| Application No. | Docket No. | Applicant | Regulation(s) affected | Nature of special permits thereof |
|---|---|---|---|---|
| 14944–N ..... | ..... | Dean Foods Corporation, Broomfield, CO. | 49 CFR 178.33b ..... | To authorize the transportation of Specification 2S inner nonrefillable plastic receptacles containing an aerosol food product that was testing using a modified test protocol. (modes 1, 4, 5). |

[FR Doc. E9–27351 Filed 11–13–09; 8:45 am]

**BILLING CODE M**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2008–0204 (PD–33 (F))]**

### City of Boston Requirements for Highway Routing of Certain Hazardous Materials

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), United States Department of Transportation (DOT).

**ACTION:** Notice of administrative determination of preemption.

*Applicants:* American Trucking Associations, Inc. and Massachusetts Department of Highways.

*Local Laws Affected:* Massachusetts Ordinances of 1979, Chapter 39, Document 78; the City of Boston Regulations Controlling the Transportation of Hazardous Materials, and the Traffic Rules and Regulations of the City of Boston.

*Applicable Federal Requirements:* Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* and FMCSA regulations at 49 CFR part 397.

**SUMMARY:** Federal hazardous material transportation law preempts the following highway routing designations of the City of Boston Regulations Controlling the Transportation of Hazardous Materials:

1. The Traffic Rules and Regulations of the City of Boston, Article VII, section 8B, Hazardous Materials Route; and

2. The *de facto* ban on hazardous materials transportation through the City of Boston due to the change in administration of the City's hazardous materials permitting system.

**DATES:** *Effective Date:* This preemption decision is effective on May 17, 2010.

*Petitions for Reconsideration* of this preemption decision must be submitted to the FMCSA Administrator no later than December 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** James Simmons, Chief, Hazardous Materials Division (MC–ECH), (202) 493–0496, FMCSA, 1200 New Jersey Avenue, SE., Washington, DC 20590, or at *james.simmons@dot.gov*, or Charles Fromm, Assistant Chief Counsel, Office of Chief Counsel, Enforcement and Litigation Division (MC–CCE), (202) 366–3551, FMCSA, 1200 New Jersey Avenue, SE., Washington, DC 20590, or at *charles.fromm@dot.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Application for a Preemption Determination

American Trucking Associations, Inc. (ATA) and the Massachusetts Department of Highways (Mass Highway) applied for an administrative determination concerning whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* and FMCSA regulations at 49 CFR part 397 preempt certain hazardous material routing requirements that have been established or modified by the City of Boston (the City or Boston). The FMCSA published notice of ATA's application in the **Federal Register** on August 8, 2008. 73 FR 46349. The FMCSA published notice of Mass Highways' application in the **Federal Register** on September 2, 2008. 73 FR 51335. Both applications were consolidated into one docket because of their overlapping issues. Comments and rebuttal comments were received on the consolidated docket on or before December 1, 2008.[1] FMCSA received 17 comments and one rebuttal comment generally or specifically in support of the position that the City of Boston should have complied with the current Federal regulations regarding hazardous material highway routing designations but failed to do so. One comment and one rebuttal comment were received, both from the City of Boston, arguing that the City of Boston's hazardous material routing designations were in compliance with applicable statutes and should not be preempted. On March 3, 2009, the FMCSA published a notice of delay in making the preemption decision to allow additional time for fact-finding and legal analysis of the issues raised in the preemption applications. 74 FR 9328.

ATA's preemption application submits that the City of Boston made two impermissible hazardous material routing designations regarding the transportation of non-radioactive hazardous material (NRHM).[2] The first is a change in the designated hazardous material route that resulted from construction of the Central Artery Tunnel (CA/T), also known as ''the Big Dig,'' in downtown Boston. The second is a change in Boston's administration and use of its hazardous material permitting program.

With respect to the City's hazardous material route change, ATA alleges that Boston did not properly comply with Federal requirements, discussed herein, for the establishment or modification of a hazardous material route when the City began enforcing a new hazardous material route on July 3, 2006. Due to various road changes stemming from the Big Dig construction project, the City altered its hazardous material route by amending a section of the City of Boston Traffic Rules and Regulations. This route change relates to transportation of certain hazardous materials for vehicles having a point of origin or destination within the City of Boston.[3] The practical effect of the route change is to move hazardous material vehicle traffic from Commercial Street to Cross Street in downtown Boston. According to comments from the City of Boston (Boston Comments), this shift in route is one roadway over and was done to

[1] Comments and/or rebuttal comments were received from the following: American Trucking Associations, Associated Industries of Massachusetts, Brewer Petroleum Service, Inc., C. White and Son Inc., City of Boston, Dangerous Goods Advisory Council, Dennis K. Burke, Inc., DJ Cronin, Institute of Makers of Explosives, J&S Transport Co., Inc., J.P. Noonan Transportation, Inc., Lighter Association, Inc., Massachusetts Motor Transportation Association, Massachusetts Oilheat Council, National Tank Truck Carriers, Inc., P.J. Murphy Transportation, Inc., Salvoni Transportation and Triumvirate Environmental Incorporated.

[2] NRHM is defined at 49 CFR 397.65 as ''[a] non-radioactive hazardous material transported by motor vehicle in types and quantities which require placarding, pursuant to Table 1 or 2 of 49 CFR 172.504.''

[3] Presumably, this same route would also be used for any hazardous materials vehicles authorized by permit to travel through the City of Boston, in addition to those vehicles with a point of origin or destination within the City. As discussed below, however, the City has not issued any permits for through transportation of hazardous material since the route change took effect, so it is unclear which routes would be approved for through transportation.

utilize an improved and more direct route on Cross Street.[4]

ATA alleges that because the new route was not part of the City's previously designated hazardous material route, the change in route designation requires the City to comply with current Federal standards regarding the designation of hazardous material routes, pursuant to the terms of 49 CFR part 397, subpart C.

Mass Highway's preemption application notes that the City of Boston has made a change in its hazardous material route from Commercial Street to Cross Street, but Mass Highway has not taken a position as to whether this route modification requires Boston to comply with the standards set forth in 49 CFR part 397. Rather, Mass Highway's application seeks guidance from FMCSA as to the effect that this route change, as well as other issues, have on City and State obligations under Federal statutory and regulatory requirements relating to hazardous material routing designations.

As a second basis for challenging the City's route designation, ATA alleges that Boston improperly created a new *de facto* hazardous material routing designation by the change in administration and enforcement of the City's permit system for ''through'' transportation by motor carriers transporting NRHM, *i.e.,* vehicles that do not have a point of origin or destination within the City. ATA submits that the permit system is being administered in a manner that effectively bans the through transportation of hazardous material. ATA argues that Boston previously issued permits to motor carriers that wished to transport hazardous material through the City. In 2006, the City revised the manner in which through permits would be evaluated and issued. Although the original permit system still exists, ATA submits that authorization for permits to allow hazardous material transportation through the City is no longer being granted. The Mass Highway application for a preemption determination, as well as comments from the City of Boston, state that the City began to enforce its hazardous material regulations more strictly in light of security concerns following the September 11, 2001 terrorist attacks. Part of this increased enforcement included changes to the renewal and issuance of permits for motor carriers seeking permission to transport hazardous material through the City. Mass Highway states that it has conferred with City of Boston officials and verified that no new through-permits have been issued in the past several years.[5]

## II. Federal Preemption

Title 49 U.S.C. 5125 contains several preemption provisions. Subsection (a) provides that 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 issued by the Secretary of Homeland Security. These two paragraphs set forth the ''Dual Compliance'' and ''Obstacle'' criteria, which are based on U.S. Supreme Court decisions on preemption.[6] As discussed more fully below, any hazardous material highway routing designation that was established prior to, and not modified after, November 14, 1994, is ''grandfathered'' under prior Federal hazardous material transportation law. As such, pre-1994 routing designations are examined under the Dual Compliance/Obstacle test for preemption determinations.

The statutory preemption section most relevant to this proceeding is section 5125(c)(1), which allows a State or Indian tribe to establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with 49 U.S.C. 5112(b).

Section 5112(b) requires the Secretary of Transportation (''Secretary''), in consultation with the States, to prescribe by regulation standards for the States and Indian tribes to follow when designating specific highway routes for transportation of hazardous materials. The Secretary has delegated to FMCSA authority and responsibility for highway routing of hazardous material. 49 CFR 1.73(d)(2).

The standards required by 49 U.S.C. 5112(b) for establishing highway routing requirements for non-radioactive hazardous material are set forth in 49 CFR part 397, subpart C, and apply to any designations established or modified on or after November 14, 1994. 49 CFR 397.69(a). A State, political subdivision or Indian tribe must follow FMCSA standards when establishing or modifying highway routing requirements for hazardous material.

The preemption provisions in 49 U.S.C. 5125 carry out Congress's intention that a single body of uniform Federal regulations promote safety in the transportation of hazardous materials. In section 2 of the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101–615, November 16, 1990, 104 Stat. 3244), Congress underscored the need for uniform regulations relating to transportation of hazardous materials:

> (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.

The Committee on Commerce, Science, and Transportation, U.S. Senate, when reporting in 1990 on the bill to amend the Hazardous Materials Transportation Act (HMTA) [Pub. L. 93–633 section 112(a), 88 Stat. 2161 (1975)], stated, ''[t]he original intent of HMTA was to authorize [DOT] with the regulatory and enforcement authority to

[4] The record is unclear whether the change from Commercial Street to Cross Street is the only change to the City's designated hazardous material route. ATA and several commenters reference other changes to the allowable use of various streets, for example, Massachusetts Avenue, that may also have been affected by the City's route change. Additionally, the description of the shift in route as ''one roadway over'' does not fully describe the relationship between Commercial and Cross Street, which run along opposite ends of the City's central downtown corridor, ranging from 5 to 10 blocks apart.

[5] In addition, the record does not indicate that any through-permits issued prior to 2006 are still in effect, as it appears that they were either revoked or not renewed.

[6] *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).

protect the public against the risks imposed by all forms of hazardous materials transportation, and varying as well as conflicting regulations.'' S. Rep. No. 101–449 (1990), reprinted in 1990 U.S.C.C.A.N. 4595, 4596. A Federal Court of Appeals has indicated uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments expanding the original preemption provisions.[7]

## III. Preemption Determinations

Title 49 U.S.C. 5125(d) provides for issuance of administrative preemption determinations regarding hazardous material by the Secretary. The Secretary has delegated to FMCSA authority to make determinations of preemption concerning highway routing of hazardous material. 49 CFR 1.73(d)(2). Any directly affected person may apply for a determination as to whether a requirement of a State, political subdivision or Indian tribe is preempted. 49 CFR 397.205(a).

The FMCSA's preemption determinations are governed by procedures in 49 CFR part 397, subpart E and 49 U.S.C. 5125. After the preemption determination is issued, aggrieved persons have 20 days to file a petition for reconsideration. 49 CFR 397.211(c) and 397.223. Any party to the proceeding may seek judicial review in the U.S. Court of Appeals for the District of Columbia Circuit or in the Court of Appeals for the circuit in which the person resides or has its principal place of business. 49 U.S.C. 5127(a).

In making preemption determinations under 49 U.S.C. 5125(d), FMCSA is guided by the principles and policies set forth in Executive Order 13132, titled ''Federalism.'' 64 FR 43255 (Aug. 4, 1999). Section 4(a) of Executive Order 13132 directs agencies to construe a Federal statute to preempt State law only when the statute contains an express preemption provision, there is other clear evidence that Congress intended preemption of State law, or the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute. Section 5125 includes express preemption provisions, which FMCSA has implemented through its regulations. FMCSA is also mindful of recent Administration policy on Federal preemption contained in the President's May 20, 2009, Memorandum for the Heads of Executive Departments and Agencies, on Preemption. 74 FR 24693 (May 22, 2009).[8]

## IV. Discussion

### *a. Background of Boston's Hazardous Material Route and Permit System*

The City of Boston enacted Regulations Controlling the Transportation of Hazardous Materials (''Boston Regulations'') in December 1980, pursuant to Massachusetts Ordinances of 1979, Chapter 39, Document 78 (''Ordinance''). The Ordinance and Boston Regulations contained provisions relating to various aspects of hazardous material transportation, including time of day restrictions, prohibitions of certain transportation, designation of routes within the City for hazardous material vehicles and establishment of a permit system for motor carriers wishing to operate their vehicles outside the parameters of the Ordinance and Boston Regulations.

With respect to designation of routes, the Boston Regulations require that hazardous material be transported on designated ''Major Thoroughfares.'' Boston Regulations § 7.1.4. As explained by the City, in 2006, following substantial completion of the CA/T project, certain portions of the Major Thoroughfare System were no longer available for use by hazardous cargo vehicles because part of the surface roadway was reconstructed in a tunnel in which hazardous cargo was prohibited. In addition, upgrades were made to new surface roads, including portions of Cross Street in downtown Boston. Boston Comments at 17. In light of these and other roadway changes, the City altered the hazardous material route as designated on its Major Thoroughfare System by amending Article VII, Section 8B of the City of Boston Traffic Rules and Regulations.

ATA contends that Boston did not properly comply with federal requirements for the establishment or modification of a hazardous material route when it began enforcing this new hazardous material route on July 3, 2006. The practical effect of the route change is to move hazardous material vehicle traffic from Commercial Street to Cross Street. According to the City, this shift in route is one roadway over and was done to utilize an improved and more direct route on Cross Street. In 2006, the City issued the following notification regarding the new route:

*Notice of Hazardous Materials Route Change*

The Traffic Rules and Regulations of the City of Boston are hereby amended by inserting into Article VII,

''Section 8B, Hazardous Materials Route:

No person shall operate a vehicle and no person shall allow, permit, or suffer a vehicle leased by him or registered in his name to be operated, transporting any hazardous materials other than on the route listed below through Boston proper;

Northbound:

Route 93 (North) to Frontage Road, straight on Atlantic Avenue, straight on Cross Street, right on North Washington Street;

Southbound:

North Washington Street left on John F. Fitzgerald Expressway Surface Road, right onto Purchase Street, straight on John F. Fitzgerald Expressway Surface Road, straight on Albany Street to Route 93 (South).''

**Please Be Advised That Enforcement of the New Route Will Begin on Monday, July 3, 2006*

Since the establishment of the new hazardous material route, motor vehicles transporting regulated hazardous materials must use the newly designated streets.

In addition to the hazardous material routing designation, the Boston Regulations and Ordinance also established a permit system which requires, among other things, that carriers who wish to operate their vehicles inconsistently with the requirements of the Ordinance and/or Boston Regulations, obtain a permit for authorities beyond those restrictions. A permit would be issued only where (1) a compelling need is shown, and (2) where transportation of the hazardous materials is in the public interest. Ordinance § 2(A)(8); Boston Regulations § 8.1.3. The permit would be granted for a period of one year and would be automatically renewed upon request unless revoked for cause after a hearing. *Id.* In order for hazardous material vehicles to use City streets for transportation of regulated hazardous material where there is no point of origin or destination within the City, the motor carrier must obtain a permit for ''through'' transportation via downtown Boston.

ATA contends that prior to 2006, motor carriers were regularly issued through-permits, allowing them to transport hazardous material through downtown Boston. In April 2006, the City issued a form letter to all permit holders and applicants stating that it was undertaking a review of all permits issued pursuant to the Ordinance and Boston Regulations ''to determine if the

[7] *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991). In 1994, Congress revised, codified and enacted the HMTA ''without substantive change,'' at 49 U.S.C. chapter 51. [Pub. L. 103–272, 108 Stat. 745].

[8] ''The purpose of this memorandum is to state the general policy of my Administration 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.'' 74 FR at 24693.

criteria for issuing the permit continue to be met.'' [9] The letter went on to state:

> In light of various changed circumstances, both locally and nationally, that have arisen over the years after the Regulations were enacted, the Fire Commissioner and the Commission have determined that each permit and permit application now needs to be reviewed with those changed circumstances and criteria in mind.

The City cites changes and events such as the terrorist attacks of September 11, 2001, changed traffic patterns and roadways occasioned by the Big Dig project, land use changes and population density shifts within the City, and an overall increase in hazardous material transportation by motor vehicle as reasons for the reexamination of the issued permits. Each permit holder and applicant was notified of a hearing date to present evidence of the criteria for issuance and/or maintenance of the permit, *i.e.,* that there was a compelling need and that transportation of the hazardous material was in the public interest. According to the ATA and Mass Highway preemption applications, and undisputed by the City of Boston, following this 2006 reexamination of permit holders, no permits for ''through'' transportation have been issued/renewed in the past several years.

As a result of their inability to obtain through transportation permits, hazardous material motor carriers are directed to travel on alternate routes that bypass the restricted areas of downtown Boston.[10] According to ATA, the bypass route significantly increases the mileage of motor carriers with regular commercial activities involving origin and destination points immediately north and south of the City.[11] In addition, the diversion of hazardous material motor vehicles around the City causes those vehicles to travel through numerous other communities surrounding Boston.

*b. Summary of Federal Statutory and Regulatory Requirements*

Any State or political subdivision of a State, such as the City of Boston, must comply with Federal statutes and regulations when establishing, maintaining, enforcing or modifying a hazardous material highway routing designation. 49 U.S.C. 5125(c); 49 U.S.C. 5112(b). FMCSA promulgated regulations pursuant to 49 U.S.C. 5112(b) that States must follow when establishing or modifying a hazardous material routing designation. 49 CFR 397.69. In summary, the standards require:

— A finding by the State that the highway routing designation ''enhances public safety in the areas subject to its jurisdiction and in other areas which are directly affected by such highway routing designation.'' 49 CFR 397.71(b)(1).

— Notice to the public of the proposed routing designation, a 30-day period for the public to submit comments, and consideration of whether to hold a public hearing (with advance notice to the public). 49 CFR 397.71(b)(2).

— Notice to and consultation with ''officials of affected political subdivisions, States and Indian tribes, and any other affected parties,'' and completion of the routing designation process within 18 months of the notice to the public or notice to other affected jurisdictions. 49 CFR 397.71(b)(3), (6).

— Assurance of ''through highway routing * * * between adjacent areas'' so as not to impede or unnecessarily delay the transportation of non-radioactive hazardous material. 49 CFR 397.71(b)(4).

— A risk analysis be conducted, with a finding that the routing designation enhances public safety. 49 CFR 397.71(b)(4).

— No unreasonable burden on commerce. 49 CFR 397.71(b)(5).

— Agreement with the proposed routing by all affected States or Indian tribes within 60 days of notice, or alternatively, approval by the FMCSA Administrator pursuant to dispute resolution procedures under 49 CFR 397.75. 49 CFR 397.71(b)(5).

— Reasonable access for vehicles to reach terminals, pickup and delivery points, loading and unloading locations, and facilities for food, fuel, repairs, rest and safe havens. 49 CFR 397.71(b)(7).

— Responsibility by the States for ensuring that all of their political subdivisions comply with the federal regulations and for resolving any disputes between political subdivisions within their jurisdictions. 49 CFR 397.71(b)(8).

— Compliance by the State or Indian tribe with the public information reporting requirements in 49 CFR 397.73. 49 CFR 397.71(b)(8).

— Consideration of specific factors, including population density, type of highway, types and quantities of NRHM normally transported, emergency response capabilities, results of consultation with affected persons, exposure and other risk factors, terrain, continuity of routes, alternative routes, effects on commerce, delays in transportation, climatic conditions, and congestion and accident history. 49 CFR 397.71(b)(9).

The standards summarized above, set forth at 49 CFR 397.71, apply to all hazardous material highway routing designations established or modified on or after November 14, 1994. 49 CFR 397.69(a). Except in the case of certain dispute resolutions or waivers, any hazardous material routing designation made in violation of the applicable Federal standards is preempted. 49 CFR 397.69(b).

Any routing designation that was established prior to, and not modified after, November 14, 1994, is ''grandfathered'' under the prior Federal hazardous material transportation law. 49 CFR 397.69(c); 49 U.S.C. 5125(c)(2)(B).[12] Those earlier routing designations that fall within the ''grandfathered'' period, are subject to preemption in accordance with the standards set forth in 49 U.S.C. 5125(a) and 49 CFR 397.203(a)(1) and (a)(2). This earlier preemption standard is often referred to as the Dual Compliance/Obstacle Test. Under that standard, a routing designation is preempted if: (1) Compliance with both the hazardous material routing designation and any requirement under the HMTA or of a regulation issued therein is not possible, or (2) the highway routing designation as applied and enforced creates an obstacle to the accomplishment and execution of the HMTA or the regulations thereunder.

[9] Letter from Kevin P. MacCurtain, Acting Fire Commissioner, to various permit holders, April 7, 2006, attached to ATA's preemption application as Exhibit E.

[10] See Exhibit J to Boston's Comments, Exemplar of Massachusetts Highway Department Hazmat ''Trucker Notice'' Sign and Exhibit K to Boston's Comments, Photograph of Massachusetts Highway Department Posted Hazmat ''Trucker Notice'' Sign. Both signs state, ''I–93 BOSTON TUNNELS HAZARDOUS/DANGEROUS CARGOES PROHIBITED USE I–95 NORTH [SOUTH].''

[11] Specifically, in one example provided by ATA, motor carriers transporting petroleum products from a fuel farm in Everett, MA to points south of the City, such as Milton, MA, are required to travel an additional 84 miles roundtrip, a 382% mileage increase. According to ATA, this effectively has reduced motor carrier productivity by 33%, in light of hours of service restrictions.

[12] Title 49 U.S.C. 5125(c)(2)(B) states that ''[t]his subsection and section 5112 of this title do not require a State or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation or requirement was established before November 16, 1990.'' Although the statutory and regulatory ''grandfather'' clause dates vary by approximately four years—November 16, 1990 versus November 14, 1994—the date differential is of no consequence in the instant preemption proceeding. The original Boston routing designations were established in 1980, while the purported modifications occurred in 2006, well beyond the timeframe of the two ''grandfather'' clauses.

*c. Application of Federal Regulatory Requirements to Boston's Hazardous Material Route and Permit System*

The central issue of the consolidated preemption application is whether the City of Boston was required to comply with current Federal standards regarding the establishment or modification of hazardous material highway routing designations, as contained in 49 CFR part 397, subpart C. In order to make that determination, it is necessary to decide which preemption standard is applicable to the hazardous material routing designations established or modified by the City—the standard contained in 49 CFR 397.69(a) or the earlier standard of the Dual Compliance/Obstacle Test. In this case, that analysis turns on the meaning of a ''modification'' of a routing designation, as that term is used in 49 CFR 397.69(a).[13]

It is undisputed that Boston's original hazardous material routing designation was established in 1980 pursuant to the Ordinance and Boston Regulations. As such, the preemption standard for the original route(s) would ordinarily fall within the ''grandfather'' clauses of both 49 U.S.C. 5125(c)(2) and 49 CFR 397.69(c). The pertinent question, however, is whether that original routing designation was modified subsequent to November 14, 1994, such that the modified route would be subject to the current Federal standards for hazardous material routing designations. ATA contends that two events occurred that amount to modifications of Boston's routing designations, and therefore the City was required to comply with all of the standards set forth in 49 CFR 397.71, *infra*. Those two events are (1) the change in designated streets of the hazardous material route as a result of roadway construction in conjunction with the CA/T project, and (2) the change in the administration and enforcement of the City's permit system such that through-permits are no longer issued, thereby creating a new *de facto* routing restriction which effectively bans all hazardous material transportation if the vehicle has neither a point of origin nor destination within the City of Boston.

In its comments submitted in response to the preemption applications, Boston argues that its regulations have been in existence for 29 years and have remained unchanged during that time. The City contends that the changes to the hazardous material route were adjusted to accommodate changes to physical road locations caused by the Big Dig, but that such changes did not amount to a significant or material modification of the route. Boston submits that it was taking advantage of an improved surface roadway to increase public safety in connection with the transportation of hazardous material. The City further contends that the route change was accomplished by ''administratively updating'' the City's Major Thoroughfare System and that the route change involved only an ''insignificant shift'' one roadway over within the same central corridor through downtown Boston. As such, Boston argues that this shift in roadway does not constitute a modification of a designated hazardous material route for purposes of triggering 49 CFR 397.69.

The FMCSA is not persuaded by Boston's arguments and finds that the change in roadways, evidenced by the City's own ''Notice of Hazardous Materials Route Change,'' does constitute a modification of the designated route. In order to make this change in the route, the City was required to amend its Traffic Rules and Regulations so that it could update the designation of the Major Thoroughfare System to include the new road(s). Referring to the amendment as an ''administrative update'' does not change the fact that the City was legally required to revise its regulations for the route change to take effect. And although the original route and the new route may be located in close proximity to one another, the FMCSA declines to find that a route change of only a block or two is not a modification of the route. Such a finding would immediately raise the question of how far a route could be changed before it is considered modified. The simpler and preferred approach, which allows for no confusion, is that a change from one roadway to another constitutes a modification of the route. If a hazardous materials motor carrier were to use the previous designated route on Commercial Street, that vehicle would presumably be subject to enforcement for a violation of the City's hazardous material routing designation. Given that fact, it can hardly be said that the route was not modified within the meaning of 49 CFR 397.69. As such, Boston was required to comply with current Federal regulatory standards before designating the new hazardous material route. A preemption analysis under the earlier Dual Compliance/Obstacle Test is not warranted given that the designated route was modified after November 14, 1994. The routing designation therefore must be evaluated against the requirements of 49 CFR 397.71.

ATA further submits that the change in administration of the City's permit system, which it argues has effectively banned through transportation of hazardous material within the City of Boston, also amounts to a *de facto* new routing designation that would subject the City to compliance with 49 CFR 397.69 and 397.71. Boston disputes ATA's contention that its actions with respect to its permitting program constitute a newly designated routing restriction. The City states that its 2006 review of current permit holders and new applicants was simply an exercise of enforcement of the 1980 Boston Regulations. It submits that during the course of that review and subsequently, the analysis of whether or not to issue a through-permit to an applicant is based on the same criteria established in the 1980 Boston Regulations, namely, whether the applicant has demonstrated a compelling need and that transportation of the hazardous material is in the public interest. Boston argues that it is entitled to administrative discretion and to reach its own conclusions, which may change over time, as to what constitutes ''compelling need'' and ''in the public interest.'' While it concedes that in years past the City may have been ''more permissive in granting permits,'' Boston argues its recent adoption of a more restrictive approach to permitting does not mean a change in the Boston Regulation has occurred. Boston Comments at 22–25.

Once again, we do not find Boston's arguments persuasive. The City may not circumvent its own regulations or Federal regulation by claiming to utilize a 29-year-old permitting system, yet failing to actually issue any permits. Although the City is correct that the permitting provision of the Boston Regulation did not change, that is not the relevant analysis in this instance. The real question is whether the City's highway routing designation has changed, and the answer to that question is yes. The definition of a ''routing designation'' includes ''[a]ny regulation, *limitation, restriction*, * * * [or] *routing ban* * * * applicable to the highway transportation of NRHM over a specific highway route or portion of a route.'' 49 CFR 397.65 (emphasis

[13] Title 49 CFR 397.69(a) states:

Any State or Indian tribe that establishes or *modifies* a highway routing designation over which NRHM may or may not be transported on or after November 14, 1994, and maintains or enforces such designation, shall comply with the highway routing standards set forth in § 397.71. For purposes of this subpart, any highway routing designation affecting the highway transportation of NRHM, made by a political subdivision of a State is considered as one made by that State, and all requirements of this subpart apply. (Emphasis added.)

added). The City used to allow transportation of hazardous material vehicles through the downtown corridor even where the motor carrier did not have a point of origin or destination within the City. This transportation was authorized through issuance of permits to qualified hazardous material motor carriers. Beginning at a very identifiable point in time in 2006, Boston made the decision to revoke through-permits previously issued and not to issue any new through-permits going forward. This change in the administration of the City's permitting system has created a new limitation/restriction/ban on through transportation of hazardous material vehicles and a *de facto* modification of the City's routing designation. Boston's current administration of the permitting system essentially removes the provision of the Ordinance and Boston Regulation that allows a hazardous materials motor carrier to demonstrate a compelling need for issuance of a through-permit. This *de facto* modification to the City's routing designation has a significant impact on transportation of hazardous materials through Boston. It also serves to shift the risk associated with that transportation to neighboring jurisdictions by forcing hazardous material motor carriers to use alternative routes bypassing the City of Boston. Because this modification to Boston's routing designation occurred post-November 14, 1994, the City is required to comply with Federal regulatory standards found in 49 CFR 397.71.

Both the City of Boston in its comments and Mass Highway in its preemption application raise the issue of a prior DOT Inconsistency Ruling (''IR–3''), as well as a prior U.S. District Court case [14] that addressed certain aspects of the Ordinance and 1980 Boston Regulations. In view of the fact that the federal court case dealt with a request for a preliminary injunction which does not undertake an analysis of the merits of the arguments, and the fact that the ruling on IR–3 was found to be ''indeterminate,'' neither of these prior rulings is of precedential value to FMCSA's current preemption determination. Moreover, the challenges raised in IR–3 and the federal court case related to various provisions of the original 1980 Boston Regulations and Ordinance. The issue before FMCSA in the current preemption applications is whether there has been a modification of Boston's hazardous material highway routing designations such that current Federal preemption standards apply. Given the findings above that such a modification has occurred, the prior IR–3 and federal court case have no applicability to the present determination.

As noted by ATA in its preemption application, as well as by the majority of commenters, including the Massachusetts Motor Transportation Association, Associated Industries of Massachusetts, Brewer Petroleum Service, Inc., Dangerous Goods Advisory Council, Lighter Association, Inc., Triumvirate Environmental Inc., Salvoni Transportation, Massachusetts Oilheat Council, J&S Transport Co., Inc., National Tank Truck Carriers, Inc. and Dennis K. Burke, Inc., Boston did not undertake the necessary steps to comply with the standards set forth in 49 CFR 397.71 before making modifications to the City's hazardous material routing designations. While Boston argues on the one hand that it did not have to comply with these current Federal regulatory requirements, the City argues in the alternative that it did undertake certain steps and applied an analysis similar to the requirements in section 397.71. Mass Highway and the City submit that a study conducted for purposes of analyzing alternative hazardous material routes in conjunction with construction during the CA/T project, ''largely complied with the federal regulatory requirements later outlined in § 397.71.'' [15] Mass Highway Application at 4; Boston Comments at 14. Although that study may have considered some of the same factors found in 397.71(b)(9), such as population density, type of highway, emergency response capability, etc., it failed to address other factors required under the current standards. For example, Boston did not engage in any of the other requirements of part 397.71, most notably the requirements of 397.71(b)(3), involving consultation with other affected parties, and 397.71(b)(5), requiring agreement to the routing designation by other affected States or approval by the FMCSA Administrator, in lieu of such agreement. Moreover, the study was completed in 1994 while the new routing designation was not proposed until 2006. The factors to be considered in 397.71(b)(9) are fluid conditions, such as population density, type of highway, exposure to risk factors, alternative routes, congestion and accident history, to name a few. An analysis of these factors 12 years earlier would likely not accurately reflect the current conditions and considerations.

Our finding today that the change in roadway is a modification of the designated hazardous material route, as well as our finding that a *de facto* new routing designation was created by Boston's effective ban on through-permits, further the public policy and legislative intent behind the Federal hazardous materials transportation law, which seeks to provide a uniform basis of regulations to promote the safe transportation of hazardous materials. When Boston's original routing designations were established in 1980, the current Federal regulations were not in existence. The grandfathering provisions in the Federal statute and rule excuse Boston's compliance with the Federal standards as to its 1980 routing designations. However, almost fifteen years have passed since the current regulations were enacted, and the City has had ample notice of what would be required should it wish to modify its hazardous material highway routing designations. The City could have applied for a waiver of preemption pursuant to 49 U.S.C. 5125(e) and 49 CFR 397.213, but it decided not to do so. The City of Boston chose to make the modifications discussed herein, and it must comply with the current Federal regulations.

## V. Ruling

FMCSA finds that 49 U.S.C. 5125(c)(1) preempts certain highway routing requirements of the City of Boston because Boston failed to comply with FMCSA's standards for establishing or modifying a hazardous material highway routing designation issued pursuant to 49 U.S.C. 5112(b) and 49 CFR part 397, subpart C. The specific routing requirements preempted are:

1. The Traffic Rules and Regulations of the City of Boston, Article VII, section 8B, Hazardous Materials Route; and
2. The *de facto* ban on hazardous material transportation through the City of Boston due to the change in administration of the City's hazardous material permitting system.

This preemption decision will become effective on May 17, 2010 to allow time for the City of Boston to comply with the current Federal statutory and regulatory requirements.

## VI. Petitions for Reconsideration and Judicial Review

In accordance with 49 CFR 397.223(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of

[14] *American Trucking Assoc., Inc., et al.* v. *Boston*, 1981 U.S. Dist. LEXIS 18423 (D. Mass. 1981).

[15] The study was entitled ''June 1994 CA/T Project Concept Report No. 2AB26, Transportation of Hazardous Cargo,'' and can be found as Exhibit H to Mass Highway's preemption application.

service of this decision. The decision will become the final decision of FMCSA 20 days after service if no petition for reconsideration is filed within that time. If a petition for reconsideration of this decision is filed within 20 days, the action by FMCSA on the petition for reconsideration will be the final decision. 49 CFR 397.223(d).

Persons adversely affected or aggrieved by this determination may seek judicial review, in accordance with 49 U.S.C. 5127(a), in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals for the circuit in which the person resides or has its principal place of business. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127.

Issued on: November 10, 2009.

**Rose A. McMurray,**

*Acting Deputy Administrator.*

[FR Doc. E9–27483 Filed 11–13–09; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**TIME AND DATE:** December 10, 2009, 12 noon to 3 p.m., Eastern Daylight Time.

**PLACE:** This meeting will take place telephonically. Any interested person may call Mr. Avelino Gutierrez at (505) 827–4565 to receive the toll free number and pass code needed to participate in these meetings by telephone.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

**FOR FURTHER INFORMATION CONTACT:** Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: November 10, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–27565 Filed 11–12–09; 4:15 pm]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Petition for Exemption from the Federal Motor Vehicle Motor Theft Prevention Standard; Jaguar Land Rover

**AGENCY:** National Highway Traffic Safety Administration, Department of Transportation (DOT).

**ACTION:** Grant of petition for exemption.

**SUMMARY:** This document grants in full the petition of Jaguar Land Rover North America's, (Jaguar) petition for an exemption of the XJ vehicle line in accordance with 49 CFR Part 543, *Exemption from the Theft Prevention Standard.* This petition is granted because the agency has determined that the anti-theft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541).

**DATES:** The exemption granted by this notice is effective beginning with model year (MY) 2010.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, W43–439, 1200 New Jersey Avenue, SE., Washington, DC 20590. Ms. Ballard's phone number is (202) 366–0846. Her fax number is (202) 493–2990.

**SUPPLEMENTARY INFORMATION:** In a petition dated May 11, 2009, Jaguar requested an exemption from the parts-marking requirements of the theft prevention standard (49 CFR Part 541) for the XJ vehicle line beginning with MY 2010. The petition has been filed pursuant to 49 CFR part 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an anti-theft device as standard equipment for the entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant an exemption for one vehicle line per model year. In its petition, Jaguar provided a detailed description and diagram of the identity, design, and location of the components of the anti-theft device for the XJ vehicle line. Jaguar stated that the XJ vehicles will be equipped with a passive, transponder based, electronic engine immobilizer device as standard equipment beginning with the 2010 model year. Additionally, Jaguar states that its vehicle security system also includes an audible and visual perimeter alarm system as standard equipment and can be armed with the Smart Key or programmed to be passively armed. The perimeter alarm system can be programmed to arm automatically 30 seconds after all doors, luggage compartment and hood apertures are closed and the Smart Key is removed from the vehicle. The siren will sound and exterior lights will flash if the hood, luggage compartment, or doors are open during unauthorization.

Jaguar stated that there are three methods to its system operation, one method of operation consist of the driver approaching the vehicle and pulling on the driver's door handle, when the door handle is pulled, the Keyless Vehicle Module via the Low frequency Door Handle Antenna sends a signal to the Key Fob by using a resonant frequency of 125 KHz. The Key fob will decrypt the data received along with its unique identifier and send an answer back to the Keyless Vehicle Module via the Remote Frequency Receiver. On pressing the ignition start button, a search is commenced in order to find and authenticate the Smart Key within the vehicle interior. If successful, this information is passed via a coded data transfer to the Body Control Module (BCM) via the Remote Function Actuator. The BCM in turn, will pass the valid key status to the instrument cluster, via a coded data transfer. The BCM sends the key valid message to the Power Train Control Module which initiates a coded data transfer, then the engine is authorized to crank, fuel and start. The second method is by using the Smart Key unlock button, upon pressing the button, the doors will unlock, once the driver presses the ignition start button, the operation is the same as method one. The third method is if the Smart Key has a discharged battery or is damaged, there is an emergency key blade that can be removed from the Smart Key and used to unlock the doors. On pressing the ignition start button, a search is commenced in order to find and authenticate the Smart Key within the vehicle interior, if successful, the Smart Key needs to be docked. Once the Smart Key is placed in the correct position, and the ignition start button is pressed again, the BCM and Smart key enter a coded data exchange via the Immobilizer Antenna Unit, the BCM in turn, passes the valid key status to the instrument cluster, via a coded data transfer. The BCM sends the key valid message to the Power Train Control Module which initiates a coded data transfer, if successful the engine is authorized to crank, fuel and start.

In addressing the specific content requirements of 543.6, Jaguar provided information on the reliability and