DEPARTMENT OF TRANSPORTATION

Research and Special Program Administration

Federal Highway Administration

[Docket No. RSPA–98–3579 (PDA–20 (RF))]

Application by Association of Waste Hazardous Materials Transporters for a Preemption Determination as to Cleveland, Ohio Requirements for Transportation of Hazardous Materials

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

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to submit comments on an application by the Association of Waste Hazardous Materials Transporters (AWHMT) for an administrative determination whether Federal hazardous materials transportation law preempts requirements of the City of Cleveland, Ohio, concerning the transportation of explosives and other hazardous materials within the City.

DATES: Comments received on or before October 19, 1998, and rebuttal comments received on or before November 16, 1998, will be considered before an administrative ruling is issued jointly by RSPA's Associate Administrator for Hazardous Materials Safety and FHWA's Administrator. 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 all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590–0001. The application and all comments are also available on-line through the home page of DOT's Docket Management System, at ''http://dms.dot.gov.''

Comments should be submitted to the Dockets Office at the above address. Three copies of each written comment should be submitted. Comments may also be submitted by E-mail to ''rspa.counsel@rspa.dot.gov.'' Each comment should refer to the Docket Number set forth above. A copy of each comment must also be sent to (1) Mr. Michael Carney, Chairman, Association of Waste Hazardous Materials Transporters, 2200 Mill Road, Alexandria, VA 22314, and (2) Mr. Sylvester Summers, Director of Law, City of Cleveland, City Hall—Room 106, 601 Lakeside Avenue, Cleveland, OH 44114. 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 Messrs. Carney and Summers at the addresses specified in the **Federal Register**.'')

A list and subject matter index of hazardous materials preemption cases, including all inconsistency rulings and preemption determinations issued, are available through the home page of RSPA's Office of the Chief Counsel, at ''http://rspa-atty.dot.gov.'' A paper copy of this list and index will be provided at no cost upon request to Mr. Hilder, at the address and telephone number set forth in ''For Further Information Contact'' below.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration (Tel. No. 202–366–4400), or Raymond Cuprill, Office of the Chief Counsel, Federal Highway Administration (Tel. No. 202–366–0834), U.S. Department of Transportation, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

AWHMT has applied for a determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts requirements of the City of Cleveland (''City'') applicable to the transportation of explosives and other hazardous materials in and through the City. The text of AWHMT's application and a list of the attachments are set forth in Appendix A. A paper copy of the attachments to AWHMT's application will be provided at no cost upon request to Mr. Hilder, at the address and telephone number set forth in **FOR FURTHER INFORMATION CONTACT** above.

The requirements challenged by AWHMT are contained in, or relate to, provisions in Chapters 387 and 394 of the City's Consolidated Ordinances (''City Code'') for permits to transport within the City any explosive or a quantity of hazardous materials for which placarding is required under the Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180. The following discussion is based upon the copies of Chapters 387 and 394 of the City Code attached to AWHMT's application.

Permits for the transportation of explosives and other hazardous materials within the City are issued by the City's Fire Department. Secs. 387.07(a), 394.08. It is uncertain whether these permit requirements in Chapters 387 and 394 apply only to motor carriers or to all modes of transportation. The provisions that, without a permit, ''no person shall transport explosives'' (§ 387.07(a)) and ''[n]o transportation of hazardous materials * * * is permitted'' (§ 394.08) seem to apply to all modes; however, AWHMT states that only motor carriers are required to obtain permits and pay fees.

Explosives. Chapter 387 of the City Code governs the storage, transportation, possession, sale and use of explosives within the City. Sec. 387.02(g). However, this chapter does not

> Apply to explosives while in course of transportation via railroad, water or highway when the explosives are moving under the jurisdiction of and in conformity with regulations adopted by the Interstate Commerce Commission or the United States Coast Guard.'' [1]

Based on this exception in Section 387.03, the City does not require an explosives transporter that remains on interstate highways, while in the City, to obtain an explosives permit, according to affidavits submitted with AWHMT's application.

A permit to transport explosives may be issued for up to one year, and the ''Application for the Transportation of Explosives'' form states that the permit will not be effective beyond ''the expiration date of the [required] insurance.'' Section 387.09 specifies minimum amounts of liability and property damage insurance and requires submission of a copy of the insurance policy with the permit application. The blank copy of this application form provided with AWHMT's application indicates that the permit fee is $50 and that the applicant must provide its name and address and the following additional information to obtain a permit to transport explosives:

—Types and quantities of explosives (the form states that a police escort is required if more than 250 lbs. are transported);
—Name and permit number of each consignee (§ 387.07(c) provides that a permit ''shall be issued for transportation of explosives designated for delivery or consigned to a person holding a permit for the storage or use of such explosives within the corporate limits of the City'');
—Route to be taken within the City (§ 387.07(d) and (b), respectively, provide

[1] It appears that the City originally adopted its explosive permit requirement in 1958, in Ordinance No. 2074–58. At that time, the Federal regulations governing the transportation of hazardous materials were issued and administered by the Interstate Commerce Commission (ICC) (with respect to rail and highway transportation) and by the Coast Guard (with respect to water transportation).

that the Director of Public Safety shall designate ''the route to be taken,'' and that a permit will not be issued ''for the transportation of explosives through the City * * * where an alternate route lying wholly without [the City's] corporate limits may be available and will not place an unreasonable burden on such transportation'');

—Notification to the Fire Department ''24 hours in advance of all deliveries''; and

—Information regarding the vehicle, including type, capacity, license number, PUCO [Public Utilities Commission of Ohio] number, condition, fire extinguishers and marking (§ 387.08(a)(4) requires the vehicle to be ''plainly marked 'DANGER, EXPLOSIVES' in letters not less than six inches in height on both sides and on the rear,'' and § 387.08(a)(6) requires the vehicle to ''be equipped with an least two fire extinguishers of a type or design'' inspected and approved by the Fire Chief)

Section 387.08(a) also requires a vehicle used for transporting explosives to be inspected by the Fire Department ''before a permit for such transportation may be issued,'' but statements in affidavits submitted with AWHMT's application indicate that the City is not requiring or performing these inspections.

According to § 387.04(b), the explosives permit ''shall at all times be subject to inspections by any officer of the Fire or Police Departments,'' implying (but not specifically stating) that the permit must be carried on the vehicle transporting explosives.

AWHMT specifically challenges requirements in Chapter 387 for a permit, permit fees, proof of insurance, routing and prenotification of shipments, vehicle inspections, the number of fire extinguishers, and the City's uncodified requirements for a police escort to accompany shipments of more than 250 lbs of explosives.

Hazardous materials. Chapter 394 appears to have been adopted in 1992 and applies to ''all hazardous materials * * * which are transported in and through the City of Cleveland.'' Section 394.02. Those parts of the HMR in 49 CFR Parts 171, 172, 173 and 177 ''as they exist at the time of passage of this chapter and as amended hereafter'' were adopted and incorporated into chapter 394, by § 394.03(a), but that section continues as follows:

(b) When any provision of this chapter is found to be in conflict with the [HMR] regulations adopted in (a) above, the provision which establishes the stricter standard for the promotion and protection of the safety and welfare of the public shall prevail.

The City has also adopted the requirements of the Federal Motor Carrier Safety Regulations contained in 49 CFR Part 397 ''as referred to and modified herein.'' Sec. 394.04.

The City's permit requirement applies to ''hazardous materials required to be placarded'' by the HMR, but a permit is not required ''if transport in the City of Cleveland is limited to interstate highways,'' or for ''the transportation of explosives pursuant to a valid permit issued in accordance with Chapter 387'' of the City Code. Secs. 394.05, 394.08. There are two forms of hazardous materials permits, a temporary permit valid for 60 days and an annual permit, and the permit must be obtained ''no later than immediately prior to the first hazardous materials delivery or pickup in the City in any calendar year.'' Sec. 394.08(a).

According to § 384.08(b), a temporary permit is ''automatically approved and valid upon receipt by the City of the required information,'' which may be provided ''by letter, telephone, or in person, or by any other communication.'' To obtain a temporary permit, the applicant must pay a fee of $25 (§ 394.16) and provide, in addition to its name, address and principal place of business:

—Its ICC, PUCO, or Federal motor carrier census number;

—Hazard class and approximate amounts of hazardous materials to be transported within the City; and

—The name and address of the delivery or pickup point.

Within ten business days of issuance of a temporary permit, a copy must be carried in the vehicle and available for inspection (before that time a transporter need not have a copy of the temporary permit before operating within the City). A temporary permit is not renewable, and ''only one such temporary permit shall be issued in any one calendar year.'' Sec. 394.08(b).

A written application is required for an annual permit, accompanied by ''proof of insurance or self insurance,'' and fees of $50 per hazard class to be transported. Secs. 394.08(c), 396.16. The Fire Chief must act on an application for an annual permit within 30 days of submission, and the information to be provided on the application form includes the motor carrier's name, address, and business address and the following:

—Its ICC, PUCO, or Federal motor carrier census number;

—Types and quantities of hazardous materials, by hazard class, chemical name, identification number, and number and type of containers;

—Two emergency contacts (with telephone numbers) and whether the transporter has a contract with a hazardous materials clean-up contractor (with name, address, and telephone number of a contact person);

—Number of vehicles to be covered by the permit (§ 394.08(c) states that ''[s]eparate permits shall not be required for each vehicle owned and operated by a single transporter, but each vehicle shall carry a legible copy of the permit listing each permit required for each class of material carried * * * within ten (10) business days after such permit is sent by the City to the transporter'');

—Name and address of the point(s) of origin and destination; and

—The proposed route through the City for each delivery or pickup.

Section 394.08(f) provides that the permit ''shall set forth conditions such as routes and other special procedures as determined to be necessary by the Fire Chief.'' Hazardous materials may not be transported ''in the Downtown Area'' of the City between 7 a.m. and 6 p.m. except Saturdays and Sundays (§ 394.06(b)), but the Fire Chief may grant an exception on a showing that ''delivery or pickup of the hazardous material * * * can be practicably made only during [the prohibited] time period'' and transportation of this material is in ''the public interest.'' Sec. 394.08(f). Hazardous materials also may not be transported on City streets (other than interstate highways)

Where there is neither a point of origin nor destination (delivery point) within the City, except where the point of origin or destination (delivery point) is within one mile of the Cleveland City limits, and except where the use of City streets provides the safest and most direct route and the shortest distance of travel from an interstate highway to the point of origin or destination, as determined by the Fire Chief or his designee.

Sec. 394.06(a); *see also* Sec. 394.06(d).

AWHMT specifically challenges requirements in Chapter 394 for a permit, permit fees, proof of insurance, and routing and time restrictions.

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.

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).

Subsection (c)(1) of 49 U.S.C. 5125 provides that, beginning two years after FHWA prescribes regulations on standards to be applied by States and Indian tribes in establishing requirements on highway routing of hazardous materials, under 49 U.S.C. 5112(b),

A State or Indian tribe may 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 section 5112(b).[2]

Subsection (g)(1) of 49 U.S.C. 5125 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 preemption provisions in 49 U.S.C. 5125 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 authority to make determinations of preemption that concern highway routing to FHWA and those concerning all other hazardous materials transportation issues to RSPA. 49 CFR 1.48(u)(2), 1.53(b). Because AWHMT's application concerns both highway routing issues and non-highway routing issues, FHWA's Administrator will address highway routing issues, and RSPA's Associate Administrator for Hazardous Materials Safety will address non-highway routing issues. 49 CFR 107.209(a), 397.211(a).

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, FHWA and RSPA will publish their determination in the **Federal Register**. *See* 49 C.F.R. 107.209(d), 397.211(d). A short period of time is allowed for filing of petitions for reconsideration. 49 C.F.R. 107.211, 397.223. 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), FHWA and RSPA are 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 FHWA and RSPA have implemented through their regulations.

[2] FHWA's standards and procedures for State and Indian tribe requirements for highway routing of hazardous materials were issued on September 24, 1992 (57 FR 44129–44131, radioactive materials), and October 12, 1994 (59 FR 51824, 51830, non-radioactive materials), and are contained in 49 CFR Part 397, subparts C and D. Highway routing requirements applicable to non-radioactive hazardous materials that were established before the effective date of FHWA's regulations (November 14, 1994) may be subject to Federal preemption under the ''dual compliance'' and ''obstacle'' criteria codified in 49 U.S.C. 5125(a)(1) and (a)(2). *See* 59 FR 51824, 51826, 49 CFR 397.69(c).

III. Public Comments

All comments should be limited to the issue whether 49 U.S.C. 5125 preempts the City's requirements challenged by AWHMT. Comments should:

(A) Set forth in detail the manner in which the City's explosives and hazardous materials permit and related requirements are applied and enforced, including but not limited to:

(1) The modes of transportation that are subject to requirements in Chapters 387 and 394 of the City Code, and the modes of transportation to which AWHMT's application applies;

(2) The City's requirements that applicants for an explosives or hazardous materials permit provide vehicle-specific information, and the applicability of the City's permit and related requirements to specific vehicles (as opposed to the transporter);

(3) The City's interpretation and application of the exception in § 387.03 and the conditions (if any) under which transporters of explosives that comply with the HMR are subject to requirements in Chapter 387;

(4) Specific examples of the effect of the City's requirements on the transportation of explosives and hazardous materials within the City, such as changes in route or other delays experience by a loaded vehicle in order to comply with the City's requirements;

(5) The City's requirement to provide information on the Permit Application for the Transportation of Hazardous Materials with regard to Class 1 materials and the conditions (if any) under which a transporter is required to obtain permits (and pay permit fees) under both Chapters 387 and 394 of the City Code;

(6) The City's requirement to provide information on the Permit Application for the Transportation of Hazardous Materials with regard to Class 9 materials and the conditions (if any) under which a transporter of Class 9 materials excepted from the HMR's placarding requirements by 49 CFR 504(f)(9) is required to obtain a hazardous materials permit;

(7) The total amount of less collected by the City in calendar year 1997 for explosives and hazardous materials permits and all purchases for which those fees were used (including an identification of the specific accounts into which those fees were deposited);

(B) Explain the extent to which the City consulted or coordinated with surrounding jurisdictions with respect to its prohibitions on the use of City streets (other than interstate highways) for the transportation of explosives or hazardous materials through the City; and

(C) Specifically address the preemption criteria set forth in Part II, above.

Persons intending to comment should review the standards and procedures governing consideration of applications for preemption determinations, set forth at 49 CFR 107.201–107.211, and 397.201–397.211.

Issued in Washington, DC on September 9, 1998.

Kenneth R. Wykle,

Administrator, Federal Highway Administration.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety Research and Special Programs Administration.

Appendix A

Before the United States Department of Transportation Office of Hazardous Materials Safety

Application of the Association of Waste Hazardous Materials Transporters To Initiate a Proceeding To Determine Whether Various Requirements Imposed by the City of Cleveland, Ohio on Persons Involved in Transporting Certain Hazardous Materials to or From Points in the City Are Preempted by The Hazardous Materials Transportation Act

March 2, 1998.

Application of the Association of Waste Hazardous Materials Transporters to initiate a proceeding to determine whether various requirements imposed by the City of Cleveland, Ohio on persons involved in the transportation of certain 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 materials, throughout the United States, including points to and from the City of Cleveland, OH (City). Despite full compliance with the hazardous materials regulations (HMRs), members of the AWHMT are precluded from transporting certain hazardous materials to or from points in the City unless certain requirements of the City Hazardous Materials Ordinance (HazMat Ordinance) and/or Explosives Ordinance (Explosives Ordinance)[1] are met. The AWHMT asserts that the City requirements are in contravention to the Hazardous Materials Transportation Act (HMTA).

Background

When the City began enforcing its HazMat Ordinance, the hazardous materials transportation industry submitted written comments to the City.[2] The substance of the comments pointed out how the proposed requirements were inconsistent with federal requirements and urged the City to conform the proposed requirements to federal standards. The AWHMT has only recently been advised of the City's Explosives Ordinance by a member company compelled to comply with its requirements.

The City's hazmat ordinance imposes routing bans and restrictions, permits, insurance filings, and fees on motor carriers transporters of ''hazardous materials required to be placarded''[3] pursuant to the federal hazardous materials regulations (HMRs) when the vehicles operated by such transporters are used on ''City streets (other than interstate highways).''[4] Where the HMRs and the City requirements conflict, the Ordinance provides that ''the stricter standard for the promotion and protection of the safety and welfare of the public shall prevail.''[5] Any violation of these requirements is ''a misdemeanor of the first degree. Each violation [is counted] separately [and] each day of the violation constitutes a separate offense.''[6]

The City's Explosives ordinance requires that ''no person shall * * * transport * * * any Class A, Class B, or Class C explosives''[7] without first obtaining a permit, remitting a fee, and having the vehicles used in the transportation of such explosives ''inspected and approved.''[8] In addition, the Explosives Ordinance also imposes routing and financial responsibility requirements.[9] Violation of these requirements can lead to the seizure and confiscation of the cargo, as

[1] Ordinance 866–92, enacted on April 27, 1992; Ordinance 84–70, enacted March 1, 1971.

[2] Letter to Michael R. White, Mayor, City of Cleveland, from Cynthia Hilton, Chemical Waste Transportation Institute, February 4, 1993; letter to William Grubber, Director of Law, City of Cleveland, from Lynda S. Mounts, American Trucking Associations, March 11, 1993.

[3] Codified Ordinances of Cleveland, OH (hereinafter ''Code''), § 394.05.

[4] Code § 394.06.

[5] Code § 394.03(b).

[6] Code § 394.99.

[7] Code § 387.03.

[8] Code § 387.08.

[9] Code § 387.07(d) & .09.

well as to fines, not to exceed $200, and/or penalties including imprisonment not to exceed six months.[10] The Explosives ordinance states that it does not ''apply to explosives while in course of transportation via railroad * * * or highway when the explosives are moving under the jurisdiction of and in conformity with regulations adopted by the Interstate Commerce Commission * * *''[11] The fact that the ICC was abolished in 1995 has no bearing on this exclusion inasmuch as the City has interpreted the ICC exception to apply to vehicles that do not leave the ''interstate.''[12] Even if the City subsequently give another interpretation of this exception, it must be remembered that: (1) Not all motor carriers were subject to ICC jurisdiction, and (2) even if a motor carrier was excepted from the Explosives Ordinance, nothing in the HazMat Ordinance suggests that such an exception would carry over to the HazMat Ordinance.

City Requirements for Which a Determination Is Sought

This application seeks preemption of the following City requirements.[13]

- Code § 394.16 & 387.04(b) concerning fees.
- Code § 394.06, .08(f) & § 387.07, concerning shipments routing and prenotification.
- Code § 394.08 & § 387.09 concerning proof of insurance.
- Code § 387.08(a) concerning vehicle inspections.
- Code § 387.08(a)(6) concerning fire extinguishers.
- Explosives Permit Application concerning requirement for police escort.
- Code § 394.08 & 387.02(g), .04, and .07, concerning annual permits.

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.''[14] By vesting primary authority over the transportation of hazardous materials in 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.''[15] 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,''[16] 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],''[17] 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 or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.[18]

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).''[19]

In 1990, Congress codified the dual compliance and obstacle tests as the Act's general preemption provision.[20] 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.[21]
- ''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.''[22] Second, non-federal highway routing requirements that fail to satisfy the federal standard under 49 U.S.C. 5112(b) are preempted.[23] Third, non-federal registration and permitting forms and procedures that are not ''the same'' as federal regulations to be issued are preempted.[24] 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.''[25] 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.[26]
- The 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.''[27] Transportation'' is defined as ''the movement of property and loading, unloading, or storage incidental to the movement.''[28]

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

The Fees Imposed by the Ordinance Are Not ''Fair'' and Subject to Preemption Under the Obstacle Test

Code § 394.16 authorizes the assessment of annual fees in the amount of $50 per hazard class identified on the HazMat permit application or $25 per

[10] Code § 387.15 & .99.

[11] Code § 387.03.

[12] See attached affidavits.

[13] Attached to this compliant are affidavits that attest to the issues we have submitted for review.

[14] P.L. 93–633 § 102.

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

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

[17] P.L. 93–633 § 112(a).

[18] 41 *FR* 38171 (September 9, 1976).

[19] 41 *FR* 38168 (September 9, 1976).

[20] 49 U.S.C. 5125(a).

[21] 49 U.S.C. 5125(b).

[22] 49 CFR 107.202(d).

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

[24] 49 U.S.C. 5119(c)(2).

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

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

[27] 49 U.S.C. 5103(b).

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

temporary HazMat permit. Because of the restrictions accompanying the temporary permit—60-day limitation; issuance of only one temporary permit per carrier in any given year—we believe the majority of motor carriers will be compelled to obtained the annual permit. Additionally, motor carriers transporting Class 1 materials are required to pay $50 for the annual explosives permit required by Code § 387.04.[29] Consequently, motor carriers that transport materials that fall within all of the federal hazard classes are subject to an aggregate annual permit charge of $450.[30]

The City's fee is set at a flat rate and unapportioned to each motor carrier's presence in the City. The U.S. Supreme Court has declared fees which are flat and unapportioned to be unconstitutional under the Commerce Clause because, among other things, such fees fail the ''internal consistency'' test.[31] 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.[32] 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.[33] In a number of subsequent cases, courts have relied on these arguments to strike down, enjoin, or escrow flat hazardous materials taxes and fees.[34] The City's decision to impose its suspect fee on a per hazard class basis rather than a per vehicle basis does not save it from review under these constitutionally-derived tests. In fact, a per hazard class fee is not unique. Most recently, the State of Wisconsin imposed fees based on transportation activities that can be linked to placard requirements. The court that considered the Wisconsin hazmat transportation fee found that this fee scheme also violated the Commerce Clause.[35] 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 submit that flat fees also run afoul of the HMTA because some motor carriers, otherwise in compliance with the HMRs, will inevitably be unable to shoulder multiple flat-per vehicle fees, and thus be excluded from some sub-set of fee-imposing jurisdictions. If the City's flat fee scheme is allowed to stand, similar fees must be allowed in the Nation's other 30,000 non-federal jurisdictions. The cumulative effect of such outcome would be not only a generally undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation and attendant, unnecessary handling of hazardous materials as these materials are transferred 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.'' [36]

In recognition of these outcomes, Congress amended the HMTA, in 1990, to provide 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.'' [37] (Emphasis added.) Augmenting this authority, Congress further provided, in the 1994 amendments to the HMTA, that DOT collect information about the basis on which the fee is levied.[38] The then-Chairman of the Senate Subcommittee to authorize the amendment explained that DOT was to use this authority to determine if ''hazardous materials fees are excessive * * * and therefore subject to preemption.'' [39] When determining what constitutes ''fair,'' the Chairman clarified that ''the usual constitutional commerce clause protections remain applicable and prohibit fees that discriminate or unduly burden interstate commerce.'' [40] In closely analogous circumstances, the Supreme Court considered the meaning of 49 U.S.C. 1513(b), which authorizes States to impose ''reasonable'' charges on the users of airports. The Court read the statute to apply a ''reasonableness standard taken directly from * * * dormant Commerce Clause jurisprudence.'' [41] In the absence of any evidence the Congress meant to sanction non-federal fees that are discriminatory or malapportioned, a ''fair'' fee within the meaning of 49 U.S.C. 5125(g)(1) surely is one that, at a minimum, complies with the requirements of the Commerce Clause.

Additionally, it must be remembered that the Ordinance imposes its challenged flat fees only on motor carriers engaged in the transportation of placarded types of quantities of hazardous materials on City roads. However, AWHMT has reviewed the hazardous materials incident reports filed with DOT pursuant to 49 CFR 171.16 and discovered, for the five-year representative period 1992–1996, that 204 hazardous materials incidents were reported.[42] Forty-seven percent of these incidents resulted from shipments traveling through the City. Twenty of the incidents were in the air mode, seventeen were in the rail mode. Of the 204 incidents only 3 met DOT's definition of ''serious.''[43] All of the serious incidents occurred in the rail mode. While we are not suggesting that the City impose flat, inapprotioned fees on other transportation modes, the City clearly has unfairly burdened select motor carriers with fees and requirements that are unsupported by the risk presented to the citizen and/or environment of the City.

For the above listed reasons, we assert that flat fees are inherently ''unfair'' and that the City's fee scheme should fall to the obstacle test pursuant to 49 U.S.C. 5125(a)(2).

The Shipment Routing and Prenotification Requirements Are Subject to Preemption Under the Obstacle Test

Code § 394.06, .08(f) and § 387.07 impose limits on the transportation of hazardous materials. As a condition of obtaining a Code § 394.08 HazMat

[29] Code § 387.04 does not set a fee amount for the Explosives permit, but provides that the permit ''shall be * * * in such form and detail as the Chief prescribes.'' The Application form for the Explosives permit requires a filing fee of $50.00.

[30] Although domestic movements of Class 9 materials do not require placarding, the HazMat permit application requires disclosure about the transport of Class 9 shipments, and the City still insists on a $50 fee to move these materials on City streets. Should the City reverse itself on the Class 9 fee, motor carriers would still be liable for up to $400 in annual permit fees.

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

[32] *Ibid.,* 294–86.

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

[34] *American Trucking Assn's Inc.* v. *State of Wisconsin,* No. 95–1714, 1996 WL 593806 (Wisc. App. Ct., October 1996); *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).

[35] *American Trucking Assn's Inc.* v. *State of Wisconsin,* No. 95–1714, 1996 WL 595806 (Wisc. App. Ct., October 1996).

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

[37] 49 U.S.C. 5125(g)(1).

[38] 49 U.S.C. 5125(g)(2).

[39] *Cong. Record,* August 11, 1994, page 11324.

[40] *Ibid.*

[41] *Northwest Airlines* v. *City of Kent,* 510 U.S. 355, 374, 127 L.Ed. 2d 183, 114 S.Ct. 855 (1994).

[42] Hazardous Materials Information System, U.S. Department of Transportation—1992–1996, January 28, 1998.

[43] ''Serious'' incidents are those that result in one or more of the following: death; accident/derailment of vehicle; evacuation of six or more individuals; injury requiring hospitalization; or road closure.

permit, motor carriers are required to list, in advance, each route for each delivery and pickup, all types and quantities of hazardous materials to be hauled during the ensuing year.[44] Code § 394.06 prohibits the use of City streets (other than interstate highways) for transportation of placarded hazardous materials other than from a point of origin or to a point of destination. Transportation of placarded materials is also prohibited on all City streets in the ''Downtown Area'' between 7:00 am and 6:00 pm on weekdays.[45] The Code § 387.07 Explosives permit, likewise, prohibits the transportation of explosives through the City ''where an alternate route lying wholly without such corporate limits may be available and will not place an 'unreasonable' burden on such transportation.''[46] Additionally, routes to be taken in the City for the transportation of explosives ''shall be designated by the Director of Public Safety * * *.''[47] The Explosives permit application requires that the Fire Prevention Bureau ''be notified 24 hours in advance of all deliveries.''[48]

The HazMat and Explosives Ordinances' routing requirements include the requirement to use interstate highways, time-of-day and day-of-week travel restrictions, and the requirement to avoid the City altogether if alternative routing is available. The time-of-day and day-of-week restrictions compel transporters to deliver non-Cleveland bound, non-hazardous material elsewhere first, keeping hazardous materials on the road longer or to wait outside the City until the time restriction is lifted thus increasing the risk to adjoining communities. The outright ban on explosives transportation through the City when in the judgment of the Fire Chief an alternative route exists likewise would have the same otherwise effect on surrounding communities. These restrictions also do not contemplate the disruption to Cleveland-area businesses awaiting delivery of non-hazardous materials if these products are loaded on a vehicle with cargo requiring a placard—a common practice among so-called ''less-than-truckload'' carriers. There is no evidence in either Ordinance that the City consulted with adjoining affected jurisdictions that may be adversely impacted by hazardous materials traffic bound to or from the City which is delayed in those jurisdictions as a result of the routing requirements of the Ordinances. Generally, DOT has found inconsistent and preempted such requirements.[49] More importantly, as a consequence of amendments to the HMTA in 1990, Congress provided a process to establish standards for the routing of hazardous materials. States, not localities, are charged to ensure compliance with the standards in their respective jurisdictions.[50]

The City's 24-hour advance notice of explosives shipments obviously is understood to be a shipment prenotification requirement. Perhaps not as blatant, the City's requirements to file routes as well as the City's requirements to disclose types and quantities of hazardous materials to be moved in the City also qualify as a form of shipment prenotification. These requirements cannot be accomplished, as the City suggests, on an annual basis. Compliance requires a shipment-by-shipment prior notice. Motor carriers, for example, hold themselves out continuously to the shipping public to haul whatever commodity may be tendered to them at any given time. These carriers frequently do not, and cannot know, even one day in advance either their routings or their cargo. Even the City's temporary permit is not a remedy because a carrier may avail itself of a temporary permit only one time in a calendar year.[51] Consequently, the Ordinances force motor carriers, for all but routine scheduled pick-ups and deliveries, to wait on roads outside the City while attempting to obtain approval of each route before entering the City. DOT has determined that prenotification is a field totally occupied by the HMRs and that local requirements for advance notice of hazardous materials transportation that have the potential to delay traffic are inconsistent and preempted.[52]

Indemnification and Insurance Filing Requirements Violate Federal Law and Are Preempted Under the Obstacle Test

Code § 394.08 provides that proof of insurance or self-insurance must be provided with the motor carrier's application for a HazMat permit. Likewise, an ''exact copy'' of a carrier's insurance policy must be ''deposited with the City before the issuance of the [Explosives] permit.''[53] In addition, the Explosives Ordinance requires the insurer to give the City ten days notice in writing before the cancellation of any policy.[54]

Not only do the Ordinances not provide for evidence of surety bonds, if this is the method chosen by the motor carrier to satisfy federal responsibility requirements,[55] but it flies in the face of Congressional enactments that have prohibited since January 1, 1994 state ability to require proof of insurance from instate motor carriers unless the state participates in the SSRS (Single State Registration System) program, and then filings can only be required in the carrier's base state.[56] Federal rules also provide that, in the event of a cancellation or change of policy holder, a carrier—not the carrier's insurance agent—must ''supplement its filings as necessary to ensure that current information is on file.''[57] Finally, ''[t]o the extent any State registration requirement imposes obligations in excess of these specific [under Federal law] the requirement is an unreasonable burden on [interstate] transportation.''[58] If Congress so limited the ability of the various states to obtain this information, it stands to reason that Congress likewise intended to bar the over 30,000 local jurisdictions in the County from imposing similar multiple proof-of-insurance requirements.

While comparable insurance requirements are not currently found in the HMRs, it must be remembered that the City's financial responsibility requirements apply only to motor carriers transporting hazardous materials. The HMTA does authorize DOT to issue permits for the transportation of hazardous materials only to motor carriers that, among other things, ''comply with applicable United States motor carrier safety laws and regulations and applicable minimum financial responsibility laws and regulations.''[59] DOT's ''obstacle test''

[44] See attached HazMat Permit Application.

[45] Code § 394.08(e) allows the Fire Chief to grant permits to operate in exception to § 304.06 only if, in the judgment of the Fire Chief, (1) need is shown that the delivery can only occur during restricted hours; and (2) that the transportation is in the ''public interest.''

[46] Code § 387.07(b). ''Unreasonable'' is not defined.

[47] Code § 387.07(d).

[48] Explosives Application, Note 3.

[49] Inconsistency Ruling (IR)–1, 43 *FR* 16954 (April 20, 1978); IR–2, 44 *FR* 75566 (December 20, 1979); IR–3, 46 *FR* 18918 (March 26, 1981); IR–10, 49 *FR* 46645 (November 27, 1984); IR–11, 49 *FR* 46647 (November 27, 1984); IR–14, 49 *FR* 46656 (November 27, 1984); IR–16, 49 *FR* 20872 (May 20, 1985); IR–20, 52 *FR* 24396 (June 30, 1987); IR–23; 53 *FR* 5538 (February 24, 1988); and IR–32, 55 *FR* 36736 (September 6, 1990).

[50] P.L. 101–615, Section 4(b).

[51] Code § 394.08(b).

[52] IR–8(A), 52 *FR* 13000 (April 20, 1987); and IR–6, 48 *FR* 760 (January 6, 1983). *Colo. Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571 (10th Cir. 1991).

[53] Code § 387.09(a).

[54] Code § 387.09(c).

[55] 49 CFR 387.

[56] 49 U.S.C. 14504(b).

[57] 49 CFR 1023.4(C)(2).

[58] 49 CFR 1023.4(h).

[59] 49 U.S.C. 5109(a)(3).

preemption authority provides that non-federal requirements are preempted if ''the requirement of the . . . political subdivision * * * as applied or enforced, is an obstacle to accomplishing and carrying out *this chapter* or a regulation prescribed under this chapter.'' (Emphasis added.) In short, a specific HMR does not have to be the basis from which a determination of obstacle preemption is made.[60]

The DOT has found that non-federal hazardous materials transportation indemnification, bonding, or insurance requirements differing from Federal requirements are inconsistent and preempted.[61] This view has been supported by the courts.[62]

Ordinance Requirement for Vehicle Inspections is Subject to Review Under the Obstacle Test

Code § 387.08(a) requires that ''[v]ehicles used in the transportation of explosives shall be inspected and approved by the Fire Chief or his duly authorized representative before a permit for such transportation may be issued.'' As a permit condition, the inspection is valid for a year. DOT has preempted vehicle inspection requirements in the past because the inspections could not be accomplished with ''unnecessary delay'' within the meaning of 49 CFR 177.853(a) and consequently the challenged requirements failed the obstacle test of the HMTA.[63]

While we have no current evidence that the City is enforcing its vehicle inspection requirement, as such may not be able to satisfy the obstacle test condition ''as applied or enforced,'' we maintain that the requirement should not be allowed to stand. On its face, the requirement contains the elements that, if enforced, would be impossible to satisfy without ''unnecessary delay.'' Moreover, DOT should consider additional facts that would reasonably cause a carrier to (1) decide not to pursue obtaining an Explosives permit because of the disruption to business operations of the inspection requirement, thus causing the carrier to avoid the City when the possibility exists that the carrier would, for whatever reason, exist an interstate highway and shifting the potential risk of such transportation to other jurisdictions; or (2) leave carriers with permits in a perpetual state of uncertainty and confusion about their compliance status with the Code. These facts include the fact that the requirement exists in the Code, that the Code with the vehicle inspection requirement is distributed to persons requesting information from the City about its requirements to transport explosives in the City, and that the City provides no explanation that enforcement of the requirement has been withheld (if it has).

Ordinance Requirement for Multiple Fire Extinguishers is Subject to Review Under Substantively-the-Same-As and/or the Obstacle Test

Code § 387.08(a)(6) requires that all vehicles operating under a Explosives permit in the City ''be equipped with at least two fire extinguishers * * * inspected and approved by the [Fire] Chief, or his duly authorized representative upon the issuance of the permit.'' The federal motor carrier safety regulations (FMCSRs) provide that vehicles used to transport hazardous materials be equipped with one fire extinguisher.[64]

Under a ''substantively-the-same-as test'' review, we would argue that the City's requirement for two fire extinguishers in nothing more than a requirement that substantively differs from the HMRs to qualify a ''container,'' in this case a motor vehicle, to transport packages of hazardous materials that are otherwise in compliance with the HMRs.[65] RSPA has ''established * * * the principle that the HMR provisions concerning hazardous materials transportation * * * accessories; * * * have fully occupied that regulatory field [and that] those subjects are the exclusive province of the Federal Government.''[66]

If an ''obstacle test'' review is used, we argue that 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 that are deemed ''adequate'' only at the discretion of the Fire Chief, 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—neither recognizing comparable federal standards, nor 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).[67]

[60] 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 accouterments 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 regulations. We believe that any non-federal requirement that pertains only to the transportation of hazardous materials is within RSPA's purview to consider under the preemptive authority of the HMTA.

[61] IR–10, 49 *FR* 46645 (November 27, 1984); IR–25, 54 *FR* 16308 (April 21, 1989); and IR–31, 55 *FR* 25571 (June 21, 1990).

[62] *Colorado Pub. Utilities Comm'n* v. *Harmon*, 951 F.2d (10th Cir. 1991).

[63] Preemption Determination 4(R) 58 *FR* 48933 (September 20, 1993), affirmed on reconsideration 60 *FR* 8800 (February 15, 1995).

[64] 49 CFR 393.95.

[65] 49 U.S.C. 5125(b)(1)(E).

[66] IR–22, 52 *FR* 46574, 46582 (December 8, 1987).

[67] The AWHMT cites standards of the FMCSRs as examples of federal rules to which the City requirement 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. Again, we believe it is approriate 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. We believe that any non-federal requirement that pertains only to the transportation of hazardous materials is within RSPA's purview to consider under the preemptive authority of the HMTA. As noted above, non-federal requirements are preempted if under the ''obstacle test'' if the non-federal requirement is an obstacle to accomplishing and carrying out federal hazmat law. With regard to the FMCSRs, federal law provides, as a condition of obtaining a federal permit to transport hazardous materials by highway, that a motor carrier ''comply with applicable United States motor carrier safety laws and regulations * * *.'' [49 U.S.C. 5109(a)(3).] In other words, a specific HMR does not have to be the basis from which a determination of preemption is made. This view is consistent with the findings of the HMTA which states, in part, that non-federal requirements ''which vary from Federal laws and regulations pertaining to the transportation of hazardous materials * * * creat[e] the potential for reasonable hazards in other jurisdictions and confound[] shippers and carriers which attempt to comply [and]that the movement of hazardous materials * * * shall be conducted in a safe and *efficient* manner.'' (Emphasis added). [Pub. L. 101–615 § (2)(3).]

Application Requirement for Vehicle Escort is Subject To Review Under the Obstacle Test

While we find no specific authority for the requirement in the City's Explosives Ordinance, the application for the Explosives permit requires a ''police escort * * * if more than 250 pounds are transported.''[68] The transportation of hazardous materials is a highly regulated enterprise. DOT has established extensive requirements for such transportation, including requirements for vehicle escort if the vehicle carriers certain RAM shipments.[69] The fact that the HMR requires escort vehicles only for RAM shipments shows RSPA's intent not to require them for transport of other hazardous materials. The courts have held that non-federal requirements for escort vehicles are preempted under the obstacle test because such requirements interfere with Federal uniformity in an unsafe and burdensome manner.[70]

Permit Requirements at Odds With Federal Requirements Have the Potential To Delay Transportation and Are Preempted Under The Obstacle Test

Code § 394.08 and § 387.02(g), .04 and .07 provide authority for the City to issue annual permits for the transportation of hazardous materials and explosives on City streets. Copy(ies) of the Permit(s) must be carried on each subject vehicle. As discussed above, both permits require that consignee(s)/Consignor(s) be listed, that insurance information be filed, that routes be declared for approval, and that the types and quantities of hazardous materials to be transported be disclosed. Additionally, the HazMat permit requires that ''emergency contact numbers'' be provided and that clean-up contractor identified. The Explosive permit requires, as discussed above, the additional fire extinguisher, the police escort, and the prenotification of all deliveries.

During the 1990 reauthorization of the HMTA, Congress found that ''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 . . . permitting . . . requirements.'' To address this problem, Congress specifically authorized the federal government to issue permits to motor carriers transporting hazardous materials, and allowed states to issue such permits if the permits, based on a federal rule, were uniform and reciprocal.[71] Congress could have but did not affirm a role for localities in this regulatory field. Congress surely could not have intended to grant localities—over 30,000 localities nationwide—authority it was unwilling, except under limited circumstances, to grant to the states. The City HazMat and Explosives permits apply to selected hazardous materials, involve extensive information and documentation requirements, and contain discretion as to permit issuance. The courts have found that ''[c]umulatively, these factors constitute unauthorized prior restraints on shipments of * * * hazardous materials that are presumptively safe based on their compliance with Federal regulations.''[72] DOT should find these permits preempted under the obstacle test based on the onerousness and the sheer impossibility of fully and efficiently complying with the permits' conditions without causing unnecessary delay in the transportation of hazardous materials.

Conclusion

The City's HazMat and Explosives Ordinances impose requirements on the transportation of certain hazardous materials which we believe are preempted by federal law. The City is enforcing the above suspect requirements. Despite good-faith efforts to deal directly with the City on these matters, the City has not responded to our concerns. We can no longer ignore the determination of the City to enforce its suspect regulatory requirements. Consequently, 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 to: Sharon Sobol Jordan, Director of Law, City of Cleveland, City Hall—Rm. 106, 601 Lakeside Ave., Cleveland, OH 44114.

Respectfully submitted,

Michael Carney,

Chairman

Enclosures

cc: Ed Bonekemper, Asst. Chief Counsel for Hazardous Materials Safety, RSPA—DCC–10, U.S. Department of Transportation, 400 Seventh St., SW, Washington, DC 20590.

Attachments

(A) City HazMat Ordinance § 394.
(B) City Explosives Ordinance § 398.
(C) HazMat Permit Application.
(D) Explosives Permit Application.
(E) Affidavits of: W. Barry Olsen, Freehold Cartage, Inc., Connie Buschur, Metropolitan Environmental, Inc., Susan Camara, Roadway Express, Inc., Karla Simmons, Tri-State Motor Transit Co.
(F) Sample notice of City's current effort to enforce its permit requirement.

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[68] Explosives Permit Application, Note 3.

[69] 49 CFR 173.457(b)(2).

[70] *Chlorine Institute, Inc.* v. *Calif. Hwy. Patrol,* Civ. S–92–396 (E.D. Cal., September 16, 1992), *aff'd,* 29 F.3d 495 (9th Cir. 1994).

[71] 49 U.S.C. 5109 & 5119.

[72] *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n of Nevada,* 909 F.2d 352 (9th Cir. 1990).