where he lived for the entire period of separation from the spouse who is challenging the last marriage and the existence of a divorce.

The Supreme Court of Kansas in *Harper* v. *DuPree*, 345 P.2d 644 (Kan. 1959), established a very high burden of proof on the party who attacks a marriage as invalid on the grounds that one of the spouses was not previously divorced. In *Harper*, the burden of proof is one of leaving ''no room for reasonable doubt.'' In *Elms* v. *Bowen*, 702 F. Supp. 273 (D. Kan. 1989), the district court, relying on *Harper*, concluded that the absence of divorce records concerning a prior marriage was not sufficient to prove the invalidity of a subsequent marriage.

The presumption under Kansas law is so strict that it precludes a blanket rebuttal policy that the absence of a divorce decree among the public records of places the insured lived constitutes sufficient evidence that no divorce occurred. Therefore, each claim involving the rebuttal of the presumption of the last marriage under Kansas law must be evaluated and decided individually. SSR 82–43 is rescinded because it does not reflect Kansas law at this time and a general policy statement on rebutting the presumption of the validity of the last marriage where the claim is governed by Kansas law is not possible, at least until Kansas law is clarified.

(Catalog of Federal Domestic Assistance, Programs 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance; 96.005 Special Benefits for Disabled Coal Miners.)

Dated: March 8, 1996.

Shirley S. Chater,

Commissioner of Social Security.

[FR Doc. 96–6674 Filed 3–19–96; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. PDA–15(R)]

Application by Association of Waste Hazardous Materials Transporters for a Preemption Determination as to Houston, Texas, Requirements on the Storage, Use, Dispensing and Handling of Hazardous Materials

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Public Notice and Invitation to Comment.

SUMMARY: The Association of Waste Hazardous Materials Transporters (AWHMT) has applied for an administrative determination whether Federal hazardous materials transportation law preempts certain requirements of the City of Houston, Texas, relating to the storage, use, dispensing, and handling of hazardous materials.

DATES: Comments received on or before May 6, 1996, and rebuttal comments received on or before June 18, 1996, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, Room 8421, Nassif Building, 400 Seventh Street, SW, Washington, DC 20590–0001 (Tel. No. 202–366–4453). Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (PDA–15(R)). Three copies of each should be submitted. In addition, a copy of each comment and each rebuttal comment must also be sent to (1) Mr. Charles Dickhut, Chairman, Association of Waste Hazardous Materials Transporters, 2200 Mill Road, Alexandria, VA 22314, and (2) Mr. Gene L. Locke, City Attorney, City of Houston Legal Department, P.O. Box 1562, Houston, TX 77251. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I hereby certify that copies of this comment have been sent to Messrs. Dickhut and Locke at the addresses specified in the Federal Register.'')

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. AWHMT'S Application for a Preemption Determination

AWHMT has applied for a determination that the Federal hazardous material transportation law preempts certain provisions of the Fire Code of the City of Houston, Texas (Houston Fire Code), as adopted May 15, 1995, in Ordinance No. 95–279. The challenged provisions concern the storage, use, dispensing and handling of hazardous materials. The Houston Fire Code consists of the Uniform Fire Code (1991 edition), as modified by a ''Conversion Document.''

The parts of the Houston Fire Code challenged by AWHMT are: sections in Article 4 concerning inspections and fees for obtaining a permit; sections in Article 79 containing requirements for tank vehicles used for flammable and combustible liquids; and the definition of ''hazardous materials'' in Articles 9 and 80. In its application, AWHMT states that one of its members has been cited for violations of the Houston Fire Code. AWHMT has separately provided copies of additional citations written to its members for loading or unloading corrosive hazardous materials without a permit, memoranda of the Texas Tank Truck Carriers Association concerning enforcement of the permit requirement, and the ''Conversion Document.'' Copies of these materials have been placed in the docket.

Inspections and fees. Sec. 4.104 authorizes the fire chief to inspect and approve vehicles before a permit is issued, and Sec. 4.109 sets annual fees for the permit and inspection at amounts ranging from $75 to $250, depending on the hazardous material and activity involved. According to AWHMT, inspections are scheduled only after the submission of an application for a permit and conducted only between 7:00 a.m. and 8:00 a.m., Monday through Friday. AWHMT states it is uncertain whether multiple fees must be paid when a vehicle transports more than one hazardous material, or a hazardous material meeting more than one permit requirement.

Permit requirements are contained in (at least) Articles 4, 79 and 80. Sec. 4.108 makes it unlawful for any person to engage in numerous specified activities without having a permit, including (1) operating a tank vehicle used for the transportation of flammable or combustible liquids, and (2) storing, transporting on-site, dispensing, using or handling hazardous materials in excess of limited amounts. Permits to store, dispense, use or handle flammable and combustible liquids, and hazardous materials in general, in excess of the quantities specified in Sec. 4.108, are also required by Secs. 79.103(a) and 80.103(a), respectively. However, excepted from the scope of Articles 79 and 80 are the transportation of flammable and combustible liquids ''when in accordance with DOT regulations'' and ''[o]ff-site hazardous materials transportation in accordance with DOT requirements.'' Secs. 79.101(a), 80.101(a) (exceptions).

Tank vehicles. Tank vehicles are defined in Sec. 9.110 to include a vehicle, other than a rail car or boat, with a cargo tank as an integral part and used for transporting flammable or combustible liquids, liquefied petroleum gas, or hazardous chemicals. However, the sections in Article 79 challenged by AWHMT relate only to tank vehicles used for flammable and combustible liquids:

—79.1201—providing that tank vehicles used for flammable and combustible liquids must be designed, constructed, equipped and maintained in accordance with Uniform Fire Code Standard No. 79–4.

—79.1203(d)—requiring ''bonding'' in accordance with Sec. 79.808(a)3. The latter section concerns static protection at tank vehicle loading racks and requires a ''metallic bond wire permanently electrically connected to the fill stem or to some part of the rack structure in electrical contact with the fill stem'' to prevent the accumulation of static charges.

—79.1203(n)—requiring the following signs and identification on tank vehicles: (1) a serial number issued by the fire chief painted on the vehicle; (2) ''FLAMMABLE'' signs on each side and the rear, and ''NO SMOKING'' signs at draw-off valves, at least four inches high and in a color that contrasts with the background; and (3) the company name or corporate symbol of the tank vehicle's owner or operator permanently displayed in a conspicuous location. AWHMT's application states that a ''permit sticker'' must also be placed immediately below the fire department's serial number. AWHMT also states that the exception in Sec. 79.1203(n), for ''[s]ignage and identification that complies with U.S. Department of Transportation regulations,'' is interpreted by the fire department only as permitting DOT-required placards to be substituted for the ''FLAMMABLE'' markings.

—79.1205(b)—prohibiting leaving tank vehicles unattended at any time on residential streets, or within 500 feet of a residential area, apartment or hotel complex, educational facility, hospital, or health care facility, or, ''at any other place that would, in the opinion of the [fire] chief, present an extreme life hazard.''

—79.1207—requiring tank vehicles to be equipped with at least two fire extinguishers having a minimum rating of 2–A, 20–B:C, located as far apart on the vehicle as possible.

Definition of hazardous materials. Sec. 9.110 defines ''hazardous materials'' as chemicals or substances that are physical or health hazards ''as defined and classified in Article 80 whether the materials are in usable or waste condition.'' Sec. 80.101(b) classifies as ''hazardous materials'' the chemicals or substances ''defined as such in Article 9. See Appendix VI-A for the classification of hazard categories and hazard evaluations.'' AWHMT states that the hazard classification in Appendix VI–A is based on rules of the U.S. Department of Labor concerning occupational health and safety, rather than the Hazardous Materials Regulations, 49 CFR Parts 171–180.

The text of AWHMT's application and a list of the attachments are set forth in Appendix A. The attachments (which include extracts from the Houston Fire Code) and Houston's ''Conversion Document'' may be examined at RSPA's Dockets Unit, and copies of these items will be provided at no cost upon request to the RSPA's Dockets Unit (see the address and telephone number set forth in ''Addresses'' above). The Uniform Fire Code and Standards are published by the International Conference of Building Officials and the Western Fire Chiefs Association. Copies may be purchased from the International Conference of Building Officials, 5360 South Workman Mill Road, Whittier, CA 90601, telephone 800–284–4406.

II. Federal Preemption

Section 5125 of Title 49 U.S.C. contains several preemption provisions that are relevant to AWHMT's application. Subsection (a) provides that—in the absence of a waiver of preemption by DOT under § 5125(e) or specific authority 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 or a regulation issued under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to the accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria which RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Pub. L. 93–633 § 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).

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects, that is not ''substantively the same as'' a provision of Federal hazardous material transportation law or a regulation prescribed under that law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(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 design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

Subsection (f) provides that a State, political subdivision, or Indian tribe may—

impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

These statutory preemption provisions carry out Congress's view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In 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 it amended the HMTA in 1990, Congress 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 § 2, 104 Stat. 3244. A Federal Court of Appeals has found that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments which expanded the original preemption provisions. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991). (In 1994, the HMTA was revised, codified and enacted ''without substantive change,'' at 49 U.S.C. Chapter 51. Pub. L. 103–272, 108 Stat. 745.)

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing which have been delegated to FHWA. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a). This administrative determination has replaced RSPA's process for issuing inconsistency rulings. RSPA maintains a subject matter index of hazardous materials preemption cases, including all inconsistency rulings and preemption determinations issued. A copy of this index will be provided at no cost upon request to the individual named in ''For Further Information Contact'' above.

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the Federal Register. Following the receipt

and consideration of written comments, RSPA publishes its determination in the Federal Register. *See* 49 C.F.R. 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 C.F.R. 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under 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. 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. *Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 12612, entitled ''Federalism'' (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

III. Public Comments

All comments should be limited to the issue whether 49 U.S.C. 5125 preempts the provisions of the Houston Fire Code challenged by AWHMT. Comments should:

(1) Specifically address (a) the preemption criteria set forth in Part II, above, and (b) whether the challenged provisions of the Houston Fire Code are ''authorized by another law of the United States.''

(2) Explain in detail the manner in which the challenged provisions of the Houston Fire Code are applied and enforced.

(3) Discuss in detail the scope and meaning of the exceptions in Secs. 79.101(a) and 80.101(a) of the Houston Fire Code, applicable to transportation in accordance with DOT requirements, including the relationship of the permit requirement in Sec. 4.108 to the exceptions in Secs. 79.101(a) and 80.101(a) from the permit requirements in Secs. 79.103(a) and 80.103(a), respectively.

Persons intending to comment should review the standards and procedures governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201–107.211.

Issued in Washington, DC, on March 13, 1996.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

Appendix A

February 20, 1996

Application of the Association of Waste Hazardous Materials Transporters to initiate a proceeding to determine whether various requirements imposed by the City of Houston, Texas on persons involved in transporting hazardous materials to or from points in the City are preempted by the Hazardous Materials Transportation Act

Interest of the Petitioner

The Association of Waste Hazardous Materials Transporters (AWHMT) represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, throughout the United States, including points to and from the City of Houston, TX (City). Despite full compliance with the hazardous materials regulations (HMRs), members of the AWHMT are precluded from transporting hazardous materials to or from points in the City unless certain requirements of the Fire Code of the City of Houston, TX, adopted pursuant to City Ordinance 95–279 (Ordinance), are met. The AWHMT asserts that the City requirements are in contravention to the Hazardous Materials Transportation Act (HMTA).

The Ordinance was enacted March 15, 1995 to be effective in May of that year. However, we only recently become aware of the Ordinance as it pertains to permits and requirements for the loading, unloading and storage of hazardous materials incidental to motor vehicle transportation when a member company received a notice of violation in December 1995, apparently within the week of the Fire Department training a team to enforce the hazardous materials provisions of the Ordinance. Failure to comply with the Ordinance carries penalties up to $2,000 per violation, and each day a violation continues is counted as a separate violation.[1] In addition, violations may result in the suspension, revocation, cancellation or denial of a permit.[2]

City Requirements For Which A Determination Is Sought

The Ordinance adopts the Uniform Fire Code U.F.C., 1991 Edition, published by the International Conference of Building Officials with amendments as the ''Fire Code of the City of Houston, Texas'' (Code). The Code authorizes the Houston Fire Chief (Chief) ''to administer and enforce this code * * * pertaining to * * * [t]he storage, use and handling of hazardous materials.''[3] The Code defines ''handling'' to mean ''the deliberate transport of material by any means to a point of storage or use.''[4] ''Use'' is defined as ''the placing in action or making available for service by opening or connecting anything utilized for confinement of material whether a solid, liquid or gas.''[5] ''Storage'' is not defined in Article 9, Definitions, but a definition does occur in Article 79, Flammable and Combustible Liquids. In Article 79, ''storage'' means ''the keeping, retention or leaving of flammable or combustible liquids in closed containers, tanks or similar vessels.''[6] Article 9 defines ''tank'' as ''a vessel containing more than 60 gallons.''[7] It appears from the Fire Department's implementation of the Code that ''storage'' occurs whenever a motor vehicle is stopped off the City's designated hazardous materials route, including stoppage by a driver for rest, fuel, food, and/or comfort.

The Code requires persons that ''store, dispense, use or handle hazardous materials in excess of quantities specified in Section 4.108'' to obtain a permit.[8] The permit requirements of Article 4 ''constitute permission to * * * store, use or handle materials, or to conduct processes which produce conditions hazardous to life or property * * * ''[9] To obtain a permit, an application must be submitted and fees paid.[10] (Copy attached.) Also, ''before a permit is issued, the Chief is authorized, but not required, to inspect and approve * * * vehicles.''[11] The Chief, in his discretion, does require inspection of vehicles used to transport hazardous materials in quantities requiring a permit. (Copy of Fire Department check list for tank vehicle inspections is attached.) Additionally, ''tank vehicles''[12] transporting ''flammable and combustible liquids'' are required to be ''designed, constructed, equipped and maintained in accordance with U.F.C. Standard No. 79–4''; be ''bonded''; carry specified fire extinguishers; and be permanently marked with permit indicia and hazard warnings.[13] Drivers of such cargo tanks must comply with certain attendance and overfill protection requirements.[14]

The Code provides an exception from the requirements of Article 80 for ''[o]ff-site hazardous materials transportation in

[1] Code § 2.111(a).

[2] Code § 2.111(b).

[3] Code § 2.101(c).

[4] Code § 9.110.

[5] Code § 9.123.

[6] Code § 79.102.

[7] Code § 9.122.

[8] Code § 80.103(a).

[9] Code § 4.102(a).

[10] Code §§ 4.103 & 4.109.

[11] Code § 4.104.

[12] ''Tank vehicles'' are defined as vehicles ''other than a railroad tank car or boat, with a cargo tank mounted thereon or built as an integral part thereof used for the transportation of flammable or combustible liquids, LP-gas, or hazardous chemicals. Tank vehicles include self-propelled vehicles and full trailers and semitrailers, with or without motive power, and carrying part or all of the load.

[13] Code §§ 79.1201, .808(a), .1207, & .1203(n).

[14] Code §§ 79.1205(b) & .1203(f).

accordance with DOT requirements.'' [15] However, ''off-site'' does not include loading, unloading, or storage incidental to transportation.

Federal Law Provides for the Preemption of Non-Federal Requirements When Those Non-Federal Requirements Fail Certain Federal Preemption Tests

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the U.S. Department of Transportation (DOT) greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.'' [16] By vesting primary authority over the transportation of hazardous materials in the DOT, Congress intended to ''make possible for the first time a comprehensive approach to minimization of the risks associated with the movement of valuable but dangerous materials.'' [17] As originally enacted, the HMTA included a preemption provision ''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.'' [18] The Act preempted ''any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the Act], or in a regulation issued under [the Act].'' [19] This preemption provision was implemented through an administrative process where DOT would issue ''inconsistency rulings'' as to,

[w]hether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible; and [t]he extent to which the State of political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.'' [20]

These criteria, commonly referred to as the ''dual compliance'' and ''obstacle'' tests, ''comport[ed] with the test for conflicts between Federal and State statutes enunciated by the Supreme Court in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).'' [21]

In 1990, Congress codified the dual compliance and obstacle tests as the Act's general preemption provision.[22] The 1990 amendments also expanded on DOT's preemption authorities. First, Congress expressly preempted non-federal requirements in five covered subject areas if they are not ''substantively the same'' as the federal requirements. These covered subject areas are:

- The designation, description, and classification of hazardous materials.
- The packing, repacking, handling, labeling, marking and placarding of hazardous materials.
- The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents.
- The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.
- The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.[23]

''Substantively the same'' was defined to mean ''conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis*, changes are permitted.'' [24] Second, non-federal highway routing requirements that fail to satisfy the federal standard under 49 U.S.C. § 5112(b) are preempted.[25] Third, non-federal registration and permitting forms and procedures that are not ''the same'' as federal regulations to be issued are preempted.[26] Fourth, non-federal fees related to the transportation of hazardous materials are preempted unless the fees are ''fair and used for a purpose related to transporting hazardous materials.'' [27] These preemption authorities are limited only to the extent that non-federal requirements are ''otherwise authorized'' by federal law. A non-federal requirement is not ''otherwise authorized by Federal law'' merely because it is not preempted by another federal statute.[28]

The hazardous materials regulations (HMRs) have been promulgated in accordance with the HMTA's direction that the Secretary of Transportation ''issue regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce.'' [29] ''Transportation'' is defined as ''the movement of property and *loading, unloading, or storage* incidental to the movement.'' [30] (Emphasis added.)

Our review of federal statutes and the Code leads us to believe that the following specific Code requirements are subject to preemption pursuant to 49 U.S.C. 5125(a)(2), (b), and (g) absent further modification and/or clarification.

The Designation, Description, and Classification of Hazardous Material in Transportation Is Reversed to the Federal Government

As noted above, the HMTA provides that non-federal rules designating, describing, and classifying hazardous materials for transportation is preempted unless the non-federal rules are substantively the same as the federal rules. Article 9 of the Code defines ''hazardous materials'' as ''those chemicals or substances which are physical hazardous or health hazards as defined and classified in Article 80 whether the materials are in usable or waste condition.'' [31] Article 80 states that ''[h]azardous materials are those chemicals or substances defined as such in Article 9. See Appendix VI–A for the classification of hazard categories and hazard evaluations.'' [32]

Appendix VI–A designates hazard classes based on rules of U.S. Department of Labor concerning occupational health and safety, not the HMRs.[33] Moreover, the classification scheme relies on examples rather than objective tests to identify, for the regulated community, what materials are subject to the requirements of the Code. Clearly, the Code provisions relating to the ''designation, description, and classification of hazardous materials'' are not ''substantively the same'' as DOT's designation and classification system found at 49 CFR 172. We believe this classification scheme, as it affects hazardous materials in transportation, is preempted pursuant to 49 U.S.C. 5125(b)(1)(A).

The Design, Manufacturing, Fabrication and Maintenance of a Package or Container Which is Represented, Marked, Certified, or Sold as Qualified for Use in the Transportation of Hazardous Materials is Reserved to the Federal Government

As noted above, the HMTA preempts non-federal requirements concerning the construction and maintenance of cargo tanks. Article 79.1201 provides that ''tank vehicles shall be designed, constructed, equipped and maintained in accordance with U.F.C. Standard No. 79–4.''

U.F.C. Standard No. 79–4 is the 1990 version of the 1985 edition of the National Fire Protection Association (NFPA) standard for tank vehicles for flammable and combustible liquids [34] In transportation, the HMRs set the specifications for the construction and maintenance of cargo tanks.[35] Uniformity in the construction and maintenance of packagings, especially reusable packagings, is critical. For example, the Code, in its reference to the NFPA standard, requires that ''Class II or Class III liquids shall not be loaded into an adjacent compartment to Class I liquids unless double bulkheads are provided * * *.'' [36] No such requirement exists in the HMRs. For this reason, Congress authorized DOT to preempt non-federal requirements affecting the ''design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.'' Nowhere, does the Code or U.F.C. Standard No. 79–4 grant equivalency to the cargo tank construction and maintenance standards of the HMRs. Article 79.1201

[15] Code § 80.101(a)(1).

[16] Public Law 93–633 § 102.

[17] S. Rep. 1192, 93rd Cong., 2d Sess., 1974, page 2.

[18] S. Rep. 1192, 93rd Cong., 2d Sess., 1974, page 37.

[19] P.L. 93–633 § 112(a).

[20] 41 FR 38171 (1976).

[21] 41 FR 38168 (1976).

[22] 49 U.S.C. § 5125(a).

[23] 49 U.S.C. 5125(b).

[24] 49 CFR 107.202(d).

[25] 49 U.S.C. 5125(c).

[26] 49 U.S.C. 5119(c)(2).

[27] 49 U.S.C. § 5125(g).

[28] *Colo. Pub. Util. Comm'n* v. *Harmon, 951 F. 2d, 1571, 1581 n.10, (10th Cir. 1991).*

[29] 49 U.S.C. 5103(b).

[30] 49 U.S.C. 5102(12).

[31] Code § 9.110.

[32] Code § 80.101(b).

[33] See attached Appendix VI–A.

[34] See attached NFPA 385, Standard for Tank Vehicles for Flammable and Combustible Liquids, as amended, 1990 Edition, hereinafter ''NFPA Standard''.

[35] 49 CFR 178 & 180.

[36] NFPA Standard, 6–1.7.

should be preempted pursuant to 49 U.S.C. 5125(b)(1)(E) because it is not ''substantively the same as'' the federal cargo tanks standards found at 49 CFR 173, 178, and 180.

The Code Requirement for Multiple Fire Extinguishers is Subject to Review Under the Obstacle Test

Article 79.1207 provides that tank vehicles transporting hazardous materials be equipped with ''at least two fire extinguishers having a minimum rating of 2–A, 20–B:C.'' The federal motor carrier safety regulations (FMCSRs) provide that vehicles used to transport hazardous materials be equipped with one fire extinguisher having an Underwriters' Laboratories rating of at least 10 B:C.[37] The Code does not provide any justification to support its view that the federal standard is inadequate. If it is permissible for the City to require multiple fire extinguishers at ratings different that the federal requirement, then it is permissible for other jurisdictions to do the same. For an interstate carrier of hazardous materials, such diverse requirements cannot be tolerated particularly when they are non-reciprocal, either recognizing comparable federal standards, or even other non-federal standards if they exist. We believe this requirement poses an unnecessary and unreasonable burden on motor carriers of hazardous materials that operate in multiple jurisdictions and that the requirement should be preempted pursuant to 49 U.S.C. 5125(a)(2).[38]

The Code Requirements for Periodic Vehicle Inspections Are Preempted by the HMTA

Article 4.104 provides for the inspection of vehicles prior to the issuance of permits to transport hazardous materials. The inspection is valid for one year. The inspection is scheduled after the Fire Department receives an application for a permit. The inspection is to be scheduled within 20 days of receiving confirmation from the City that an ''H.F.D.'' (Houston Fire Department) number has been assigned to the vehicle. The inspection takes place at one fire station in the City. The regularly scheduled inspections take place Monday through Friday from 7:00 am to 8:00 am.

Recently, DOT preempted inspection requirements imposed by the State of California on cargo tanks carrying flammable and combustible materials. California's annual inspection requirement was preempted because the inspection could not be accomplished without ''unnecessary delay'' within the meaning of 49 CFR 177.853(a) and consequently failed the obstacle test of the HMTA. Vehicles were diverted out of the route of travel to inspection locations and, in some cases, vehicles had to wait pending the arrival of an inspector.[39] We believe that the City's periodic inspection requirements, as distinguished from random, roadside inspections, are likewise preempted pursuant to 49 U.S.C. 5125(a)(2).

Non-Federal Marking Requirements on Cargo Tanks Carrying Hazardous Materials Are Preempted

Article 79.1203(n) provides for several vehicle marking requirements for vehicles transporting flammable or combustible liquids. First, cargo tanks must be marked with an H.F.D. serial number that must be permanently affixed and located on the left forward part of the tank in letters at least 3 inches in height. Second, the City Hazardous Material Transport Permit sticker is to be placed immediately below the H.F.D. number. (Permit sticker example attached.) The sticker indicates the expiration date. Third, cargo tanks must have a sign posted on each side and at the rear that reads ''FLAMMABLE'' in lettering that is a minimum of 4 inches in height and a color that contrasts with the background. The Code does provide an ''exception'' for ''signage and identification that complies with U.S. Department of Transportation regulations.''[40] The Fire Department interprets this exception to substitute placards for the FLAMMABLE marking. Fourth, the vehicle must be marked with ''the company name . . . of the company that owns or operates the vehicle.'' We believe this marking requirement comports with 49 CFR 390.21 concerning the marking of commercial motor vehicles. Fifth, the words ''NO SMOKING'' must be marked at ''draw-off valves'' in letters 4 inches in height and of a color that contrasts with the background.

The HMTA provides that non-federal marking of a package or container which is marked or otherwise certified pursuant to the HMRs as qualified for use in the transportation of hazardous materials is preempted unless the non-federal requirements are substantively the same as federal requirements. We believe this preemption standard—49 U.S.C. 5125(b)(1)(E)—is appropriate for review of the first and second listed Code marking requirements. In fact, similar cargo tank marking requirements imposed by the State of California were preempted under this standard.[41] The HMTA also provides for the preemption of non-federal hazard warning marking requirements for hazardous materials when such markings are substantively different than the federal standard. We submit that the ''NO SMOKING'' marking requirement is such a hazard warning. The ''NO SMOKING'' marking is permanent and displayed even when non-flammable materials are being transported or when the vehicle is empty. Permanent hazard warning vehicle markings not substantively the same as federal requirements have been preempted pursuant to 49 U.S.C. 5125(b)(1)(B).[42]

Non-Federal Financial Bonds Fail the Obstacle Test

Article 79.1203(d) provides that ''[b]onding shall be in accordance with Section 79.808(a)3.'' We do not have access to § 79.808(a)3. Consequently, we are unable to determine if the bonding requirement is a financial bond or a bond to conduct electric charge. We have reason to believe the bond requirement may refer to a financial bond because bonding requirements for static electricity are addressed at paragraphs 79.1203 (l) and (m). Also, the permit application asks whether or not a ''bond/insurance'' is required. We have asked the City to clarify the nature of the bond required by § 79.808(a)3, but have not received a response.[43]

DOT has preempted non-federal bonding requirements under the obstacle test. DOT has concluded that non-federal bonding requirements are a barrier to the safe transportation of hazardous materials. In a series of inconsistency rulings between 1984 and 1989, DOT found that bonding requirements divert shipments from jurisdictions with such requirements, thereby increasing transit time and, ultimately, increasing overall exposure to the risks of transporting hazardous materials.[44] Moreover, DOT's review of non-federal bonding requirements has found that ''there is no reciprocity, offset, credit or other

[37] 49 CFR 393.95.

[38] Here and in other sections of this application, the AWHMT cites to standards of the FMCSRs as examples of federal rules to which the City requirements might be compared. We realize that these requirements are not *de facto* repeated in the HMRs. However, they are certainly given *de jure* meaning pursuant to 49 CFR 177.804. Surely Congress meant the Secretary to consider the entire regulatory scheme required of a motor carrier in determining what rules were necessary to ensure the safe transportation of hazardous materials. We could have just as easily cited to the Secretary's silence in terms of a regulatory standard in the HMRs as an affirmative determination that some type of requirement was not necessary to the safe transportation of hazardous material. We believe it is appropriate and necessary that RSPA consider the rules of other federal agencies or departments within DOT and the meaning of regulatory silence within the HMRs in determining matters of hazardous materials preemption particularly when the challenged non-federal requirements are applicable *only* to persons who transport or offer for transport hazardous materials. Without such a view, any number of non-federal conditions in areas such as planning, emergency response, or vehicle accoutrements could be envisioned which would just as effectively frustrate the transportation of hazardous materials in interstate, intrastate, or foreign commerce as non-federal rules concerning shipping papers, packaging standards, or other more traditional forms of hazardous materials regulation. We believe that any non-federal requirement that pertains only to the transportation of hazardous waste, or some aspect thereof, is within the RSPA's purview to consider under the preemptive authority of the HMTA. In fact, 49 U.S.C. 5125(a)(b)—the ''obstacle test''—provides that non-federal requirements are preempted if ''the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter *or* a regulation prescribed under this chapter.'' In other words, a specific HMR does not have to be the basis from which a determination of preemption is made.

[39] 58 FR 48933 (September 20, 1993), affirmed on reconsideration 60 FR 8800 (February 15, 1995).

[40] Code § 79.1203(n).

[41] 58 FR 48933 (September 20, 1993), affirmed on reconsideration 60 FR 8800 (February 15, 1995).

[42] 59 FR 6186 (February 9, 1994).

[43] Letter to Bob Lanier, Mayor, City of Houston, TX, from Charles Dickhut, Chairman, AWHMT, dated January 18, 1996.

[44] Inconsistency Ruling (IR)–10, IR–11, IR–15, IR–18, IR–25, IR–31. State may not require proof of insurance meeting the Federal requirements. *Colo. Pub. Util. Comm'n* v. *Harmon*, 951 5.2d 1571 (10th Cir. 1991).

recognition for a bond posted in another [jurisdiction]. This means that, in each [jurisdiction] with a bonding requirement in which a transporter picks up or delivers hazardous [materials], it must post a separate bond.'' [45] If the City bonding requirement proves to be a financial bond, we see no reason why this bonding requirement should also be preemptive pursuant to 49 U.S.C. 5125(a)(2).

Driver Attendance Requirements Exceed Federal Requirements and Are an Obstacle to the HMTA

Article 79.1205(b) provides that ''[t]ank vehicles shall not be left unattended at any time on residential streets, or within 500 feet of a residential area, apartment or hotel complex, educational facility, hospital, or care facility. Tank vehicles shall not be left unattended at any other place that would, in the opinion of the chief, present an extreme life hazard.'' Federal attendance requirements appear at 49 CFR 177.834(i) and 397.5. Neither of these standards is as stringent as the standard in the Code. The FMCSRs provide that ''motor vehicle[s] containing hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless they are at variance with specific regulations of the [DOT] and which impose a more stringent obligation or restraint.[46] Our concerns with this section of the Code is that the ''in the opinion of the chief'' standard is unreasonably subjective, and the 500 foot standard may not be able to be met at a ''hotel complex'' where a driver may seek rest, and because of ''hours of service'' constraints may not be able to search for a hotel with appropriate parking space. These Code standards would be an incentive for drivers to bypass the City, and thus export ''risk'' to other jurisdictions that ''may not be aware or prepared for a sudden, possibly permanent, change in traffic patterns'', rather than park in the City for food, fuel, rest, or comfort.[47] We request review of this standard under 49 U.S.C. 5125(a)(2).

The Fees Imposed by the Code are not ''Fair'' and Subject to Preemption Under the Obstacle Test

Article 4.109 sets forth fees to be paid for permits and inspections. The schedule of fees is confusing as it appears that the same vehicle could be subject to multiple fee requirements. For example, the fee for a hazardous materials permit is $175. However, the fee for a flammable or combustible liquids permit is also listed at $175. The permit for cryogens is $125. The permit for radioactive materials is $175. The permit for compressed gases is $125. These later materials are all subsets of hazardous materials in the federal classification scheme. It appears, but is not clear, that motor carriers must computer multiple fees for each vehicle used in the City depending on the cargo the carrier anticipates will be carried in the vehicle over the duration of the permit. We have asked the City to clarify how permit fees are computed, but have not yet received a response.[48]

However the City's fees are computed—one or multiple fee assessments per vehicle—it is clear that the fees are flat and unapportioned. The U.S. Supreme Court has declared fees which are flat and unapportioned to be unconstitutional under the Commerce Clause because such fees fail the ''internal consistency'' test.[49] The Court reasoned that a state fee levied on an interstate operation violates the Commerce Clause because, if replicated by other jurisdictions, such fees lead to interstate carriers being subject to multiple times the rate of taxation paid by purely local carriers even though each carrier's vehicles operate an identical number of miles and create the same overall risk of hazardous materials incidents.[50] In addition, because they are unapportioned, flat fees cannot be said to be ''fairly related'' to a feepayer's level of presence or activities in the fee-assessing jurisdiction.[51] In a number of subsequent cases, courts have relied on these arguments to strike down, enjoin, or escrow flat truck taxes and fees.[52] The City's per vehicle fee rate is comparable to that assessed by many states. The substantial financial burden of meeting multiple state fee requirements is magnified many times if local entities are permitted to impose fees on carriers in every jurisdiction in which they operate.

We believe flat fees will also run afoul of the HMTA because some motor carriers, otherwise in compliance with the HMRs, will inevitably be unable to meet multiple flat per vehicle fees to the exclusion of such carriers from some sub-set of fee-imposing jurisdictions. While the ''choice'' of which communities to operate in would be a decision of the motor carrier, the bar to hazardous materials transportation that localities cannot do directly in light of the Commerce Clause would be accomplished indirectly.[53] The result would be not only a generally undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation would increase transfers of hazardous materials from one company to another at jurisdictional borders. The increased transfers would pose a serious risk to safety, since ''the more frequently hazardous material is handled during transportation, the greater the risk of mishap.'' [54] The HMTA provides that a ''political subdivision * * * may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material.'' [55] We assert that flat fees are inherently ''unfair'' and that the City's fee scheme would fall to the obstacle test pursuant to 49 U.S.C. 5125(a)(2).

Conclusion

The Ordinance imposes requirements on the transportation of hazardous materials which we believe are preempted by federal law.[56] Inasmuch as we have evidence that the City is indeed enforcing the above suspect requirements, we provided the City written notice of our concerns and our intention of file this application if we had not heard back from the City within a specified period of time.[57] In our notice to the City, we offered to withdraw our application if the City acts on its own to repeal the above referenced section of the Code. Despite our offer, however, we request timely consideration of the concerns we have raised.

Certification

Pursuant to 49 CFR 107.205(a), we hereby certify that a copy of this application has been forwarded with an invitation to submit comments within 45 days to: The Honorable Bob Lanier Mayor, City of Houston, 900 Bagby, Houston, TX 77002.

Respectfully submitted,

Charles Dickhut,

Chairman.

Enclosures

ATTACHMENTS

- City Ordinance 95–279
- Applicable Sections Fire Code of the City of Houston, TX.
- Hazardous Materials Permit Application
- Vehicle Inspection Scheduling Letter
- Permit Sticker Example
- Vehicle Inspection Check List
- Appendix VI–A
- U.F.C. Standard No. 79–4

Note: Copies of these Attachments may be examined at RSPA's Dockets Unit and can be provided at no cost upon request to RSPA's Dockets Unit; see the **ADDRESSES** section of this notice.

[FR Doc. 96–6593 Filed 3–19–96; 8:45 am]

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[45] 57 FR 58848 (December 11, 1992), on appeal D.C. Cir. 1995.

[46] 49 CFR 397.2.

[47] 46 FR 18921 (1981).

[48] Letter to Bob Lanier, Mayor, City of Houston, TX, from Charles Dickhut, Chairman, AWHMT, dated January 18, 1996.

[49] *American Trucking Assn's* v. *Scheiner, 483 U.S. 266 (1987).*

[50] *Ibid.*, 284–86.

[51] *Ibid.*, 290–291 (citing *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629 (1981).

[52] *American Trucking Assn's Inc.* v. *Secretary of Administration,* 613 N.E.2d 95 (Mass. 1993); *American Trucking Assn's Inc.* v. *Secretary of State,* 595 A.2d 1014 (Me. 1991); *Smith* v. *American Trucking Assn's, Inc.,* 781 S.W.2d 3 (Ark. 1989); *American Trucking Assn's, Inc.* v. *Goldstein,* 541 A.2d 955 (Md. 1988).

[53] *Chemical Waste Management, Inc.* v. *Hunt,* 504 U.S. 334, 338 (1992).

[54] *Missouri Pac. R.R. Co.* v. *Railroad Comm'n of Texas,* 671 F. Supp. 466, 480–81 (W.D. Tex. 1987).

[55] 49 U.S.C. 5125(g).

[56] We note that the Code provides limited authority for the Chief to waive Article 80 requirements ''related to health hazardous as classified in Division II [if] preempted by other * * * statutes.'' (Code § 80.101(c).) Inasmuch as this waiver authority is so narrowly defined, we are uncertain whether this authority is sufficient to address the range of preemptive concerns we have raised absent amendatory language.

[57] Letter to Bob Lanier, Mayor, City of Houston, TX, from Charles Dickhut, Chairman, AWHMT, dated January 18, 1996.