benefits of voluntary implementation, and initiate the development of organizational strategies for FOQA information management and use. In the interest of encouraging participation in such a study, and in response to industry expressions of concern over the enforcement ramifications of participating in it, the FAA committed itself at the conference to issuing an interim policy statement concerning the use of FOQA information by the FAA.

In February 1995, the FAA Administrator issued a statement of policy on the use of FOQA information for enforcement purposes. In letters to the President of the Air Line Pilots Association (ALPA) and the President of the Air Transport Association (ATA), the Administrator committed to limitations on the use of FOQA information for enforcement purposes. The letters also stated that, ''The FAA will use information from the demonstration study as well as experience gained as a basis for determining appropriate future action regarding the need for and appropriateness of rulemaking to codify the limitations on the FAA's use of FOQA information.''

The FOQA Demonstration Study has been conducted over the past 3 years in cooperation with major airlines in the U.S. Analysis of the flight data information, which is deidentified at the time of collection, has provided substantial documentation of the benefits of FOQA. The Demonstration Study's findings are very similar to the results obtained by foreign air carriers, many of whom have long experience in the use of this technology. These include documenting unusual autopilot disconnects, GPWS warnings, excessive rotation rates on take-off, unstabilized approaches, hard landings, and compliance with standard operating procedures. They also include use of FOQA data for monitoring fuel efficiency, identifying out-of-trim airframe configurations, enhanced engine condition monitoring, noise abatement compliance, rough runway surfaces and aircraft structural fatigue. These results clearly validate the value of FOQA for safety enhancement.

Based on the results of the Demonstration Study, the FAA has concluded that FOQA can provide a source of objective information on which to identify needed improvements in flight crew performance, air carrier training programs, operating procedures, air traffic control procedures, airport maintenance and design, and aircraft operations and design. The acquisition and use of such information to achieve improvements in these areas clearly enhances safety. The FAA therefore finds that encouraging the voluntary implementation of FOQA programs by U.S. operators is in the public interest.

Policy Statement

The FAA encourages voluntary airline collection of deidentified digital flight data recorder data to monitor line operations on a routine basis, along with the establishment of procedures for taking corrective action that analysis of such data indicates is necessary in the interest of safety. The FAA also recognizes the industry's concerns regarding the use of deidentified FOQA information to undertake enforcement actions. The FAA therefore has determined that the appropriate policy is to refrain from using deidentified FOQA information to undertake enforcement actions except in egregious cases, i.e., those that do not meet the conditions listed in section 9, paragraph c of Advisory Circular 00–46D governing the Aviation Safety Reporting Program. This policy applies only to information collected specifically in a FOQA program that is FAA-approved.

For purposes of this policy, the term ''FOQA program'' means an FAA-approved program for the routine collection and analysis of in-flight operational data by means of a DFDR. The program would include a description of the operator's plan for collecting and analyzing the data, procedures for taking corrective action that analysis of the data indicates is necessary in the interest of safety, procedures for providing the FAA access at the carrier's offices to deidentified aggregate FOQA information, and procedures for informing the FAA as to any corrective action being undertaken. The FAA will be able to monitor safety trends evident in the FOQA data and the operator's effectiveness in correcting adverse safety trends.

Issued in Washington, DC on December 2, 1998.

Jane F. Garvey,

Administrator.

[FR Doc. 98–32483 Filed 12–3–98; 11:27 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Preemption Determination No. PD–14(R) (Docket No. PDA–15(R))

Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials

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

ACTION: Notice of administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

APPLICANT: Association of Waste Hazardous Materials Transporters (AWHMT).

LOCAL LAWS AFFECTED: Houston, Texas, Ordinance No. 96–1249 adopting the 1994 Uniform Fire Code with certain modifications.

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 40 CFR Parts 171–180.

MODES AFFECTED: Highway.

SUMMARY: The Houston Fire Code contains express exceptions for flammable and combustible liquids and other hazardous materials when being transported ''in accordance with'' DOT's regulations. For that reason, the following requirements in the Houston Fire Code do not apply, and are not preempted by Federal hazardous material transportation law, when the transportation of flammable and combustible liquids is subject to the requirements in the HMR: (1) permits for the storage, handling, transportation, dispensing, mixing, blending or using hazardous materials, including the definition of ''hazardous materials'' as part of these permit requirements; (2) the design, construction, or operation of tank vehicles used for flammable or combustible liquids; (3) physical bonding during loading of the vehicle; (4) unattended parking of the vehicle; and (5) the service rating of the fire extinguisher required to be carried on the vehicle.

RSPA denies the request in AWHMT's May 1997 comments to consider a provision limiting the time for unloading flammable or combustible liquids from rail tank cars after delivery, because that requirement is unrelated to the issues raised in AWHMT's application.

FOR FURTHER INFORMATION CONTACT:

Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590–0001, telephone 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

A. Application and Public Notices

In February 1996, AWHMT applied for an administrative determination that Federal hazardous material transportation law preempts certain provisions of the Fire Code of the City of Houston, Texas, as adopted March 15, 1995, in Ordinance No. 95–279. At that time, the Houston Fire Code consisted of the Uniform Fire Code (1991 edition) as modified in a ''Conversion Document.''

In its application, AWHMT stated that the challenged provisions were being applied to tank vehicles that picked up or delivered hazardous materials within the City of Houston (City) and involved: (1) inspections and fees required to obtain an annual permit to store, handle, transport, dispense or use hazardous materials (including flammable and combustible liquids) in excess of specified amounts; (2) the definition of ''hazardous materials''; and (3) additional requirements applicable to tank vehicles used for flammable and combustible liquids. AWHMT separately provided copies of citations issued to operators of cargo tank motor vehicles for loading or unloading corrosive materials within the City without the permit required by the Houston Fire Code.

The test of AWHMT's application was published in the **Federal Register** on March 20, 1996, and interested parties were invited to submit comments. 61 FR 11463. Comments were submitted by the Hazardous Materials Advisory Council (HMAC), the National Tank Truck Carriers, Inc. (NTTC), the Texas Tank Truck Carriers Association, Inc. (TTTC), and the City. Rebuttal comments were submitted by AWHMT. In its comments, the City stated that the Houston Fire Department would be submitting the 1994 edition of the Uniform Fire Code to the Houston City Council for adoption. According to the City, the revised version of the Houston Fire Code would (1) make clear that the permit requirements did not apply to over-the-road (or ''off-site'') transportation of hazardous materials, and (2) modify some of the requirements applicable to tank vehicles used for flammable or combustible liquids.

In February 1997, the City provided a certified copy of Ordinance No. 96–1249, approved by the Houston City Council on November 26, 1996, which (among other matters) amended Ordinance No. 95–279 to adopt the 1994 edition of the Uniform Fire Code together with certain ''City of Houston Amendments.'' Thereafter, RSPA published a notice in the **Federal Register** reopening the comment period on AWHMT's application so that interested parties could provide further information on the current status of the challenged provisions in the Houston Fire Code, and how those provisions are being applied or enforced in light of the exceptions in the Houston Fire Code for ''[t]ransportation of flammable and combustible liquids when in accordance with DOT regulations,'' and ''[o]ff-site hazardous materials transportation in accordance with DOT requirements.'' 62 FR 17281, 17282 (April 9, 1997).

In the April 1997 notice, RSPA also invited interested parties to comment on whether AWHMT's application raised issues concerning the applicability of the HMR that should be considered (in addition to or instead of action on AWHMT's application) in the rulemaking under Docket No. HM–223, ''Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage.'' *See* RSPA's Advance Notice of Proposed Rulemaking, 61 FR 39522 (July 29, 1996), and Notices of Meeting, 61 FR 49723 (Sept. 23, 1996) and 61 FR 53483 (Oct. 11, 1996). Further comments were submitted by the City, AWHMT, and TTTC. The City and AWHMT also submitted rebuttal comments.

Althought the City has asked RSPA to postpone consideration of AWHMT's application pending issuance of a final rule in HN–223, there is no reason for deferral. The circumstances here are not comparable to those in PDs 8(R)–11(R), California and Los Angeles County Requirements Applicable to On-site Handling and Transportation of Hazardous Materials, 60 FR 8774 (Feb. 15, 1995), where RSPA is deferring consideration of petitions for reconsideration. Those proceedings, which involve requirements in the Uniform Fire Code (as adopted by Los Angeles County), raise issues of the applicability of the HMR as applied to the ''on-site'' handling and transportation of hazardous materials. In contrast, no party here disputes that the HMR apply to carriers who pick up or deliver hazardous materials within the City for ''off-site'' transportation. The main issue in this case is whether the Houston Fire Code applies to those carriers and their vehicles—not whether the HMR apply.

AWHMT, the City, and other parties who submitted comments in this proceeding are encouraged to participate fully in HM–223 because of the relationship between the applicability of the HMR and the Uniform Fire Code to transportation-related activities involving hazardous materials.

B. The Challenged Houston Fire Code Requirements

At its outset, the 1994 Uniform Fire Code adopted in the City's Ordinance No. 96–1249 states that it:

> prescribes regulations consistent with nationally recognized good practice for the safeguarding to a reasonable degree of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life and property in the use or occupancy of buildings and premises.

Sec. 101.2 (''Scope''). The Uniform Fire Code includes ''general provisions for safety'' (*e.g.*, access and water supply, fire protection equipment, emergency exists), as well as more specific requirements on ''special occupancy uses'' (*e.g.*, places of assembly and shopping malls, temporary structures, dry cleaners and lumber yards), ''special processes'' (*e.g.*, welding, organic coatings), and ''special equipment'' (*e.g.*, oil-burning equipment, drying ovens, refrigeration). A separate part of the Uniform Fire Code covers ''special subjects,'' including flammable and combustible liquids (in Article 79) and hazardous materials (in Article 80).

Within both Articles 79 and 80 (as well as Article 1) are requirements for permits, and Article 79 contains additional provisions concerning ''tank vehicles and vehicle operations'' relating to flammable and combustible liquids. Because the categories of ''hazardous materials'' include flammable and combustible liquids, *both* Articles 79 and 80 appear to apply to flammable and combustible liquids. These articles of the Uniform Fire Code also contain several exceptions, including the following in Sec. 7901.1.1:

> Transportation of flammable and combustible liquids when in accordance with DOT regulations on file with and approved by DOT.

And in Sec. 8001.1.1:

> Off-site hazardous materials transportation in accordance with DOT requirements.

To the above-quoted language in Sec. 8001.1.1, the City has added that the exception also applies to ''other activities for which local regulation is preempted by federal or state law.'' In the following sections containing the

permit requirements challenged by AWHMT, the City of Houston Amendments also state that, ''A permit is not required for any activity where the requirement of local permits is preempted by federal or state law'': Secs. 105.8.f.3, 108.5.h.1, 7901.3.1, 8001.3.1.

The provisions in the Houston Fire Code covered by AWHMT's application relate to the following:

Permits. A permit is required to:

''Store, handle, transport, dispense, mix, blend or use flammable or combustible liquids'' in excess of certain quantities (Sec. 7901.3.1) and to ''. . . operate tank vehicles . . . and similar facilities where flammable and combustible liquids are producted, processed, transported, stored, dispensed or used'' (Sec. 105.8.f.3.3).

''Store, transport on site, dispense, use or handle hazardous materials'' in excess of certain specified amounts (Sec. 105.8.h.1; *see also* Sec. 8001.3.1 [''store, dispense, use or handle hazardous material'']).

Before a permit is issued, the fire chief ''is authorized, but not required, to inspect and approve the receptacles, vehicles, buildings, devices, premises, storage spaces or areas to be used.'' Sec. 105.4. The City charges a $175 fee ''for the permits and inspections'' applicable to flammable and combustible liquids and other hazardous materials, and additional fees for an inspection performed ''outside of regular hours.'' Secs. 106.1, 106.3.3, Table 106–A.

''Hazardous materials''. The classification and categories of ''hazardous materials,'' as regulated by the Houston Fire Code, are set forth in Appendix VI–A, which states that these categories are based on the regulations of the Department of Labor's Occupational Safety and Health Administration (OSHA) in Title 29 of the CFR. *See also* Secs. 209 and 8001.1.2. The only relevance of the term ''hazardous materials'' to this proceeding appears to be its use in the permit requirement in Secs. 105.8h.1 and 8001.3.1.

Tank Vehicles. Among the requirements in Article 79 specifically applicable to tank vehicles used for flammable or combustible liquids are the following:

Sec. 7904.6.1. Tank vehicles shall be designed in accordance with U.F.C. Standard 79.4 and Section 7904.6.

Sec. 7904.6.3.4. Bonding shall be in accordance with Section 7904.5.2.3 [which requires a metallic bond between the truck and the fill stem or some part of the rack in electrical contact with the fill stem, in order ''to prevent the accumulation of static charges during truck-filling operations * * * through open domes * * *'']].

Sec. 7904.6.5.2.1. Tank vehicles shall not be left unattended at any time on residential streets, or within 500 feet (152.4 m) of a residential area, apartment, or hotel complex, educational facility, hospital or care facility. Tank vehicles shall not be left unattended at any other place that would, in the opinion of the chief, present an extreme life hazard.

Sec. 7904.6.7. Tank vehicles shall be equipped with a fire extinguisher having a minimum rating of 2–A, 20–B:C. During unloading of the tank vehicle, the fire extinguisher shall be out of the carrying device on the vehicle and shall be 15 feet (4572 mm) or more from the unloading valves.

In adopting the 1994 edition of the Uniform Fire Code, the City reduced the number of fire extinguishers required on tank vehicles from two (in former Sec. 79.1207) to one; it also eliminated a provision challenged by AWHMT, requiring ''NO SMOKING'' and ''FLAMMABLE'' signs and other identification on tank vehicles (former Sec. 79.1203(n)).

In its May 23, 1997 comments, AWHMT asked RSPA to consider an additional requirement that rail tank cars containing flammable or combustible liquids ''shall be unloaded as soon as possible after arrival at point of delivery'' and within 24 hours of being connected for transfer operations, unless otherwise approved by the fire chief. Sec. 7904.5.4.3. AWHMT noted that the same tank car unloading requirement in the Uniform Fire Code, as adopted by Los Angeles County, was found to be preempted in PD–9(R), Los Angeles County Requirements Applicable to the Transportation and Handling of Hazardous Materials on Private Property, 60 FR 8774, 8783, 8788 (Feb. 15, 1995). Petitions for reconsideration of that decision and the other determinations made in PDs 8(R)–11(R) are being deferred pending RSPA's consideration of the scope of the HMR in HM–223.

Unlike the challenge to the Los Angeles County requirements, however, neither AWHMT nor any other party has submitted any information as to how Sec. 7904.5.4.3 is being applied or whether there are practical problems in complying with the 24-hour unloading requirement. AWHMT itself acknowledged that the tank car unloading requirement in Sec. 7904.5.4.3 applies to the recipient or consignee of a shipment of hazardous materials in a tank car and, in this respect, differs from the other ''requirements imposed on carriers and equipment under the care, control and custody of carriers'' involved in AWHMT's application.[1]

RSPA believes that the City and other parties who submitted comments understood, as RSPA did, that AWHMT's application challenged requirements in the Houston Fire Code only as applied to motor carriers that pick up or deliver hazardous materials within the City. Indeed, NTTC objected to ''the City's permit system [because] it involves only cargo tank vehicles.'' In the absence of additional information, RSPA cannot add to its prior discussion in PDs 8(R)–11(R) on this requirement, and RSPA is denying AWHMT's belated request to consider the 24-hour tank car unloading requirement because that requirement is unrelated to the issues raised in AWHMT's application.

C. The HMR and Federal Preemption

Federal hazardous material transportation law and the MHR apply to the transportation of hazardous materials in commerce. ''Transportation'' is defined as ''the movement of property and loading, unloading, or storage incidental to the movement.'' 49 U.S.C. 5102(12). With respect to motor carriers, ground transportation is ''in commerce'' when it takes place ''on, across, or along a public road,'' and the HMR ''apply to the ground transportation of hazardous material on, across, or along a public road, including loading, unloading and storage incidental to that transportation.'' PDs 8(R)–11(R), 60 FR at 8777.[2] In the terminology used in PDs 8 (R)–11(R), the HMR unquestionably apply to ''off-site'' transportation; the issues that RSPA hopes to resolve in HM–223 concern the scope of ''transportation'' and the ''on-site'' activities to which the HMR apply.

The HMR do not contain requirements for permits, and regulations have not yet been issued by DOT to implement the provisions of 49 U.S.C. 5109 regarding Federal motor carrier safety permits. In Part 173 of 49 CFR, the HMR contain specific rules for classifying hazardous materials (in some cases differently than OSHA), and, at 49 CFR 172.101, there is a lengthy table listing the materials designated as hazardous for the purpose of transportation.

[1] The City also points out that the current tank car unloading requirement (in the 1994 Uniform Fire Code) is unchanged from the requirement in Section 79.809(c) of the 1991 Uniform Fire Code and could have been raised in AWHMT's application.

[2] As of October 1, 1998, the HMR apply to all transportation of hazardous materials by motor vehicle. 49 CFR 171.1(a)(1). Previously, intrastate motor carriers of hazardous materials other than hazardous wastes, hazardous substances, marine pollutants, and flammable cryogenic liquids in portable tanks and cargo tanks were regulated only by similar requirements in State or local law (and Texas has adopted the HMR as State law). *Id*.

The HMR include specifications for the construction of cargo tank motor vehicles used to transport flammable liquids, *see* 49 CFR 178.345–178.348, but authorize the use of nonspecification cargo tank motor vehicles for the domestic highway transportation of combustible liquids. 49 CFR 173.150(f). The HMR contain specific requirements for physical bonding during the transfer of hazardous materials to or from a cargo tank. 49 CFR 177.837(c). The HMR incorporate by reference requirements in the Federal Motor Carrier Safety Regulations concerning unattended parking of a motor vehicle containing hazardous materials, 49 CFR 397.5(c), and fire extinguishers on a power unit used to transport hazardous materials. 49 CFR 393.95(a)(2)(i).[3]

Strong Federal preemption is a central feature of Federal hazardous material transportation law, contained in 49 U.S.C. 5101 *et seq.* (Which codified and replaced the former Hazardous Materials Transportation Act (HMTA), Pub. L. 93–633, 88 Stat. 2156, amended by Pub. L. 101–615, 104 Stat. 3244). 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 and 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 preemption provisions. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

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 HMTA. 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 about any of the following subjects, that is not ''substantively the same as'' a provision of Federal hazardous material transportation law or a regulation prescribed under that law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

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

Subsection (g)(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 relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing which have been delegated to FHWA. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the **Federal Register.** Following the receipt and consideration of written comments, RSPA publishes its determination in the **Federal Register.** *See* 49 CFR 107.209(d). A short period of time is allowed for filing petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

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

[3] As provided in 49 CFR 177.804, motor carriers of hazardous materials ''and other persons subject to this subpart shall comply with 49 CFR parts 390 through 397 (excluding §§ 397.3 and 397.9) to the extent those regulations apply.''

II. Discussion

The focus of the comments in this proceeding has been the provisions in the Houston Fire Code for a permit—including the related inspection and fee requirements—and their application to ''off-site'' transportation. RSPA has repeatedly found that a State or local permit requirement is not *per se* preempted; rather, ''a permit itself is inextricably tied to what is required in order to get it.'' IR–2, 44 FR at 75570–71; *see also* IR–3, Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City, 46 FR 18918, 18923 (Mar. 23, 1981), action on appeal, 47 FR 18457 (Apr. 29, 1982); IR–20, Triborough Bridge and Tunnel Authority Regulations Governing Transportation or Radioactive Materials and Explosives, 52 FR 24396, 24397 (June 30, 1987); and IR–28, City of San Jose, California, Restrictions on Storage of Hazardous Materials, 55 FR 8884, 8890 (Mar. 8, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992).

According to the initial comments submitted by the City and TTTC, until the effective date of Ordinance No. 95–279, Houston had a simple, straightforward exception: the City did not apply its fire code requirements for permits or inspections to any tank truck that was operated within the City for less than 30 days. Beginning in January 1996, however, TTTC noticed a significant increase in citations issued to tank vehicles for failing to have the hazardous materials permit required by Section 4.108 of the Houston Fire Code. According to TTTC, the City was applying the Fire Code adopted in Ordinance No. 95–279 to require a permit for every tank vehicle operating within the City that was ''not on the hazardous material route or one of the main arteries traveling through the Houston area, such as Highway 59.''

Although the exception for ''off-site hazardous materials transportation in accordance with DOT requirements'' was contained in former Sec. 80.101(a) of the 1991 edition of the Uniform Fire Code, TTTC states that the City was interpreting the term ''off-site'' as applying only to the designated hazardous materials routes and main arteries through the City. Because the pick-up or delivery of any material presumably takes place at a location off the designated hazardous materials routes and main arteries, this interpretation of ''off-site'' meant that the City was applying its Fire Code requirements to any vehicle that picked up or delivered hazardous materials within the City—or stopped at a point off the designated hazardous materials routes and main arteries for rest, fuel, food, or other purposes. TTTC states that the term ''off-site'' should apply to ''vehicles making deliveries over-the-road'' and that these off-site movements should be completely exempt from the permit and inspection requirements under the Houston Fire Code adopted in Ordinance 96–1249. TTTC contends that the Houston Fire Code should apply only to ''on-site'' transportation, or when ''a vehicle is used *exclusively* on the *premises* of a facility'' (emphasis in original).

TTTC states that, following AWHMT's application, the City appears to have stopped applying its permit and inspection requirements to tank vehicles that simply picked up or delivered hazardous materials within the City. AWHMT states that it has no evidence ''that the City is continuing to enforce its permit and other hazardous materials requirements on motor carriers,'' although it believes that the withholding of enforcement may be ''contingent on the outcome of this proceeding.''

In the conclusion of its initial comments, the City stated that the ''express exceptions for DOT-regulated activities'' in Secs. 7901.1.1 and 8001.1.1 mean that ''the Fire Code should not be read as applicable to over-the-road (off-site) transportation * * *'' The City elaborated that ''permits will not be required for DOT-regulated activities''; the ''hazardous materials classifications [in the Houston Fire Code] * * * are not applicable to activities regulated by the DOT''; and that provisions in the Fire Code setting design and construction requirements for tank vehicles apply only to ''off-road (or on-site) transportation of flammable or combustible liquids not regulated by DOT.''

In its more recent comments, the City now confirms that it does not require permits, apply its definition of ''hazardous materials,'' or apply its tank design requirements to vehicles ''meeting DOT requirements.'' (The City also states that its ''30-calendar-day requirement is no longer in effect.'') This clearly appears to be the proper interpretation of the exceptions in Secs. 7901.1.1 and 8001.1.1, which apply to the entire contents of Articles 79 and 80—not just the permit requirements.

Although the City states that the provisions in Article 79 concerning physical bonding, unattended parking, and fire extinguishers ''are not affected by the [e]xceptions'' in Secs. 7901.1.1 and 8001.1.1, that conclusion is in direct conflict with the plain language of these exceptions. It is not possible to read these exceptions as applying to some, but not all, of the Houston Fire Code requirements on flammable and combustible liquids (Article 79) and hazardous materials (Article 80). If, because of these exceptions, the permit and inspection requirements in these articles do not apply to a cargo tank motor vehicle that is subject to regulation under the HMR, all the other requirements in these articles (including those on physical bonding, unattended parking, and fire extinguishers) also cannot apply. In the absence of more detailed comments on these other requirements—and specific information that the City is actually enforcing these requirements against carriers that the City does not require to obtain permits or undergo inspections—RSPA must assume that the City applies the exceptions in Secs. 7901.1.1 and 8001.1.1 in a consistent manner.[4]

Because the City now correctly equates the exceptions in the Houston Fire Code for vehicles ''meeting DOT requirements'' with ''subject to regulation by DOT'' under the HMR, AWHMT's challenges to these requirements have become moot. Federal hazardous material transportation law does not preempt non-Federal requirements that do not apply to ''transportation in commerce.'' RSPA agrees with the City's statements that, when it applies the Houston Fire Code to ''motor vehicles that are transporting hazardous materials exclusively on private property,'' its local provisions are not preempted because ''transportation that takes place entirely on private property is not transportation ''in commerce' '' Quoting from PD–9(R), 60 FR at 8785; *see also* PD–10(R), 60 FR at 8792.[5]

[4] As a general matter, an inconsistent or erroneous interpretation of a non-Federal regulation should be addressed in the appropriate State or local forum, because ''isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent'' with Federal hazardous material transportation law. 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), quoted in 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).

[5] Certain activities that take place on private property, including the ''loading, unloading, or storage [of hazardous material] incidental to the movement'' of that material in commerce, fall within the scope of ''transportation'' in commerce 49 U.S.C. 5102(12), and are subject to regulation under the HMR.*See* PD–9(R), 60 FR at 8788, 8789 (a 24-hour limit for unloading a tank car is preempted because it is not substantively the same as Federal requirements, and a prohibition against unloading hazardous materials in accordance with a DOT exemption creates an obstacle to

III. Ruling

Because the following Houston Fire Code sections do not apply when the transportation of flammable and combustible liquids is subject to regulation under the HMR, these requirements are not preempted by Federal hazardous material transportation law:

105.4, 105.8.f.3, 105.h.1, 106.1, 7901.3.1, and 8001.3.1., concerning permits and inspections;

209 and 8001.1.2, concerning the definition of ''hazardous materials'' (as relevant to the permit requirements in Secs. 105.8.f.3 and 8001.3.1);

7904.6.1, concerning requirements for the design and construction of tank vehicles;

Sec. 7904.6.3.4, concerning physical bonding during truck-filling operations to prevent the accumulation of static charges;

Sec. 7904.6.5.2.1, prohibiting unattended parking of tank vehicles used for flammable or combustible liquids at specific locations or ''at any other place that would, in the opinion of the chief, present an extreme life hazard''; and

Sec. 7904.6.7, requiring a fire extinguisher with a minimum rating of 2–A, 20–B:C on board a tank vehicle used for flammable or combustible liquids.

IV. Petition for Reconsideration/ Judicial Review

In accordance with 49 CFR 107.211(a), ''[a]ny person aggrieved'' by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register.** Any party to this proceeding may seek review of RSPA's decision ''in an appropriate district court of the United States . . . not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register,** the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 40 CFR 107.211(d).

Issued in Washington, DC, on November 30, 1998.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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accomplishing and carry out the HMR). The City is free to adopt the HMR's requirements as local regulations and apply those consistent requirements to the ''off-site'' transportation of hazardous materials, including flammable and combustible liquids.

DEPARTMENT OF THE TREASURY

Customs Service

Extension of National Customs Automation Program Test Regarding Remote Location Filing

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces Customs second extension of the second prototype of Remote Location Filing (RLF). This notice also invites public comments concerning any aspect of the current test, informs interested members of the public of the eligibility requirements for voluntary participation, describes the basis for selecting participants, and establishes the process for developing evaluation criteria. To participate in the prototype test, the necessary information, as outlined in this notice, must be filed with Customs and approval granted. It is important to note that resources expended by the trade and Customs on these prototypes may not carry forward to the final program.

Based on our experience in the extension of the second prototype of RLF, we have made modifications to the sections detailing Eligibility Criteria, Prototype Two Applications, and Misconduct. The changes to the Prototype Two Applications will affect parties who wish to apply for participation in the extension of the second prototype of RLF. Current participants may continue their participation without reapplying.

EFFECTIVE DATE: The extension of the second prototype will commence no earlier than January 1, 1999, will continue, and be concluded, no earlier than December 31, 1999, by a notice in the **Federal Register**. Comments concerning any aspect of the remote filing prototype test must be received on or before [insert date 30 days after date of publication of this document in the **Federal Register**].

ADDRESSES: Written comments regarding this notice, and information submitted to be considered for voluntary participation in the prototype should be addressed to the Remote Filing Team, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Room 5.2 A, Washington, DC 20229–0001.

FOR FURTHER INFORMATION CONTACT: For systems or automation issues: Joseph Palmer (202) 927–0173, Jackie Jegels (301) 893–6717, or Patricia Welter (305) 869–2782.

For operational or policy issues: Jennifer Engelbach (202) 927–2293, or Bonnie Brigman (202) 927–0294.

SUPPLEMENTARY INFORMATION:

Background

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Pub. L. 103–182, 107 Stat. 2057 (December 8, 1993), contains provisions pertaining to Customs Modernization (107 Stat. 2170). Subtitle B of title VI establishes the National Customs Automation Program (NCAP), an automated and electronic system for the processing of commercial importations. Section 631 in Subtitle B of the Act creates sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414). These define and list the existing and planned components of the NCAP (Section 411), promulgate program goals (Section 412), provide for the implementation and evaluation of the program (Section 413), and provide for remote location filing (Section 414).

The Remote Location Filing (RLF) prototype will allow an approved participant to file electronically a formal or informal consumption entry with Customs from a location within the United States other than the port of arrival (POA), or from within the port of arrival with a requested designated exam site (DES) outside of the POA. Section 101.9(b) of the Customs Regulations (19 CFR 101.9(b)), implements the testing of NCAP components. See, T.D. 95–21 (60 FR 14211, March 16, 1995).

Since June 1994, the Customs Remote Team has shared the Customs RLF concept through many public meetings and concept papers, as well as posted information on the Customs Electronic Bulletin Board (CEBB), the Customs Administrative Message System, and the Customs Web Site on the Internet at ''http://www.customs.treas.gov/rlf.'' Pursuant to § 101.9, Customs Regulations, Customs has been testing the RLF concept.

On April 6, 1995, Customs announced in the **Federal Register** (60 FR 17605) its plan to conduct the first of at least two prototype tests regarding RLF. The first test, Prototype One, began on June 19,