

D. Financial Plan

The Financial Plan must demonstrate that sufficient funding is available to successfully complete all aspects of the proposed project as described in the Technical Plan.

1. The Financial Plan must include a clear identification of the proposed funding for the proposed deployment, and a commitment to provide a minimum twenty percent (20%) matching share that must be from non-Federally derived funding sources. All financial commitments from both the public and private partners, including any details of revenue sharing, must be documented.

2. The Financial Plan must include a sound financial approach to ensure the timely deployment and the continued long-term operation and management of the system without continued reliance on Federal funding. The Financial Plan must include documented evidence of continuing fiscal capacity and commitment.

3. The proposed project must include corresponding public and/or private investments that minimize the relative percentage and amount of Federal funds.

Authority: 23 U.S.C. 315; Sec. 5117(b)(3) of Public Law 105-178, as amended; 49 CFR 1.48.

Issued on: May 25, 2001.

Vincent F. Schimmoller,

Deputy Executive Director.

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Federal Motor Carrier Safety Administration

[Docket No. RSPA-98-3579 (PD-20(RF))]

Cleveland, Ohio Requirements for Transportation of Hazardous Materials

AGENCY: Research and Special Programs Administration (RSPA) and Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of administrative determination of preemption.

APPLICANT: Association of Waste Hazardous Materials Transporters (AWHMT) and American Trucking Associations, Inc. (ATA).

LOCAL LAWS AFFECTED: Cleveland Consolidated Ordinances (City Code), Chapters 387 and 394, and uncodified requirements for advance notification

and police escort of explosives shipments.

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

MODES AFFECTED: Highway.

SUMMARY: The following requirements are preempted by 49 U.S.C. 5125(a)(2) because they create obstacles to the accomplishment and carrying out of Federal hazardous material transportation law and the HMR:

1. Cleveland City Code section 394.06(b) prohibiting the transportation of hazardous materials in the Downtown Area between 7 a.m. and 6 p.m., except Saturday and Sunday, preempted with respect to radiopharmaceuticals only.

2. Cleveland's uncodified requirements for a transporter of explosives to notify the Fire Prevention Bureau 24 hours in advance of any pick-up or delivery, to specify the route to be taken within the City, and to have a police escort if more than 250 pounds are transported.

3. Cleveland City Code sections 387.08(b) and 394.07(b) specifying separation distance requirements between vehicles transporting explosives or other hazardous materials.

There is insufficient information in the record to find that the weekday time restriction in City Code section 394.06(b) is preempted with respect to hazardous materials other than radiopharmaceuticals.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration (Tel. No. 202-366-4400), or Joseph Solomey, Office of the Chief Counsel, Federal Motor Carrier Safety Administration (Tel. No. 202-366-1374), U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

In this determination, FMCSA and RSPA consider whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts requirements of the City of Cleveland, Ohio (City) that:

—Hazardous materials may not be transported within the "Downtown Area" of the City between 7 a.m. and 6 p.m. except Saturdays and Sundays, unless the Fire Chief grants an exception on a showing that delivery or pick-up of the hazardous material "can be practicably made" only during the prohibited time period and

transportation of this material is in "the public interest";

—A carrier of explosives must (1) notify the Fire Department "24 hours in advance of all deliveries" of explosives within the City, (2) specify the route to be taken within the City in accordance with the authority of the City's Director of Public Safety (or his representative) to designate the route to be taken within the City, and (3) have a police escort if more than 250 lbs. of explosives are transported within the City; and

—A vehicle transporting explosives or other hazardous materials must maintain a certain distance from any other vehicle transporting explosives or other hazardous materials, *i.e.*, 500 feet between vehicles transporting explosives and 300 feet between vehicles transporting hazardous materials.

This proceeding is based on two notices published in the **Federal Register** on September 17, 1998 (63 FR 49804), and June 30, 1999 (64 FR 35239). The first notice invited interested parties to comment on an application by AWHMT in March 1998 challenging a broad set of the City's requirements for:

—A permit to transport hazardous materials when a placard is required, permit fees, proof of insurance, permissible routes and advance notice of the route to be used, and the weekday time restrictions in the Downtown Area; and

—A permit to transport any amount of explosives, permit fees, proof of insurance, routing and prenotification of shipments, vehicle inspections, the number of fire extinguishers on the vehicle, and a police escort (for any shipment of more than 250 lbs. of explosives).

In response to the September 17, 1998 notice, comments were submitted by the City, AWHMT, and the following additional parties: the Public Utilities Commission of Ohio (PUCO), Association of American Railroads, Hazardous Materials Advisory Council (HMAC), Institute of Makers of Explosives, National Paint & Coatings Association (NPCA), Ohio Environmental Service Industries, and Roadway Express.

The City and PUCO initially asked for a 60-day extension of the opening comment period in order to allow them to further examine with AWHMT the City's requirements and consider changes that might avoid the need for RSPA and FMCSA to make determinations in this proceeding. These requests were denied, but the City

and AWHMT were encouraged to continue their discussions, which resulted in the development of proposed amendments to many of the City Code provisions initially challenged by AWHMT. In an April 15, 1999 letter, AWHMT asked RSPA and FMCSA to defer consideration of the City's requirements on permits, permit fees, vehicle inspections, and fire extinguishers. With some qualifications, the City concurred. As a result, in the June 30, 1999 **Federal Register** notice, RSPA and FMCSA invited interested parties to submit further comments on the following requirements: the weekday time restrictions for hazardous materials; the prenotification, routing, and escort requirements for explosives; and the vehicle distance separation requirements.¹

In response to the June 30, 1999 notice, further comments were submitted by the City, AWHMT, Mallinckrodt, Inc., Radiopharmaceutical Shippers and Carriers Conference (RSCC), and Roadway Express.

In March 2000, a representative of ATA advised that ATA had assumed AWHMT's role in this proceeding because AWHMT (formerly affiliated with ATA) had been dissolved. In November 2000, the City's Law Department submitted its latest draft of proposed revisions to Chapters 387 and 394 of the City Code, which appears to resolve many of the issues raised in AWHMT's application. RSPA and FMCSA understand that, if this draft is ultimately adopted, the City would:

- Retain its current weekday time restrictions for hazardous materials;
- Require persons within the City who ship or receive explosives (rather than the transporter of explosives) to obtain a permit and also (1) provide 24-hour advance notice to City Police of the proposed route and time and place that the shipment will originate or be received (plus updates of any changes), and (2) require the transporter to both comply with the route designated by the Fire Chief and cooperate with any police escort within the City; and
- Modify its current 300-foot separation distance requirement to apply to all vehicles transporting hazardous materials, except when at a destination or point of origin, and

¹ AWHMT's April 15, 1999 letter and the City's response on April 30, 1999 were set forth in the June 30, 1999 notice. Because the comment period was reopened, the City's prior objection to the failure to extend the opening comment period and its objection to considering its distance separation requirement (which was not challenged in AWHMT's original application) are considered moot.

eliminate the separate requirement specifying a 500-foot separation distance for vehicles transporting explosives.

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 tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

These two paragraphs set forth the “dual compliance” and “obstacle” criteria that 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 Section 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 DOT prescribes regulations on standards to be applied by States and Indian tribes in establishing requirements on highway routing of hazardous materials,

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

In addition, 49 U.S.C. 5125(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.

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

² DOT's regulations on State and Indian tribe requirements for highway routing of hazardous materials are set forth in two subparts of 49 CFR part 397. Subpart D, adopted September 24, 1992, applies to radioactive materials and sets forth the same requirements originally issued by RSPA in 1981. 57 FR 44129. Subpart C applies to non-radioactive hazardous materials and became effective on November 14, 1994. 59 FR 51824 (Oct. 12, 1994). The latter provides that only designations established or modified on or after November 14, 1994 must comply with the standards issued under 49 U.S.C. 5112(b). 49 CFR 397.69(a).

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 section 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 that expanded the original preemption provisions. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). (In 1994, Congress revised, codified and enacted the HMTA "without substantive change," at 49 U.S.C. Chapter 51. Pub. L. 103-272, 108 Stat. 745.) To also achieve safety through consistent Federal and State requirements, Congress has authorized DOT to make grants to States "for the development or implementation of programs for the enforcement of regulations, standards, and orders" that are "compatible" with the highway-related portions of the HMR. 49 U.S.C. 31102(a). In this fiscal year, \$155 million is available for grants to States under the Federal Motor Carrier Safety Assistance Program. See 49 CFR Parts 350 & 355 and the preamble to FMCSA's March 21, 2000 final rule, 65 FR 15092, 15095-96.

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. This administrative determination replaced RSPA's process for issuing advisory inconsistency rulings (IRs) under the "dual compliance" and "obstacle" criteria now explicitly set forth in § 5125(a).

The Secretary of Transportation has delegated to FMCSA the authority to make determinations of preemption that concern highway routing and to RSPA the authority to make such determinations concerning all other hazardous materials transportation issues. 49 CFR 1.53(b), 1.73(d)(2). In this determination, FMCSA's Administrator has addressed the highway routing issues, and RSPA's Associate Administrator for Hazardous Materials Safety has addressed the 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 be published in the **Federal Register**. Following receipt and

consideration of written comments, RSPA and FMCSA publish their determination in the **Federal Register**. See 49 CFR 107.209, 397.211. A short period of time is allowed for filing petitions for reconsideration. 49 CFR 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, the Fifth Amendment or other provisions 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, or whether a fee is "fair" within the meaning of 49 U.S.C. 5125(g)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA and FMCSA are guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (August 10, 1999)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which RSPA and FMCSA have implemented through their regulations.

III. Discussion

A. General Arguments on "Traditional State Control"

In its opening comments, the City stated that its requirements on transporting hazardous materials are not preempted because they "concern areas of traditional state control." In later comments, the City argued that "environmental regulation, including hazardous material regulation and traffic safety, has long been recognized as an historic police power and an area of traditional state control," citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), and *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990), *aff'd sub nom.*, *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992). The City urged DOT to follow *Commonwealth of Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890,

895 (D.C. Cir. 1996), in which the Court of Appeals stated that there is an "established presumption against preemption in matters of traditional state control." The City also has taken the position that, under the standard in 49 CFR 397.3, "traffic control regulations" are preempted only when they are "at variance with specific regulations of the Department of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint."

AWHMT responded that the transportation of hazardous materials is not an area traditionally within State or local control but, rather, was reserved to the Federal Government under the Commerce Clause of the Constitution. It stated that Congress assigned to DOT, rather than the Environmental Protection Agency (EPA) or the States, "the regulation of hazardous materials in transportation," including intrastate commerce. AWHMT also stated that 49 CFR 397.3 is "dated" and of questionable relevance because it "does not even demand that the non-federal operating rules have a safety nexus."

References to areas of "traditional state control" and a "presumption" against finding preemption provide little help in resolving issues of preemption under Federal hazardous material transportation law. It is undisputed that Congress has the power to "regulate commerce * * * among the several States," under the Commerce Clause of the Constitution. The Federal hazardous material transportation law was enacted under that authority to promote safety through greater uniformity in the regulation of hazardous materials in transportation. At the same time, RSPA has noted that

The history of the Hazardous Materials Regulations for highway carriage has been one of an accommodation of Federal and State interests that is pragmatic and that recognizes, as have the courts, that local interest in highway safety is well established and proper, and that a local exercise of police powers in support of that interest is not to be lightly displaced.

IR-1, New York City Health Code, 43 FR 16954-55 (Apr. 20, 1978).

In sum, the legitimate State and local interests in traffic safety do not displace DOT's authority to regulate the transportation of hazardous materials in commerce and to find, by regulation or other process, that a non-Federal requirement on transportation conflicts with the Federal hazardous material transportation law and is preempted.

The traditional State and local role in "environmental regulation" focuses primarily on limits or liabilities on the

discharge of pollutants, including their disposal, rather than requirements affecting the movement of transportation vehicles. The Supreme Court recently noted that it has “upheld state laws imposing liability for pollution caused by oil spills.” *United States v. Locke*, 529 U.S. 89, 106 (2000). However, “there is no beginning assumption” that a State’s laws directly affecting commerce constitute “a valid exercise of its police powers,” even when those State laws are designed to prevent or minimize damage to the environment. *Id.* at 108.

Congress provided that hazardous substances designated by EPA under 42 U.S.C. 9601(14) must be listed and regulated as hazardous materials under Federal hazardous material transportation law. 42 U.S.C. 9656(a). Moreover, EPA was directed to issue regulations on transporters of hazardous waste, “after consultation with the Secretary of Transportation and the States,” that are “consistent with” DOT’s regulations under Federal hazardous material transportation law. 42 U.S.C. 6923(a), (b). State regulations on transportation of hazardous waste must be consistent with the HMR, because a State program may not be approved unless it is “equivalent to” and “consistent with” EPA’s hazardous waste program. 42 U.S.C. 6926(b). *See also* PD–12(R), 60 FR 62527, 62532–34 (Dec. 6, 1995), decision on petition for reconsideration, 62 FR 15970, 15973 (Apr. 3, 1997), complaint for judicial review dismissed, *State of New York v. U.S. Dep’t of Transp.*, 37 F. Supp. 2d 152, 158 (N.D.N.Y. 1999) (“EPA’s authorization of a state RCRA program is not the equivalent of ‘authoriz[ation] by another law of the United States’”).

The decisions in the *Huron Portland Cement* and *National Solid Wastes Management Ass’n* cases cited by the City provide no specific guidance here. In the former, the Supreme Court simply held a city smoke abatement ordinance could be applied to a ship docked at the Port of Detroit. In the latter case, the Seventh Circuit recognized that “Congress has in some specific instances expressed its intent to preempt particular kinds of state and local [environmental] legislation,” 918 F.2d at 673, including the particular State laws on the training, testing and licensing of hazardous waste site workers that are not part of a plan approved by the Secretary of Labor.

The requirement in 49 CFR 397.3 for vehicles transporting hazardous materials to comply with local laws may not be read too broadly. In a 1976 interpretation set forth in Appendix C to IR–1, 43 FR at 16961, DOT’s General

Counsel explained that this section has a parallel in 49 CFR 392.2 applicable to all commercial motor vehicles operated in interstate commerce. The only purpose of restating this requirement in § 397.3 was to make it apply to “intrastate movements of hazardous materials by interstate carriers.” *Id.* at 16962.

Local traffic controls may be “presumed to be valid,” even when applied only to vehicles transporting hazardous materials. IR–23, City of New York Regulations Governing Routing and Time Restrictions on Transportation of Hazardous Materials, 53 FR 16840, 16845 (May 11, 1988); IR–32, Montevallo, Alabama Ordinance on Hazardous Waste Transportation, 55 FR 36736, 36744 (Sept 6, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992). However, that presumption is not conclusive. Under the obstacle test for preemption,

The critical issue is the actual effect of the requirement in question on overall public safety. The argument that this issue is foreclosed by the presumption of validity of local laws is both circular, in that it takes the inquiry back to its starting point, and irrelevant, in that the issue is the effect on safety as a matter of fact, rather than as a matter of legal presumption.

IR–3, City of Boston Rules Governing Transportation of Certain Hazardous Materials, decision on appeal, 47 FR 18457, 18459 (Apr. 29, 1982).

Thus, § 397.3 does not give States or localities blanket authority to impose requirements on vehicles transporting hazardous materials that do not apply to other vehicles of similar type (e.g., size and weight) that are not transporting hazardous material. *See* IR–20, Triborough Bridge and Tunnel Authority Regulations Governing Transportation of Radioactive Materials and Explosives, 52 FR 24396, 24401 (June 30, 1987), corrections, 52 FR 29468 (Aug. 7, 1987) (a weight limitation that “applies only to [hazardous] materials and their container rather than to the entire vehicle and its contents, is not a *bona fide* traffic control measure”). Nor can § 397.3 “be read more broadly than to require compliance with State and local laws, ordinances, and regulations relating to the ‘mechanics of driving and handling of vehicles.’” IR–1, 43 FR at 16962. A local restriction that is “tantamount to a ban on the transportation of [hazardous] materials through or in the local jurisdiction cannot be considered to be related to the mechanics of driving and handling of vehicles.” *Id.*

The “ultimate task in any pre-emption case is to determine whether state

regulation is consistent with the structure and purpose of the statute as a whole.” *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. at 98. One must look to “the provisions of the whole law, and to its object and policy.” *Id. Accord, United States v. Locke*, 529 U.S. at 108 (“we must ask whether the local laws in question are consistent with the federal statutory structure”).

The purpose of the Federal hazardous material transportation law “is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous materials in commerce * * *.” 49 U.S.C. 5101. To accomplish that purpose, Congress has declared that a State or local requirement is preempted when it “is an obstacle to accomplishing and carrying out” that law or the regulations issued thereunder. 49 U.S.C. 5125(a)(2). RSPA and FMCSA cannot agree with the conclusion of the Court of Appeals in the *Commonwealth of Massachusetts* case that the “obstacle” test for preemption only applies to non-Federal requirements “with which a party cannot comply if it complies with HMTA, or [non-Federal] rules that otherwise pose an obstacle to fulfilling explicit provisions, not general policies, of HMTA.” 93 F.3d at 895.

With this background, RSPA and FMCSA turn to specific requirements in the City Code on transporting explosives and other hazardous materials.

B. Weekday Time Restrictions in the Downtown Area

The City’s weekday time restrictions are contained in City Code section 394.06(b) and apply to hazardous materials being picked up or delivered in the “Downtown Area,” defined as

The area, not including the interstate highways, bounded by Lake Erie on the North, the Cuyahoga River on the West, Interstate 71 and the Inner Belt on the South and East, and Interstate 90/Route 2 on the North-East to and including the Eastern boundary of Burke Lakefront Airport.

City Code section 394.06(c).³ At present, the 7 a.m.–6 p.m. weekday prohibition

³ City Code section 394.06(a) separately prohibits the use of City streets (other than interstate highways) when there is “neither a point of origin nor destination (delivery point)” within the City or within one mile of the City limits, unless the Fire Chief determines that “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.” Interstate highways within the City’s Downtown Area are not allowed to be used for through transportation of placarded amounts of hazardous materials through Cuyahoga and its adjacent counties. *See* FMCSA’s notice, Transportation of Hazardous Materials; Designated Preferred, and

applies only when placards are required on the vehicle or freight container under 49 CFR part 172, subpart F. City Code sections 394.02, 394.05. The proposed changes to Chapter 394 would make these time restrictions (and all other requirements in Chapter 394) applicable to vehicles that operate solely within the City when they contain hazardous materials for which labels and shipping papers are required by the HMR.

The Fire Chief may grant an exception to the weekday time restrictions on a showing that a delivery or pick-up "can be practically made" only during the restricted times and "[t]ransportation of the hazardous material is in the public interest." City Code section 394.08(e). The City stated that it grants two or three exceptions every year, usually for deliveries of fuel, and that the only occasion on which the Fire Chief denied an exception was for lack of information.⁴ The City also stated that the carrier may choose its route within the City, so long as it complies with the requirement in section 394.06(d) to "use interstate highways and designated truck routes to a point as close as possible to the destination * * *."

AWHMT argued that the City's weekday time restrictions cause a delay in the transportation of hazardous materials, because these restrictions may cause a carrier to make deliveries of non-hazardous materials outside the City before deliveries of hazardous materials within the City, or wait outside the City until it can enter the Downtown Area. AWHMT stated that, after the 1990 amendments to the HMTA, "the designation and restriction of routes for the transportation of hazardous material [is] a state responsibility, and that surrounding communities need to be consulted." It argued that there is no evidence that the City consulted with surrounding communities and, therefore, the City cannot know of the impact of its restrictions on surrounding communities.

Roadway Express stated that its customers in the Downtown Area must delay making shipments in order to comply with the City's weekday time

restrictions. Mallinckrodt and RSCC stated that timely delivery is very important for radiopharmaceuticals, which have a short half-life, and that these restrictions are not needed because requirements in the HMR provide sufficient safety. RSCC noted that routing requirements for radioactive materials were first established in 1981 by RSPA's rulemaking in docket No. HM-164. See 46 FR 5298 (Jan. 19, 1981).

The City emphasized that its weekday time restrictions apply only to the Downtown Area, not to the whole City. It argued that local safety concerns justify restricting the presence of hazardous materials during the most congested and crowded times of day. It stated that "during business hours there are an extraordinary number of pedestrians and a higher population density using street crossings and heavy traffic in the center of the business district." The City submitted an affidavit from a representative of the Northeast Ohio Area-wide Coordinating Agency to show that "traffic density in downtown Cleveland every week day and especially during the morning rush hour is high, and * * * Cleveland has the highest accident rate of any municipality in Cuyahoga County."

The City cited the decision in *City of New York v. Ritter*, 515 F. Supp 663 (S.D.N.Y. 1981), *aff'd*, *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d (2d. Cir. 1982), as finding "a legitimate safety interest" to uphold rush-hour time restrictions and requirements for trucks transporting hazardous materials to use a circuitous route through less heavily populated areas of New York City in going from New Jersey to Long Island. The City also argued that its weekday time restrictions are similar to the requirement considered in IR-3, *City of Boston Rules Governing Transportation of Certain Hazardous Materials*, 46 FR 18918 (Mar. 26, 1981), decision on appeal, 47 FR 18457 (Apr. 29, 1982).

PUCO stated that it is the State routing agency for Ohio and that it submitted to DOT in 1995 the City's routing requirements in Chapter 394, including the weekday time restrictions in City Code § 394.06(b).⁵ PUCO argued that State and local routing restrictions established before November 14, 1994 "are not subject to preemption" under 49 U.S.C. 5125(c) and 49 CFR 397.69. PUCO also asserted that surrounding communities had made no objection to

the City's requirements, and there is no evidence of any obstacle to carrying out the Federal hazardous materials transportation law and the HMR. It asserted that DOT must find some prima facie evidence of an obstacle in order to issue a binding determination of preemption.

Time restrictions on the transportation of hazardous material are a "subset of routing restrictions generally." IR-3, 46 FR at 18922. When applied to through traffic, prohibitions against travel during certain hours "may effectively route motor vehicles into other jurisdictions." *Id.* Alternatively, a vehicle transporting hazardous material that arrives during (or shortly prior to) the curfew period may have to wait in a neighboring jurisdiction for the curfew period to end. In either case, the time restriction may increase the overall risks inherent in hazardous materials transportation by increasing the overall time that those materials are in transportation and by shifting traffic to other jurisdictions "that may not be aware of or prepared for a sudden, possibly permanent, change in traffic patterns" or onto roads that "may be inadequate, particularly where the rerouted hazardous materials traffic is diverted to routes that other similar commercial traffic normally does not use." *Id.* at 18921. Routing restrictions, including time limitations, also create the potential for conflicts between adjoining jurisdictions, such as when required routes do not meet or time restrictions do not allow a vehicle to be in either jurisdiction.

In a number of rulings through 1990, RSPA found that routing restrictions that prohibit transportation through the jurisdiction (even temporarily by means of time limitations) are preempted in the absence of adequate safety justification and appropriate coordination with, and concern for the safety of people in, adjoining jurisdictions. *E.g.*, IR-2, *Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas, etc.*, 44 FR 75566, 75571 (Dec. 20, 1979), decision on appeal, 45 FR 71881 (Oct. 30, 1980); IR-21, *Connecticut Statute and Regulations Governing Transportation of Radioactive Materials*, 52 FR 37072, 37075 (Oct. 2, 1987), decision on appeal, 53 FR 46735, 46738 (Nov. 18, 1968); IR-23, 53 FR at 16845-46; IR-32, 55 FR at 36744. In 1990, Congress accepted this finding and directed DOT to prescribe standards for State and Indian tribe routing requirements which, among other matters, must "enhance public safety" in other jurisdictions affected by that requirement, must follow consultation

Restricted Routes, 65 FR 75771, 75803 (Dec. 4, 2000).

⁴ The City stated that the only transportation of explosives in the Downtown Area is for building demolition, and that it has never issued an exception to its weekday time restrictions for a delivery of explosives. This seems to make clear that the City's Downtown Area weekday time restrictions in section 394.06(b) apply to explosives, in accordance with the plain language of Chapter 394, despite other statements in the City's initial comments that the requirement for a permit in Chapter 394 did not apply to a "transporter of explosives with an explosives permit."

⁵ In accordance with 49 CFR 397.73(b), these routing designations and restrictions have been published in the *Federal Register*, 63 FR 31549, 31571 (June 9, 1998), 65 FR 75771, 75802 (Dec. 4, 2000), and they are now posted on FMCSA's internet web site at <<http://hazmat.fmcsa.dot.gov>>.

with officials of those other jurisdictions, and must be agreed to by the other affected State or Indian tribe. Pub. L. 101-615 section 4, 104 Stat. 3251 (Nov. 16, 1990), now codified at 49 U.S.C. 5112(b)(1)(A), (C), (E). *See also* FMCSA's standards at 49 CFR 397.71(b)(1), (3), (5).⁶

When time restrictions (or other routing requirements) apply only to vehicles picking up or delivering hazardous materials within the jurisdiction, different considerations exist. RSPA has found that "pickup and delivery time restrictions are less likely to affect other local jurisdictions and are a more justifiable exercise of local authority over local activities than time restrictions on through traffic." IR-23, 53 FR at 16845, discussing IR-3. In IR-3, 46 FR at 18922, RSPA stated that a time restriction applicable only to pick-up and delivery operations in the Boston downtown area is less likely to divert traffic to neighboring jurisdictions

and also appears to us to be justifiable as ancillary to regulatory authority that the City Council may exercise over land use and local activities in Boston. For example, delivery of explosives to a construction site in the city might be prohibited during certain times of the day.

FMCSA's highway routing standards in subparts C and D of 49 CFR part 397 require States and their political subdivisions to follow the principles set forth in these inconsistency rulings. Among other matters, there must be public participation (including consultation with other affected jurisdictions) in establishing highway routing designations or limitations for non-radioactive hazardous materials; routing designations must ensure continuity of movement; there may not be any unreasonable burden on commerce; and vehicles must have reasonable access to terminals, pick-up and delivery locations, and facilities for food, fuel, repairs, rest, and safe havens. 49 CFR 397.71(b). These routing designations must take account of several specific factors and may not "create unreasonable delays in the transportation" of hazardous materials. 49 CFR 397.71(b)(9)(xi). Routing designations for radioactive materials

must ensure that vehicles are operated "on routes minimizing radiological risk," considering a number of specific factors including overall transit time and "the time of day and the day of week during which transportation will occur." 49 CFR 397.101(a).

As noted above, the specific standards in subpart C of 49 CFR part 397 must be followed only when establishing or modifying non-radioactive hazardous materials routing designations on or after November 14, 1994. 49 CFR 397.69(a). Because Chapter 394 and the weekday time restrictions in Section 394.06(b) were adopted in April 1992, the more general considerations discussed in RSPA's inconsistency rulings remain applicable to City's weekday time restrictions. Those considerations apply to both radioactive and non-radioactive hazardous materials, and are consistent with the standards in 49 CFR subpart D for radioactive materials in less than highway-route-controlled quantities, so that it is unnecessary to resolve whether the standards in subpart D were issued in September 1992, or 11 years earlier, for the purposes of 49 U.S.C. 5125(c)(2). *See also* PD-3(F), State of Washington Port of Entry Restrictions, etc., 58 FR 31580 (June 3, 1993), where the Federal Highway Administration evaluated a State's routing restrictions on spent nuclear fuel under the dual compliance and obstacle criteria.

With respect to hazardous materials generally, there is insufficient evidence to find that the City's weekday time restrictions actually cause delays or possible adverse effects on neighboring jurisdictions. As noted above, traffic passing through the City may use designated interstate highways at any time of the day, and no person has challenged these designations or indicated that these vehicles would be unnecessarily delayed by having to interrupt their journey or being diverted to neighboring jurisdictions. For most hazardous materials being picked up or delivered in the Downtown Area, it is assumed that schedules can be adjusted to make certain that travel does not take place during the restricted time periods. With one exception, discussed below, the comments do not dispute the City's statement that its waiver process is adequate for handling those situations when the pick-up or delivery of hazardous materials can only be practicably made during the prohibited time period. The comments do not show that vehicles transporting hazardous materials are forced to wait to enter the Downtown Area or, if so, that the City has not adequately considered that waiting at a location outside the

Downtown Area (but still within the City) presents a lower overall risk than travel within the Downtown Area during the restricted time periods.

Mallinckrodt and RSCC both stressed the importance of timely deliveries of radiopharmaceuticals. Mallinckrodt stated that it has a nuclear pharmacy in Garfield Heights, Ohio, which serves the Cleveland metropolitan area. RSCC indicated that it is impractical to apply for waivers in order to deliver these "extremely time-sensitive" materials to "downtown Cleveland hospitals like the Cleveland Clinic." In IR-16, Tucson City Code Governing Transportation of Radioactive Materials, 50 FR 20872 (May 20, 1985), RSPA found that the short time for delivery of pharmaceuticals made it impossible to comply with a city's requirement for a 48-hour advance notification of the pick-up or delivery of radioactive materials without unreasonable delays. In that proceeding, Mallinckrodt and Federal Express stated that "orders for placarded shipments of radiopharmaceuticals are usually received less than 24 hours before delivery is to be made." 50 FR at 20879. RSPA also quoted the statement of the Committee on Radiopharmaceuticals and Radionuclides of the Atomic Industrial Forum that the

short time allowed between the placement of an order for material and its delivery to the hospital or university medical school [is] typically on the order of 8 to 24 hours * * * For efficient use of short-lived radioactive materials orders are placed in many cases as patients needs are identified. Little notice can be given to either the supplier or the carrier as to what materials will be carried or the timing of the delivery.

Id.

Because hospitals most often need radiopharmaceuticals delivered in the morning for patient treatment during the day, it is not possible to "stockpile" these materials by having them delivered on weekends or during the overnight 6 p.m.—7 a.m. period when the City's time restrictions are not in effect. In this regard, the City's prohibition extends throughout the business day, from 7 a.m. until 6 p.m., and does not provide a period when deliveries may be made in the middle of the day, as New York City did in its rush-hour curfews considered in the *Ritter* case. *See* 677 F.2d at 272.

One other situation could present a potential problem. If time restrictions also existed in the jurisdiction at the other end of the movement (*i.e.*, the pick-up location for a delivery in the City, or the delivery location for a pick-up in the City), it might not be practicable for the shipper and carrier to

⁶ Although the *Ritter* case upheld New York City's routing requirements for tank trucks carrying propane (including time limitations), that case is no longer relevant because it was decided before the 1990 amendment to the HMTA requiring DOT to adopt the highway routing standards in 49 CFR 397.71 for States and Indian tribes to follow. Moreover, RSPA has noted that neither the trial or appellate courts in *Ritter* considered the need for "coordination with, and concern for the safety of people in adjoining, affected jurisdictions." IR-23, 53 FR at 16845.

adjust their schedules to comply with both time restrictions of the City and the other jurisdiction. This possibility has not been raised in any comment and, in the absence of more specific information that this situation could exist, it does not show that the City's weekday time restrictions are an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR.

The City's weekday time restrictions in City Code section 394.06(b) cause unnecessary delays in the transportation of radiopharmaceuticals and, with respect to these materials, these restrictions are preempted by 49 U.S.C. 5125(a)(2) because they create an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR. There is insufficient information to find that Federal hazardous material transportation law preempts City Code section 394.06(b) with respect to other hazardous materials.

C. Explosives Notification, Routing and Escort Requirements

The City's Application for the Transportation of Explosives requires the applicant to (1) notify the Fire Prevention Bureau "24 hours in advance of all deliveries," (2) specify the route to be taken within the City,⁷ and (3) have a police escort "if more than 250 pounds are transported." The City has stated that it is not currently requiring carriers to obtain a permit, but it argued strongly that it should be able to impose its prenotification, routing, and escort requirements on carriers of explosives.

If the proposed changes to Chapter 387 are adopted, the City would eliminate its requirement for transporters of explosives to obtain a permit and make the shipper or recipient of explosives within the City responsible for (1) notifying the Police Department of the time and route of any explosives shipment (24 hours in advance and immediately upon any changes thereafter), (2) requiring the transporter to comply with the route specified by the Fire Chief or his designee, and (3) cooperating with any escort provided by the Police Department for either inbound or outbound shipments. The City's

⁷ City Code section 387.07(d) provides that "In the event of any transportation of explosives within the City, the route to be taken shall be designated by the Director of Public Safety or his duly authorized representative." The City indicated that it requires the carrier to specify a proposed route, subject to approval or modification by the Fire Department. The provisions of Section 387.07(d) have not been reported to DOT or published in the **Federal Register** in accordance with 49 CFR 397.73(b).

proposed changes would also eliminate the current exception in City Code section 387.03 that requirements in Chapter 387 do not apply when explosives are being transported "under the jurisdiction of and in conformity with regulations adopted by the Interstate Commerce Commission or the United States Coast Guard."⁸

RSPA presumes that the City's purpose for requiring advance notification is to either (1) allow it to modify the route specified by the carrier for a shipment that does not require an escort, or (2) arrange an escort for a shipment. Although the City stated that it issued 16 explosives transportation permits in 1997, these appear to be annual permits allowing deliveries throughout the year. No information was provided as to how many shipments of explosives are delivered within the City.

Although the City's application form appears to require advance notification only for "deliveries," AWHMT indicated that the City requires advance notice of both pick-ups and deliveries of explosives shipments. AWHMT stated that the requirement to specify routes within the City is a "prenotification" requirement for each shipment, because carriers do not always know their routes and cargoes in advance. According to AWHMT,

shipment prenotification is a field totally occupied by the federal government. To the extent that the federal government has allowed prenotification to non-federal government entities, it has provided that the notification be given to a state, not localities.

AWHMT noted that regulations of the Nuclear Regulatory Commission (NRC) require the shipper, not the carrier, to notify the Governor or its designee before shipments of nuclear waste and spent fuel. *See* 10 CFR 71.97. AWHMT also argued that the requirement in the HMR for escorts to accompany shipments of fissile material, 49 CFR 173.457(b)(2),⁹ "shows RSPA's intent not to require them for transport of other hazardous materials." It stated that non-Federal requirements for escorts interfere with Federal uniformity "in an

⁸ AWHMT argued that the exception in section 387.03 is properly read as applying to all transportation under DOT's authority, so that "the City's requirements are null and void," now that the HMR apply to intrastate, interstate and foreign commerce. *See* 49 CFR 171.1. In contrast, the City stated that it applies the requirements in Chapter 387 "to all transportation except that which is exclusively under the jurisdiction of the Federal government," and that this exception applies "only to transportation on railroads and interstate highways."

⁹ *See also* the NRC's escort requirements in 10 CFR 73.26 and 73.37 for highway shipments of certain radioactive materials.

unsafe and burdensome manner," citing *Chlorine Institute v. California Hwy. Patrol*, 29 F.3d 495 (9th Cir. 1994). It stated that the City has no basis to argue that explosives carriers appreciate escorts and do not consider the City's requirement to be a burden.

HMAC stated that having to list routes and quantities of hazardous materials in advance is impractical and delays shipments. NPCA similarly argued that providing advance notice of the route of each delivery and pick-up is almost impossible, and unsafe situations will occur if the carrier has to wait until an approval is received from the City.

The City responded that it only requires advance notice for explosives, and that a carrier is free to specify its route so long as it attempts to use interstate highways and direct routes. It stated that its advance notice requirement causes very little delay. While it appears that the Fire Division sometimes allows notification less than 24 hours in advance, according to the City, the transporter typically sends a fax

two days prior to a delivery to the Fire Division, of the date, time and place of entry to the City. The Fire Division and Police Department meet the vehicle at the appointed site, and Fire officials check the bill of lading, and the condition of the vehicle, tires, the load, and fire extinguishers. Within a half an hour to forty-five minutes, the vehicle is on its way to its destination, accompanied by a police escort.

The City stated that, because DOT has no regulation for an escort to accompany vehicles carrying explosives, its escort requirement is not in conflict with the "dual compliance" test. It argued that the *Commonwealth of Massachusetts* case on State bonding requirements provided a better framework for applying the "obstacle" test to its escort requirement than the *Chlorine Institute* case. The City asserted that neither the "text and structure" of Federal hazardous material transportation law, nor the HMR, show "an intent on the part of Congress to preempt escort requirements or advanced routing notification requirements." The City also presented affidavits by a fireman and policeman which it stated show that the escort and prenotification requirements "pose virtually no burden." The City also asserted that its escort requirement "is actually appreciated by many motor vehicle carriers, probably because it assists a transporter in arriving at his destination quickly and without the hassles of traffic congestion."

Advance notification requirements have an inherent potential to delay the transportation of hazardous materials.

Coupled with the requirement to meet, and perhaps wait for, an escort, delay is almost inevitable for many shipments within the broad definition of "explosives." There is also the potential for delay if the carrier must wait for the Fire Marshal to approve its suggested route or direct that another route be taken. A local "provision for virtually unfettered discretion whereby the County may change dates, routes, and times for radioactive materials transport" was found to be preempted in IR-18, Prince George's County, MD; Code Section Governing Transportation of Radioactive Materials, 52 FR 200, 203 (Jan. 2, 1987), decision on appeal, 53 FR 28850, 28854 (July 29, 1988).

RSPA has noted that "[a]n individual motor carrier seldom knows much in advance of any shipment precisely what is being shipped or what route it will follow. Furthermore, carriers frequently make pick-ups and deliveries enroute." IR-6, Covington (Kentucky) Ordinance Governing Transportation of Hazardous Materials, 48 FR 760, 765 (Jan. 6, 1983). Therefore, in many instances, a carrier will not know 24 hours in advance that it will need to pick up or deliver explosives within the City. And even if the City accepts notice from a carrier less than 24 hours in advance, traffic conditions and other stops may make it impossible for the carrier to know exactly when it will arrive at a point designated by the City Fire Marshal to meet an escort.

For these reasons, Federal regulations require advance notification to the State governor (or his designee), written route plans, and escorts only for shipments of irradiated reactor fuel and nuclear waste. 10 CFR 71.97, 73.37. The "long lead time in planning spent fuel shipments," coupled with the infrequency of such shipments, allows sufficient time for the shipper to notify the designated State official and the transporter to pay any required fees. IR-17, Illinois Fee on Transportation of Spent Nuclear Fuel, 51 FR 20926, 20929 (June 9, 1986), decision on appeal, 52 FR 36200 (Sept. 25, 1987). In addition, inspections and escorts that are part of the Federally required physical protection program do not cause unnecessary delays in transportation. 51 FR at 20930; 52 FR at 36203-04.

Therefore, when "Federal and local [escort] requirements are identical, and the same action satisfies both," the local requirement for escorts "amounts to an adoption of the NRC physical protection standards on which the HMR rely" and there is no inconsistency. IR-14, Jefferson County, New York: Local Legislative Stipulation Regulating Radioactive Materials Transportation,

49 FR 46632, 46656, 46658 (Nov. 27, 1984). However, State or local requirements for additional or special escorts are preempted. IR-18, 52 FR at 203 ("the County provision is neither identical to, nor does it facilitate compliance with, the Federal requirement"); IR-21, 53 FR at 28854.

In the *Chlorine Institute* case, the Court of Appeals for the Ninth Circuit held that State escort requirements for vehicles transporting chlorine and oleum are preempted. That court found that the HMR is not silent on the subject of escorts. Rather, in "an area already regulated under the HMR" where DOT has issued specific regulations that it believes are appropriate, other jurisdictions may not add requirements left out of the HMR. 29 F.3d at 497. In that situation, State requirements that exceed the HMR create "a separate regulatory system * * * fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation." *Id.* at 498, quoting from *Southern Pac. Transp. Co. v. Public Serv. Comm'n of Nevada*, 909 F.2d 352, 358 (9th Cir. 1990). Thus, a local requirement on transportation is preempted when the Secretary of Transportation "has decided that no such regulations should be imposed at all." *Ray v. Atlantic Richfield Co.*, 435 U.S. at 171-72.

When linked to escort requirements that go beyond the HMR, advance notification requirements are also preempted. Indeed, on their own, advance notification requirements for both radioactive and non-radioactive materials shipments have generally been found to be preempted as an obstacle to accomplishing and carrying out the HMR's requirement that there not be any unnecessary delays in transportation. *E.g.*, IR-6, 48 FR at 764-65; IR-30, City of Oakland, California; Nuclear Free Zone Act, 55 FR 9676, 9682 (Mar. 14, 1990) ("local requirements for advance notification of hazardous materials have potential to delay and redirect traffic and thus are inconsistent"); IR-32, 55 FR at 36746 ("State and local provisions either authorizing less prenotification or requiring greater prenotification than the HMR, therefore, constitute obstacles to the accomplishment and execution of the objectives of the HMTA and the HMR").

In IR-16, 50 FR at 20878, RSPA stated that a local requirement for advance notification that applies "only to shipments whose origin or destination is Tucson" is not "an inconsistent routing rule" because, as here, it would not cause shipments to be routed around the City. However, there remains

the potential for delays whenever the carrier has not been advised of the shipment, or does not have all the information required, in advance of the time specified for advance notification. Moreover, in this case, the advance notification requirement creates unnecessary delays because it is linked to (and part of) the requirement for escorts.

As the City seems to recognize in its proposed changes to Chapter 387, it is more appropriate to require the shipper or the recipient of a shipment of explosives, rather than the transporter, to provide notice of the time and place that the shipment will originate or be received within the City. The shipper and recipient are the parties who arrange for transportation and are usually in a much better position than the carrier to provide this information to the City.

The City's requirement that a transporter provide 24-hour advance notification of any shipment of explosives, including its specification of its intended route within the City, and the requirement for a police escort for any shipment of more than 250 pounds of explosives cause unnecessary delays in the transportation of hazardous materials and are preempted by 49 U.S.C. 5125(a)(2) because these requirements create an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR.

D. Separation Distance Requirements

The City has different separation distance requirements depending on whether vehicles are transporting explosives (in any amount) or other hazardous materials (in an amount that requires placarding). According to the City, it has never enforced either of these requirements but, if it did, "the most sensible and safest interpretation * * * is to view them as *following* distance requirements, so that a driver will not be liable for failure to maintain a minimum distance from vehicles that he cannot see."

City Code section 394.07(b) requires a vehicle transporting hazardous materials to "maintain a minimum distance of at least 300 feet from other vehicles carrying hazardous materials * * * whether such [other] vehicles are moving or parked." This requirement applies "regardless of direction of travel" but not "when overtaking or passing" or "where the conditions of travel make it impractical" to maintain this separation. *Id.* Under the proposed changes to Chapter 394, the words "regardless of direction of travel" would be eliminated and vehicles at a

destination or point of origin would not be required to be separated by 300 feet. However, the City would make local vehicles subject to Chapter 394 when they transport hazardous materials for which labels and shipping papers are required, so that certain unplacarded vehicles would also be subject to the 300-foot separation distance requirement.

Separately, City Code section 387.08(b) provides that "Where two or more vehicles are transporting explosives by permit issued hereunder, an interval of at least 500 feet shall be maintained between such vehicles." The City's proposed revisions to Chapter 387 would eliminate this separate 500-foot separation distance requirement for explosives.

The City argued that these distance separation requirements are traffic control regulations that are consistent with the provisions of 49 CFR 397.3 that:

Every motor vehicle containing hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless they are at variance with specific regulations of the Department of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint.

The City also stated that its separation distance requirements are consistent with the prohibition in 49 CFR 397.7(a)(3) against parking a motor vehicle containing Division 1.1, 1.2, or 1.3 explosives "[w]ithin 300 feet of a bridge, tunnel, dwelling, or place where people work, congregate, or assemble except for brief periods when the necessities of operation require the vehicle to be parked and make it impracticable to park the vehicle in any other place."

The City referred to three inconsistency rulings as upholding separation distance requirements. It noted that RSPA found both local speed limits and separation requirements consistent with the HMR in IR-32 and stated that the same analysis should apply. It urged RSPA to make the same findings that separation distance requirements "have very limited enforceability" when there are exceptions for vehicles "overtaking or passing" and "where the conditions of travel make it impractical to do so," as in IR-3, 46 FR at 18923, and that these requirements would not create obvious hazards or create delays when they apply only to traffic traveling in the same direction and in the same lane, as in IR-20, 52 FR at 24399.

The City stated that, because it has never enforced these requirements,

there is no evidence that they reduce safety. It also argued that it would not be burdensome to truck drivers to remember the City's traffic separation requirements and to "recognize that a placard exists on another vehicle from a distance of 300 to 500 feet." It stated that other jurisdictions also have these types of requirements, and it referred to the provision in the Ohio Fire Code that "Vehicles transporting explosive materials and traveling in the same direction shall not be driven within 300 feet (91440 mm) of each other." Ohio Administrative Code 1301:7-7-30. The City also stated that it had "the highest motor vehicle accident rate of all municipalities within Cuyahoga County," which justified its use of separation distance requirements "to lower the number of accidents in the City."

AWHMT stated that the City's distance separation requirements will result in less safety, rather than more, because a driver's attention will be diverted if he must look for placards on other vehicles. It stated that the purpose of a placard is to communicate the presence of hazardous materials in the event of an incident, rather than for traffic control. According to AWHMT, training drivers to know about local requirements, including variations in other jurisdictions, would impose an unreasonable burden on carriers, and the accident rate data provided by the City does not support separation distance requirements.

Roadway Express stated that it is unreasonable to expect drivers to scan traffic for placards and to estimate their distance.¹⁰ It said that, because the City's separation distance requirement applies in all directions, it cannot be met when vehicles meet.

Mallinckrodt and RSCC also objected to the distance separation requirements. RSCC interpreted this requirement to apply when the other vehicle carrying hazardous materials is not required to be placarded, such as those materials for which placarding is not required below 1,000 pounds, ORM-D and limited

¹⁰ Roadway Express also alluded to a driver's difficulty in seeing placards on other vehicles because placards are placed low on many vehicles (near the mud flap and below floor level). AWHMT also assumed that there are no standards on the placement of placards or their visibility. However, 49 CFR 172.516 sets forth requirements for the visibility and display of placards, including specific provisions that each placard must be securely attached or affixed to the transport vehicle, "clearly visible from the direction it faces," and "located away from any marking (such as advertising) that could substantially reduce its effectiveness," where, "[s]o far as practicable * * * dirt or water is not directed to it from the wheels of the transport vehicle," and "free of appurtenances and devices such as ladders, pipes, doors, and tarpaulins."

quantity materials, and Class 9 materials. It stated that "a radiopharmaceutical delivery truck invariably will encounter [trucks carrying medical waste] every day at Cleveland's hospitals." RSCC stated that the 300-foot separation distance requirement would cause unnecessary and unplanned stops, circuitous driving, and unnecessary delays. It assumed that the City would enforce this requirement after an accident and stated that the City should rewrite a bad requirement rather than distort it by unsupported interpretations.

The breadth of the wording of the City's separation distance requirements and the lack of enforcement present problems in this case. Although the City stated how it would enforce these requirements, we have no evidence of how it actually enforces them, because it has not. Moreover, vehicles transporting explosives that are not required to be placarded appear to be subject to the separation distance requirement in City Code section 387.08(b), and they must maintain an interval of at least 500 feet from other vehicles transporting explosives, whether the "other" vehicles are required to be placarded or not. Similarly, the proposed changes to Chapter 394 would appear to include certain unplacarded vehicles carrying hazardous materials within the category of those vehicles that must stay 300 feet apart.

In this respect, the City's separation distance requirements differ from the requirements in the three prior inconsistency rulings. IR-3 involved a requirement to maintain 300 feet between vehicles carrying hazardous materials required to be placarded, "when traffic conditions allow." 46 FR at 18923. RSPA acknowledged possible difficulty recognizing placards at a distance of 300 feet, especially at night, but Boston's requirement did not require separation from unplacarded vehicles carrying hazardous materials. IR-20 and IR-32 involved requirements that vehicles transporting certain types of hazardous materials must stay a specified distance behind other vehicles traveling in the same direction (whether or not carrying hazardous materials).

Because the appeal from IR-32 was dismissed as moot, following the 1990 amendments to the HMTA, 57 FR at 41167-68, RSPA did not specifically consider the argument raised on appeal that a distance separation requirement fails to promote traffic safety when it applies at all times of the day and in all weather and traffic conditions. In its appeal of IR-32, the Chemical Waste Transportation Institute stated that

“what constitutes a safe stopping distance depends on factors such as speed, weight of the load carried by the vehicle, traffic, road and weather conditions, * * *” This is consistent with the guidelines for maintaining an adequate distance from other traffic, based on speed and the relative size and weight of the vehicles, in the Ohio Commercial Driver Handbook, p. 2–27 (Version 2.0).

A driver is trained to vary his distance from other vehicles based on speed and traffic conditions. Any driver will have difficulty maintaining a specified distance from other vehicles, or other vehicles carrying hazardous materials, especially in the absence of a uniform requirement. Without specific notice, as speed limit signs might provide, a driver may have difficulty recalling the requirement that applies to the specific situation, from among the variations that exist for explosives (500 feet from other explosives in the City but 300 feet under the Ohio Fire Code in other parts of Ohio), or other hazardous materials (300 feet), or when he might be in Montevallo, Alabama (150 feet). See IR–32, 55 FR at 36744. It is impractical to try to train drivers to cover many different situations, even if the City’s separation distance requirements apply only when the “other” vehicle is placarded (although, by their terms, these requirements appear to apply in certain situations when the other vehicle carrying hazardous materials is not required to have placards).

If the City never actively enforces its separation distance requirements, drivers lack the “reasonable notice” that the City must provide of any local traffic control. *Id.*, 55 FR at 36745. Even with some information that these requirements exist, a total lack of enforcement fosters uncertainty as to their scope and subjects drivers to possible arbitrary enforcement actions, as stated by RSCC. Actual enforcement, even of a separation distance requirement that had “limited enforceability” as in IR–3, would provide drivers with some more specific understanding of how to comply with the requirement. A requirement that is never actively enforced can be, by its very nature, an obstacle to accomplishing and carrying out the Federal hazardous materials transportation law and the HMR. This sort of requirement frustrates the framework of the HMR that is designed to achieve the safe transportation of hazardous materials through specific rules for how hazardous materials are to be transported and specific prohibitions against certain practices.

Because the City’s separation distance requirements in City Code 394.07(b) and 387.08(b) are not enforced and are incapable of being followed by drivers who lack full understanding of their intended scope and application, these requirements create an obstacle to accomplishing and carrying out the Federal hazardous material transportation law and the HMR. For these reasons, these requirements are preempted by 49 U.S.C. 5125(a)(2).

IV. Ruling

Federal hazardous material transportation law preempts:

1. Cleveland City Code section 394.06(b) prohibiting the transportation of hazardous materials in the Downtown Area between 7 a.m. and 6 p.m., except Saturday and Sunday, preempted with respect to radiopharmaceuticals only. There is insufficient information to find that this prohibition is preempted with respect to other hazardous materials.

2. Cleveland’s uncodified requirements for a transporter of explosives to notify the Fire Prevention Bureau 24 hours in advance of any pick-up or delivery, to specify the route to be taken within the City, and to have a police escort if more than 250 pounds are transported.

3. Cleveland City Code sections 387.08(b) and 394.07(b) specifying separation distance requirements for vehicles transporting explosives or other hazardous materials.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a) and 397.223(a), any 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 this 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 the final decision of RSPA and FMCSA 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 and FMCSA on the petition for reconsideration will be the final agency decision. 49 CFR 107.211(d), 397.223(d).

Issued in Washington, D.C. on May 29, 2001.

Robert A. McGuire,

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

Julie Anna Cirillo,

Acting Deputy Administrator, Federal Motor Carrier Safety Administration.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Innovative Grants To Support Increased Seat Belt Use Rates

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Re-issuance of announcement of grants to support innovative and effective projects designed to increase seat belt use rates.

SUMMARY: On April 30, 2001, the National Highway Traffic Safety Administration (NHTSA) published an announcement of grants to support innovative and effective projects designed to increase seat belt use rates. After the announcement was published, the agency decided that it contained a number of requirements that might be burdensome to the grant applicants. Accordingly, the announcement published on April 30, 2001 is cancelled. That announcement has been revised and is being re-issued in its entirety in this notice.

In this notice, NHTSA announces the third year of a grant program under Section 1403 of the Transportation Equity Act for the 21st Century (TEA–21) to provide funding to States for innovative projects to increase seat belt use rates. Consistent with last year, the goal of this program is to increase seat belt use rates across the nation in order to reduce the deaths, injuries, and societal costs that result from motor vehicle crashes. However, unlike the first two years, when funds were determined and administered in a process similar to that of a contract, for this third year, selection for these Innovative Grants will be determined based on established criteria, and the distribution of funds will be administered in a fashion similar to other highway safety grants, including use of the Grant Tracking System (GTS). This notice solicits applications from the States, the District of Columbia and Puerto Rico, through their Governors’ Representatives for Highway Safety, for funds to be made available in fiscal year