the **Federal Register**. *See* 49 CFR 107.209(c). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(f)(1). 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 addition, PHMSA does not generally consider issues regarding the proper application or interpretation of a non-Federal regulation, but rather how such requirements are actually ''applied or enforced.'' Rather, ''isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent'' with Federal hazardous material transportation law, but are more appropriately addressed in the appropriate State or local forum. PD–14(R), Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 67506, 67510 n.4 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999), quoting from IR–31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25584 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), and PD–4 (R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48940 (Sept. 20, 1993), decision on reconsideration, 60 FR 8800 (Feb. 15, 1995).

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

IV. Public Comments

All comments should be directed to whether 49 U.S.C. 5125 preempts the City of New York's requirements for a permit for transporting these hazardous materials by motor vehicle through the City, or for transshipment from the City, and the fee for obtaining the permit. Comments should specifically address the preemption criteria discussed in Part II above and set forth in detail the manner in which these requirements are applied and enforced, including:

- Any requirements or conditions for issuance of a permit, other than completion of the application form, payment of the permit fee, and inspection of the tractor or trailer;
- the amount of time taken by the City to conduct the inspection and issue a permit; and
- for each of the past three calendar (or fiscal) years, the total amount of permit fees collected by the City and all purposes for which these fees have been used (including an identification of the specific accounts into which the permit fees were deposited).

Issued in Washington, DC, on April 11, 2014.

Vanessa L. Allen Sutherland,

Chief Counsel.

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2014–0002 (PDA–36(R)]

Pittsburgh, Pennsylvania Permit Requirements for Transportation of Hazardous Material

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

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to comment on an application by the American Trucking Associations, Inc. (ATA) for an administrative determination whether Federal hazardous material transportation law preempts requirements of the City of Pittsburgh, Pennsylvania for a permit to transport hazardous materials by motor vehicle and the fee to obtain the permit.

DATES: Comments received on or before June 2, 2014 and rebuttal comments received on or before July 16, 2014 will be considered before an administrative determination is issued by PHMSA's Chief Counsel. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: ATA's application and all comments received may be reviewed in the Docket Operations Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The application and all comments are available on the U.S. Government Regulations Web site: *http://www.regulations.gov*.

Comments must refer to Docket No. PHMSA–2014–0002 and may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Docket Operations Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

A copy of each comment must also be sent to (1) Boyd Stephenson, Director, Hazardous Materials & Licensing Policy, American Trucking Associations, 950 Glebe Road, Suite 210, Arlington, VA 22203; (2) Darryl E. Jones, Fire Chief, Pittsburgh Bureau of Fire, Civic Building, 200 Ross Street, Fifth Floor, Pittsburgh, PA 15219; and (3) Pittsburgh City Solicitor, Law Department, 313 City-County Building, 414 Grant Street, Pittsburgh, PA 15219. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I certify that copies of this comment have been sent to the American Trucking Associations, the Pittsburgh Bureau of Fire, and the Pittsburgh City Solicitor at the addresses specified in the **Federal Register**.'')

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing a comment submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://www.regulations.gov.*

A subject matter index of hazardous materials preemption cases, including a listing of all inconsistency rulings (IRs) and preemption determinations (PDs), is available through PHMSA's home page at *http://phmsa.dot.gov*. From the home page, click on ''Regulations,'' then on ''Preemption of State and Local Laws'' (in the ''Hazmat Safety'' column). A paper copy of the index will be provided at no cost upon request to Mr. Hilder or Mr. Lopez, at the address and telephone number set forth in **FOR FURTHER INFORMATION CONTACT** below.

FOR FURTHER INFORMATION CONTACT:

Frazer C. Hilder or Vincent Lopez, Office of Chief Counsel (PHC–10), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone No. 202–366–4400; facsimile No. 202–366–7041.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

ATA has applied to PHMSA for a determination whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* preempts provisions in Chapter 801 of Title 8 of the Pittsburgh Code, Fire Prevention, which, according to ATA, require a person ''desiring to transport hazardous materials by motor vehicle in, around, or through Pittsburgh [to] pay $132 dollars and fill out an application.'' [1] In Section 801.01 of the Fire Prevention Code, the City of Pittsburgh (City) has adopted ''the International Fire Code/2003, listed in Section 403.21 of Annex A, Title 34 Pennsylvania Labor and Industry Part XIV Uniform Construction Code, except for such portions thereof as are changed by Section 801.02 of this chapter.''

Section 105.6.21 of the 2003 edition of the International Fire Code, titled ''Hazardous Materials,'' provides that: ''An operational permit is required to store, *transport on site,* dispense, use or handle hazardous materials in excess of the amounts listed in Table 105.6.21.'' (Emphasis supplied.) This provision has been modified in Section 801.02 of the City's Fire Prevention Code to list permit fees (and whether an inspection fee applies) for numerous specified materials and activities. Item No. 105.6.21J indicates that a permit is required for ''Transportation of haz material'' and that the permit fee is $132.[2] The copy of the ''Application for Permit for Transportation of Hazardous Materials'' form provided by ATA contains space for the applicant to insert the ''amounts for each kind or category'' of materials for ''keeping, storage, occupancy, use, sale, handling, or manufacturing'' at the applicant's ''location'' and also indicates that the ''permit fee'' is $132.

According to ATA, ''Pittsburgh charges a flat fee for all permits under subsection 105.6.21 of its [fire prevention] code, including 105.6.21J. Carriers file a single application, and, if approved, must be ready to present copies of the permit to enforcement officials at their request.'' In summary, ATA contends that the City's permit and permit fee requirements are preempted because:

> Only motor carriers are required to obtain Pittsburgh's permit, which imposes an unfair burden on a single mode of transportation. The permit requirements also present possible substantive dissimilarity issues violating 49 CFR 107.201(d). Finally, Pittsburgh cannot show that it is using funds generated from its permit fees for hazardous materials enforcement and emergency response training.

[1] ATA has also applied for a determination whether Federal hazardous material transportation law preempts permit and inspection fee requirements of New York City. *See* Docket No. PHMSA–2014–0003 (PDA–37(R)).

[2] See Section 801.02 of the Pittsburgh Fire Prevention Code. ATA's application does not indicate that the City requires an inspection of motor vehicles used to transport hazardous materials, and Section 105.6.21J, as modified by the City, provides that there is no inspection fee for issuance of the permit.

II. Federal Preemption

Section 5125 of Title 49, United States Code (U.S.C.), contains express preemption provisions relevant to this proceeding. Subsection (a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted—unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e)—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.[3]

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

> (A) the designation, description, and classification of hazardous material.
>
> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
>
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
>
> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
>
> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold

[3] These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria that 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). PHMSA's predecessor agency, the Research and Special Programs Administration, applied these criteria in issuing inconsistency rulings under the original preemption provisions in Section 112(a) of the Hazardous Materials Transportation Act (HMTA), Public Law 93–633, 88 Stat. 2161 (Jan. 3, 1975).

as qualified for use in transporting hazardous material.[4]

In addition, 49 U.S.C. 5125(f)(1) 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 related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' [5]

The preemption provisions in 49 U.S.C. 5125 reflect Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Some forty years ago, when 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). A United States Court of Appeals has found uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.97(b).

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

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(f)(1). 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 addition, PHMSA does not generally consider issues regarding the proper application or interpretation of a non-Federal regulation, but rather how such requirements are actually ''applied or enforced.'' Rather, ''isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent'' with Federal hazardous material transportation law, but are more appropriately addressed in the appropriate State or local forum. PD–14(R), Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 67506, 67510 n.4 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999), quoting from IR–31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25584 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), and PD–4 (R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48940 (Sept. 20, 1993), decision on petition for reconsideration, 60 FR 8800 (Feb. 15, 1995).

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

IV. Public Comments

All comments should be directed to whether 49 U.S.C. 5125 preempts the City's requirements for a permit for transporting hazardous materials by motor vehicle and the fee for obtaining the permit. Comments should specifically address the preemption criteria discussed in Part II above and set forth in detail the manner in which these requirements are applied and enforced with respect to the transportation of hazardous materials by motor vehicle in, around, or through the City, including:

- Any requirements or conditions for issuance of a permit, other than completion of the application form and payment of the permit fee;
- the amount of time taken by the City to issue a permit and the period for which a permit is issued (*e.g.,* one year, indefinitely);
- whether there is any difference in the amount of the fee based on the number of shipments of hazardous materials transported in, around, or through the City; and
- for each of the past three calendar (or fiscal) years, the total amount of permit fees collected by the City and all purposes for which these fees have been used (including an identification of the specific accounts into which the permit fees were deposited).

Issued in Washington, DC, on April 11, 2014.

Vanessa L. Allen Sutherland,

Chief Counsel.

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

[5] *See also* 49 U.S.C. 5125(c) containing standards which apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported.