of information was approved by OMB under Control Number 0350–0009. Please send comments regarding the collection of information burden or any other aspect of the information collection to USTR at the above e-mail address or fax number.

Privacy Act

The following statements are made in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). The authority for request information to be furnished is section 402 of the NAFTA Implementation Act. Provision of the information requested above is voluntary; however, failure to provide the information will preclude your consideration as a candidate for the NAFTA Chapter 19 roster. This information is maintained in a system of records entitled ''Dispute Settlement Panelists Roster.'' Notice regarding this system of records was published in the **Federal Register** on November 30, 2001. The information provided is needed, and will be used by USTR, other federal government trade policy officials concerned with NAFTA dispute settlement, and officials of the other NAFTA Parties to select well-qualified individuals for inclusion of the Chapter 19 roster and for service on Chapter 19 binational panels.

Daniel E. Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 03–28390 Filed 11–12–03; 8:45 am]

BILLING CODE 3190–W3–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Thorn Creek to Moscow, ID

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Latah County, Idaho.

FOR FURTHER INFORMATION CONTACT: Russell L. Jorgenson, Field Operations Engineer, Federal Highway Administration, 3050 Lakeharbor Lane, Suite 126, Boise, Idaho 83703, telephone: (208) 334–9180; or Zachary Funkhouser, Senior Environmental Planner, Idaho Transportation Department, P.O. Box 837, Lewiston, ID 83501, telephone (208) 799–5090.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration, in cooperation with the Idaho Transportation Department, will prepare an EIS on a proposal to improve U.S. Highway 95 south of Moscow, Idaho. The proposed highway alternatives vary in length from 6.1 to 7.4 miles in length and will provide four travel lanes. The termini for the project are from the intersection at Thorn Creek Road on the southern end to the South Fork Palouse River Bridge on the north end.

This improvement is considered necessary to relieve current and projected traffic congestion on U.S. Highway 95 and to address high accident locations. Alternatives under consideration include (1) taking no action, (2) updating and improving the existing alignment, (3) alternatives east of existing U.S. 95, and (4) alternatives west of existing U.S. 95.

Letters describing the proposed action and soliciting comments will be sent to the appropriate Federal, State and local agencies and citizens who have previously expressed interest in this proposed project. Scoping will begin with the publication of the Notice of Intent. As part of the scoping process, public information meetings will be held in addition to public hearings. Public notice will be given of the time and place of any public information meetings and the public hearings. The draft EIS will be made available in electronic format for public and agency review and comment.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties.

Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or ITD at the addresses provided above.

Authority: 23 U.S.C. 315; 23 CFR 771.123; 49 CFR 1.48.

Issued on: November 5, 2003.

Pamela S. Cooksey,

Assistant Division Administrator, Federal Highway Administration, Boise, Idaho.

[FR Doc. 03–28429 Filed 11–12–03; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–03–16456 (PDA–30(R)]

Houston, Texas Requirements on Storage of Hazardous Materials During Transportation

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

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to submit comments on an application by Societé Air France for an administrative determination whether Federal hazardous material transportation law preempts requirements of the City of Houston, Texas, relating to the interim storage of hazardous materials during transportation.

DATES: Comments received on or before December 29, 2003, and rebuttal comments received on or before February 11, 2004, will be considered before an administrative determination is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. The application and all comments are also available on-line through the home page of DOT's Docket Management System, at *http://dms.dot.gov.*

Comments must refer to Docket No. RSPA–03–16456 and may be submitted to the docket either in writing or electronically. Send three copies of each written comment to the Dockets Office at the above address. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. To submit comments electronically, log onto the Docket Management System website at *http://dms.dot.gov,* and click on ''Help'' to obtain instructions. You may also sign up on DOT's DMS ''List Serve'' on this website. This service will automatically notify you when certain documents are put into a docket that is of interest to you.

A copy of each comment must also be sent to (1) Michael F. Goldman, Esq., Silverberg, Goldman & Bikoff, L.L.P., 1103 30th Street, NW., Suite 120, Washington, DC 20007, counsel for Societé Air France, and (2) Randy Rivin, Esq., Legal Department, City of Houston, P.O. Box 1562, Houston, TX 77251–1652. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I certify that copies of this comment have been sent to Messrs. Goldman and Rivin at the addresses specified in the **Federal Register**.'')

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (volume 65, Number 70, pages 19477–78.) or you may visit *http://dms.dot.gov.*

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

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 No. 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

Societé Air France (Air France) has applied for a determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* preempts permit requirements contained in the Fire Code of the City of Houston (Fire Code) and additional secondary containment and segregation requirements imposed by the Houston Fire Department (HFD), as the HFD applies those requirements to the handling or storage of hazardous materials by Air France at George Bush Intercontinental Airport (IAH). The specific provisions of the Fire Code challenged by Air France are the following:

A. Permits

1. Sections 105.8.h.1 and 8001.3.1, which require a permit to store, transport on site, dispense, use or handle hazardous materials in excess of certain ''exempt'' amounts listed in Table 105–C of the Fire Code.

2. Sections 105.8.f.3 and 7901.3.1, which require a permit to store, handle, transport, dispense, or use flammable or combustible liquids in excess of the amounts specified in § 105.8.f.3.

3. Sections 8001.3.2 and 8001.3.3, which specify that the HFD chief may require an applicant for a permit to provide a hazardous materials management plan (HMMP) and a hazardous materials inventory statement (HMIS), respectively, in accordance with the provisions of Appendix II–E of the Fire Code.

B. Containment

1. Sections 8003.1.3.3 and 7901.9, which require secondary containment in buildings, rooms or areas used for storage of hazardous materials and flammable or combustible materials, respectively, in excess of specified quantities.

2. Sections 8001.10.6, 8001.11.8, 7902.1.6, and 7902.5.9, which contain provisions on the use of storage cabinets to increase exempt amounts of hazardous materials or to separate incompatible materials.

According to Air France, it transports cargo on both passenger-carrying and all-cargo aircraft between IAH and Paris, France and, since 1979, it has received an annual permit from the HFD to handle and store hazardous materials at its IAH cargo facility. It states that the hazardous materials stored at IAH ''are in transit * * * under active shipping papers (air waybills) and are only present there incidental to prior or subsequent air transportation,'' and where ''palletization and other procedures related to their carriage by air'' take place. It stresses that ''hazardous materials typically spend only a very short period of time at the Air France cargo facility,'' and that ''Air France is unable to predict what hazardous materials it may have in its facility at any given time since this is a function of the hazardous materials that its customers choose to ship.''

Air France states that, beginning in June 2002, the HFD has required it to submit a Hazardous Materials Management Plan (HMMP) and a Hazardous Materials Inventory Statement (HMIS) in order to obtain a permit, both of which require extensive information. It relates that the HFD refused to accept the HMMP and HMIS submitted by Air France until June 2003, and, during the interval, the HFD cited the local Air France cargo manager for several violations of the Fire Code including the alleged failure to provide a proper HMIS for the storage of hazardous materials and the alleged failure to post the required local permit for the storage, handling or use of flammable liquids.

Air France also states that it moved into a new cargo warehouse facility at IAH in July 2003, where, as a condition of issuing a certificate of occupancy, the HFD has required the installation of ''a hazardous materials storage cabinet * * * for the storage by Air France of certain in transit hazardous materials.'' Air France indicates it operates cargo warehouses at six other locations in the United States, and none of these jurisdictions requires it to obtain a local permit or install and use storage cabinets when it handles and stores hazardous materials in the course of transportation.

As Air France notes in its application, in a prior proceeding, RSPA considered permit requirements in Section 105 and Articles 79 and 80 of the Fire Code relating to the transportation of flammable liquids and other hazardous materials. Preemption Determination (PD) No. 14(R), Houston, Texas Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 57606 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999). The version of the Fire Code then in effect stated that it was primarily directed at ''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 and occupancy of buildings and premises.*'' 63 FR at 67507 (quoting from Sec. 101.2 [''Scope''], emphasis supplied). Based on representations of the City of Houston (City) that it did not require permits, apply its definition of ''hazardous materials,'' or apply its tank design requirements to vehicles ''meeting DOT requirements,'' RSPA found that challenges to these provisions in the Fire Code ''have become moot.'' 63 FR at 67510.

In PD–14(R), RSPA discussed the general principle that

> the transportation of hazardous materials in commerce subject to the Federal hazardous material transportation law and the HMR includes the storage of these materials ''incidental to [their] movement.'' 49 U.S.C. 5102(12). Accordingly, RSPA has stated that HMR clearly apply to ''transportation-related storage.'' IR–19, Nevada Public Service Commission Regulations Concerning Transportation of Hazardous Materials, 52 FR 24404, 24409 (June 30, 1987), decision on appeal, 53 FR 11600 (Apr. 7, 1988). And RSPA reiterated in PDs 8(R)–11(R) that the HMR apply to ''[s]torage that is incidental to transportation,'' which includes ''storage by a carrier between the time a hazardous material is offered for transportation and the time it reached its intended destination and is accepted by the consignee.'' 60 FR [8774] at 8778 [(Feb. 15, 1995)]. *See also* PD–12(R), New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Waste, 60 FR 62527, 62541 (Dec. 6, 1995), decision on petition for reconsideration, 62 FR 15970,1 5971 (Apr. 3, 1997) (''transportation-related

activities'' include the interim storage of hazardous materials at a transfer facility).

Id. RSPA also explained that, when a State or local permit is required ''for a facility where hazardous materials are stored in transportation,'' preemption depends on what is required to obtain the permit. *Id.* RSPA has found that the Federal law preempts these permit requirements when the underlying conditions are ''so open-ended and discretionary that they authorize the [State] to approve storage prohibited by the HMR or prohibit storage authorized by the HMR,'' *id.* quoting from Inconsistency Ruling (IR) No. 19, 52 at 24410, and ''unfettered discretion * * * with respect to approval or disapproval of storage of hazardous materials incidental to the transportation thereof is inconsistent with the HMTA and the HMR,'' *id.,* quoting from IR–28, San Jose Restrictions on the Storage of Hazardous Materials, 55 FR 8884, 8890 (Mar. 8, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992). In IR–28, RSPA found that an in-transit permit requirement is preempted when it requires the submission of a HMMP and HMIS and stated that:

> detailed information required to be provided concerning the identity and quantity of hazardous materials (and other materials) which is transportation carrier might store at its facility during a given year is impossible to compile and provide in advance because a common carrier is at the mercy of its customers, including the general public, who may without advance notice offer to the carrier virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.

Id., quoted at 64 FR at 33952.

In PD–14(R), the City asked RSPA to postpone any decision pending issuance of a final rule in Docket No. RSPA–98–4952 (HM–223), ''Applicability of the Hazardous Materials regulations to Loading, Unloading, and Storage.'' *See* 63 FR at 67507, 64 FR at 33951. RSPA declined to do so, but noted the City's concerns about ''in-transit facilities'' and the stated interest of the HFD ''that the same fire protection standards apply to both (1) the buildings and other facilities where hazardous materials are stored for short times in the course of transportation and (2) the facilities where hazardous materials are stored and used outside of transporation.'' 64 FR at 33951.

In the recently-issued final rule in HM–223, RSPA has reaffirmed that ''storage incidental to movement of a hazardous material'' is a ''transportation function,'' and the HMR apply to the ''[s]torage if a * * * package containing a hazardous material by any person between the time that a carrier takes possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium * * *'' 49 CFR 171.1(c)(4), as added in 68 FR 61906, 61938 (Oct. 30, 2003); ''*see also*'' the definition of ''storage incidental to movement'' added to § 171.8. *Id.* at 61940–41. RSPA also reaffirmed in new § 171.1(f)(1) that State and local requirements may apply to a ''facility at which pre-transportation or transportation functions are performed,'' but that those State and local requirements remain subject to preemption under the criteria set forth in 49 U.S.C. 5125 (discussed in part II, below). *Id.* at 61938.

As stated in the preamble to the final rule,

> Unless the Secretary waives preemption, the preemption provisions of Federal hazmat law effectively preclude State, local, and tribal governments from regulating transportation functions, as defined in this final rule, in a manner that differs from the Federal requirements if the non-Federal requirement is not authorized by another Federal law and the non-Federal requirement fails the dual compliance, obstacle, or covered subject test. Examples of such transportation functions include:* * * (4) storage of a hazardous material between the time that a carrier takes possession of the material until it is delivered to its destination as indicated on shipping documentation.

Id. at 61924. Thus, ''the definitions adopted in this final rule permit other Federal agencies, States, and local governments to exercise their legitimate regulatory roles at fixed facilities,'' but, as expressed in one comment in the HM–223 rulemaking proceeding, ''[u]niformity, clarity, and consistency are essential when addressing the * * * storage of hazardous materials in intrastate and interstate commerce.'' *Id.* at 61915. In this regard, RSPA has not broken new ground in HM–223 but simply set forth principles ''consistent with previous administrative determinations and letters of interpretation concerning the applicability of the HMR to hazardous materials stored incidental to movement.'' *Id.*, at 61919.

In PD–14(R), RSPA addressed the provisions in the prior edition of the Fire Code that excepted the ''[t]ransportation of flammable and combustible liquids when in accordance with DOT regulations on file with and approved by DOT'' (In Sec. 7901.1.1), and for ''[o]ff site hazardous materials transportation in accordance with DOT requirements'' (in Sec. 8001.1.1). 63 FR at 67507, 67510, 64 FR at 33950, 33951. The current edition of the Fire Code has retained the exception in Sec. 7901.1.1 with respect to flammable and combustible liquids, but eliminated the previous exception in Sec. 8001.1.1. Accordingly, to the extent that flammable and combustible liquids are stored in the course of transportation, they cannot be considered subject to any requirements in Article 79 of the Fire Code. 63 FR at 67510, 64 FR at 33951. The Fire Code also contains ''exceptions'' in Secs. 105.8.f.3, 105.8.h.1, and 7901.3.1 that ''A permit is not required for any activity when the requirement of local permits is preempted by federal or state law.''

The text of Air France's application is set forth in Appendix A, and the complete application including the exhibits is available in the Dockets Office, U.S. Department of Transportation, room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001, and on-line through the home page of DOT's Docket Management System, at *http://dms.dot.gov.* A copy of the exhibits will be provided without charge upon request to Mr. Hilder (*see* **FOR FURTHER INFORMATION CONTACT** above).

In summary, Air France argues that both (1) the requirements to submit an HMMP and HMIS in order to obtain a permit to store hazardous materials at IAH for a short period in the course of transportation and (2) the requirement to store these materials in storage cabinets during the time they are at IAH create obstacles to accomplishing and carrying out the HMR because of the potential for unnecessary delay or diversion in their transportation for the reasons set forth in prior inconsistency rulings, preemption determinations, and court decisions. Air France also argues that the requirement for storage cabinets does not advance the safe transportation of hazardous materials because (1) it is not applied in the same manner to non-transportation facilities at which the same materials are stored, (2) it increases the number of times hazardous materials are handled, increasing the risk of an accident or incident, and (3) it conflicts with the HMR's requirements for separation and segregation of hazardous materials.

II. Federal Preemption

Section 5125 or 49 U.S.C. contains express preemption provisions that are relevant to this proceeding. 66 FR at 41933–34. As amended by Section 1711 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2319), 49 U.S.C. 5125(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, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) The requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria 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. 93–633 112(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 is preempted—unless authorized by another Federal law or DOT grants a waiver of preemption—when the non-Federal requirement is not ''substantively the same as'' a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Secretary of Homeland Security:

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

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

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

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

(E) The 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).

Last year's amendments to the preemption provisions in 49 U.S.C. 5125 reaffirmed Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Almost 30 years ago, when it was 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 expanded the preemption provisions 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. (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.) A United States Court of Appeals has found that uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to RSPA to make determinations of preemption, except for those that concern highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.53(b).

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 will publish its determination in the **Federal Register**. *See* 49 CFR 107.209. A short period of time is allowed for filing of 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, 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,* 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 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 has implemented through its regulations.

IV. Public Comments

All comments should be limited to whether 49 U.S.C. 5125 preempts the Houston requirements in the Fire Code and imposed by HFD for permits, secondary containment, and segregation, as applied to hazardous materials handled and stored by an air carrier at an airport during transportation. Comments should specifically address the preemption criteria detailed in Part II, above, and set forth in detail the manner in which these requirements are applied and enforced.

Issued in Washington, DC on November 4, 2003.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

Appendix A

Application of Societé Air France for a Preemption Determination

Pursuant to 49 CFR 107.203 and 49 U.S.C. 5125, Societé Air France (''Air France'') hereby applies for a determination that certain permit requirements contained in the Fire Code of the City of Houston, as well as certain secondary containment and segregation requirements imposed by the Houston Fire Department, are preempted under Federal hazardous materials transportation law as these requirements are being applied to the handling or storage by Air France of hazardous materials incidental to their movement by air at the Air France cargo facility at George Bush Intercontinental Airport (''IAH''), Houston, Texas.

I. Local Ordinances and Requirements at Issue

Air France seeks a Department determination that the following local Houston Fire Code and Fire Department requirements are preempted:

1. *§ 105.8.h.1 and § 8001.3.1. of the Fire Code*—requirement for a local permit to handle or store hazardous materials.

2. *§ 8001.3.2. and Appendix II–E of the Fire Code*—requirement that carriers must submit a Hazardous Materials Management Plan (''HMMP'') as specified therein in support of a § 105.8.h.1. and § 8001.3.1 permit application.

3. *§ 8001.3.3 and Appendix II–E of the Fire Code*—requirement that carriers must submit a Hazardous Materials Inventory Statement (''HMIS'') as specified therein in support of a § 105.8.h.1 and § 8001.3.1 permit application.

4. *§ 105.8.f.3 and § 7901.3.1 of the Fire Code*—requirement for a local permit to handle or store flammable or combustible liquids.[1]

5. *§ 8001.10.6 § 8001.11.8, § 7902.5.9 and § 7902.1.6 of the Fire Code and requirements imposed under the Lynxs/Air France Agreement*—requirements for the use of hazardous materials storage cabinets.

6. *§ 8003.1.33 and § 7901.8 of the Fire Code*—requirements for the secondary containment of hazardous materials liquids and solids.

These local Houston requirements are inconsistent with Federal hazardous materials law and specific provisions of the Hazardous Materials Regulations (''HMR''), 49 CFR part 171–180, enforced by the Department and adhered to by Air France in its United States operations, including those conducted at IAH in Houston, Texas.

II. Statement of Facts

Air France is a foreign air carrier licensed and regulated by the United States Department of Transportation (''DOT'' or ''Department'') and is authorized to transport air cargo between points in the United States and points in France. Air France has been providing cargo air transportation, including the transportation of hazardous materials, at IAH since 1969. Currently, Air France operates a daily passenger/cargo combination flight and an all-cargo flight three times per week between IAH and Paris, France.

Air France has applied for and received a permit from the Houston Fire Department to handle or store hazardous materials on an annual basis since 1979 in connection with its IAH cargo warehouse. On June 11, 2002, Air France received the paperwork from the Houston Fire Department to renew its permit to handle or store hazardous materials. On this occasion, Air France was required *for the first time* to submit tow additional items to renew its permit: (1) a HMMP and (2) a HMIS. Air France had never been asked to provide these items on any other occasion when renewing its local permit to store or handle hazardous materials.

The City of Houston has adopted the 1997 edition of the Uniform Fire code, with certain amendments (''Fire Code'').[2] The requirement for a permit to handle or store hazardous materials over certain amounts is found in § 105.8.h.1 of the Fire Code. This section also contains a general exception which states ''EXCEPTION'': A permit is not required for any activity where the requirement of local permits is preempted by Federal or State law.[3] In addition, Article 80—Hazardous Materials states that ''[p]ermits are required to store, dispense, use or handle hazardous material in excess of quantities specified in Section 105, Permit h.1.''[4] Article 80 further provides that, when required by the fire chief, and applicant for a permit is required to submit a HMMP and a HMIS.[5] Fire Code § 105.8.f.3 and § 7901.3.1 of Article 79—Flammable and Combustible Liquids also require a permit to handle or store flammable or combustible liquids in excess of certain amounts. Both of these sections also provide for an exception where the requirement of a local permit is preempted by Federal or State law.

Appendix II–E, § 2.1 of the Fire code requires that the HMIS list by hazard class all hazardous materials stored in a building and include the following information for each hazardous material listed: (1) Hazard class; (2) common or trade name; (3) chemical name, major constituents and concentrations if a mixture. If a waste, the waste category; (4) Chemical Abstract Service number found in 29 CFR; (5) whether the material is pure or a mixture and whether the material is a solid, liquid or gas; (6) maximum aggregate quantity stored at any one time; and (7) storage conditions related to the storage type, temperature and pressure. An amended HMIS is required to be provided within 30 days of the storage of any hazardous materials which changes or adds a hazard class or which is sufficient in quantity to cause an increase in the quantity that exceeds 5 percent for any hazard class.[6] Pursuant to Column 6.2 of Section II of Figure A–II–E–1 (Sample Format) contained in Appendix II–E, an applicant is also required to estimate the average daily amount of hazardous material on site during the past year.

Appendix II–E, § 3.2 of the Fire Code requires that the HMMP include the following information: (1) General business information; (2) a general site plan; (3) a building floor plan; (4) information on hazardous materials handling; (5) information on chemical compatibility and separation; (6) a monitoring program; (7) inspection and record keeping; (8) employee training; and (9) emergency response procedures.

On July 3, 2002, Air France first applied to the Houston Fire Department for renewal of its permit to handle or store hazardous materials at its IAH cargo facility. Air France, however, was unable to obtain such a permit due, in part, to its inability to provide the Houston Fire Department with the detailed information it sought as part of the HMIS requirement. Given the nature of its operations, the hazardous materials that are present at the Air France cargo facility changes on a day-to-day basis (or even on an hour-to-hour basis) at these materials are in transit and are only present for palletization and other procedures related to their carriage by air. All hazardous material shipments present in the Air France facility are under active shipping papers (air waybills) and are only present there incidental to prior or subsequent air transportation. As a result, hazardous materials typically spend only a very short period of time at the Air France cargo facility. In addition, Air France is unable to predict what hazardous materials it may have in its facility at any given time since this is a function of the hazardous materials that its customers choose to ship.

Nevertheless, Air France has attempted to comply with the Houston Fire Department's requirements. At the request of the Houston Fire Department, Air France revised its HMIS and HMMP on several occasions subsequent to its July 3, 2002 submission (the Fire Department's rejection of Air France's submitted HMMP and HMIS is evidenced by the Notice of Violation, dated October 23, 2002, attached hereto as Exhibit 2). As none of these submissions were satisfactory to the Fire Department, Air France ultimately found it necessary to retain Loss Control Associates, Inc., a fire protection engineering firm, to assist it in completing these forms. At the suggestion of the Houston Fire Department, Loss Control Associates conducted a survey of NOTOCs (Notifications to Captains) and manifests for shipments transiting the Air France IAH cargo facility during a prior sixth-month period in order to estimate the maximum aggregate quantities of hazardous materials stored at any one time as required to be provided in the HMIS. In addition, as the common names and trade names of hazardous materials are not contained on

[1] To the extent that a HMMP or a HMIS is required by the Fire Department to obtain a permit to handle or store flammable or combustible liquids under Article 79 of the Fire Code, Air France also requests that such requirements be preempted.

[2] Applicable provisions of the Fire Code are attached hereto as Exhibit 1.

[3] Fire Code § 105.8.1

[4] Fire Code § 8001.3.1

[5] Fire Code §§ 8001.3.2 and 8001.3.3.

[6] Fire Code App. II–E,§ 2.2

shipping papers, the engineering firm was required to contact the numerous shippers and manufacturers of the materials in order to obtain the information and complete the HMIS.

In addition to the permit to handle or store hazardous materials, the Houston Fire Department also required Air France to apply for and obtain a permit to handle or store flammable and combustible liquids, including requiring Air France to submit an additional HMMP and HMIS The HMMPS and HMISs prepared for Air France by Loss Control Associates and finally accepted by the Fire Department are attached hereto as Exhibit 3. Air France spent over $7,000.00 in its effort to comply with the HMMP and HMIS requirements imposed by the Houston Fire Department to obtain these local permits. The Fire Department issued the annual permit to handle or store hazardous materials on June 17, 2003 and issued the annual permit to handle or store flammable and combustible liquids on June 27, 2003 but refused to deliver the permits to Air France until after a hazardous materials storage cabinet was installed at the carrier's new cargo facility (discussed below). Air France finally received both of the permits from the Houston Fire Department on August 6, 2003 (copies of the permits issued by the Fire Department are attached hereto as Exhibit 4). Since the permits are for a one-year period and expire on June 17 or 27, 2004, Air France will have to re-apply and undergo this same burdensome and costly application procedure next year and every year thereafter.

On February 10, 2003, while Air France was attempting to comply with the Houston Fire Department's permit requirements, representatives of the Fire Department visited the Air France cargo facility and cited Eric Roberts, the local Air France cargo manager, for several alleged violations of the Fire Code, including failure to post the required local permit for flammable liquids storage, handling or use, and failure to provide a proper HMIS for storage of hazardous materials. Mr. Roberts was also cited by the Fire Department for allegedly failing to provide proper H-occupancy for storage of flammable liquids above exempt amounts, as well as for failing to post a valid certificate of occupancy (the citations are attached hereto as Exhibit 5). There is a Houston municipal court trial related to these citations scheduled for November 13, 2003.

On July 8, 2003, Air France moved into a new cargo warehouse facility at IAH. The Lynxs Group developed the new facility for the Houston Airport System (''HAS''), the Houston municipal department responsible for managing the airport. Air France subleases the new facility from the Lynxs Group. As a condition of issuing a certificate of occupancy for the new building, the Houston Fire Department required that a hazardous materials storage cabinet be installed and used at the facility for the storage by Air France of certain in transit hazardous materials. Consequently, the Lynxs Group agreed with the Fire Department to require Air France contractually to use a storage cabinet so that a certificate of occupancy could be obtained for the new facility. The Lynxs Group agreed to purchase the cabinet and finance its acquisition by assessing Air France additional rent for a 60-month period. The cost of the storage cabinet, including installation, was approximately $50,000. The specific storage cabinet requirements imposed on Air France by the Fire Department are described in the Letter Agreement between the Lynxs Group and Air France, dated April 15, 2003 (attached hereto as Exhibit 6). The certificate of occupancy was issued on June 27, 2003 with a notation that ''HAZARDOUS MATERIAL ABOVE THE EXEMPT AMOUNTS SHALL BE STORED IN LOCKERS PER FIRE MARSHALL'' (the certificate of occupancy is attached hereto as Exhibit 7).

While the Houston Fire Department has not identified for Air France the specific Fire Code provisions under which it has required the installation and use of the hazardous materials storage cabinet, various provisions of the Fire Code concern the use of such cabinets. For example, § 8001.10.6 of the Fire Code provides that storage cabinets may be used to increase exempt amounts or to comply with Article 80.[7] In addition, § 8001.11.8 provides that, among certain other methods, the separation of incompatible materials may be achieved by storing liquid and solid materials in hazardous materials storage cabinets.[8] Finally, while it does not specifically address the use of hazardous materials storage cabinets, § 8003.1.3.3 provides secondary containment requirements for buildings, rooms and areas used for the storage of hazardous materials liquids and solids.[9] The Fire Department has provided Air France with a copy of Fire Code Tables 7902.3–A,7902.5–A, 7902.5–B, 8001.15–A and 8001.15–B and indicated that these tables contain the exempt amounts of hazardous materials above which must be stored in the cabinet (the Fire Code tables of exempt amounts are attached hereto as Exhibit 8).

No other U.S. jurisdiction requires Air France to obtain a local permit to store hazardous materials at its cargo warehouses located in the U.S. Of the eleven U.S. cities Air France serves, it operates cargo warehouse facilities at six: Boston, Chicago, Houston, Los Angeles, Miami and Washington. In addition, no other U.S. jurisdiction requires Air France to install and use hazardous materials storage cabinets at any of its U.S. cargo facilities.

Air France therefore requests a determination that § 105.8.h.1, § 8001.3.1, § 8001.3.2, § 8001.3.3 and Appendix II–E of the Fire Code are preempted to the extent that these provisions require Air France to submit a HMMP or a HMIS in order to obtain a local permit to handle or store hazardous materials at its IAH cargo facility.[10] In addition, Air France requests that Exhibit 6 and § 8001.10.6, § 8001.11.8, § 8003.1.3.3, § 7902.5.9, § 7902.1.6, § 7901.8, or any other provision of the Houston Fire Code or other independent requirement of the Houston Fire Department, are preempted to the extent that these requirements or provisions mandate the installation or use of a hazardous materials storage cabinet at the new Air France cargo facility at IAH.

III. DOT's Preemption Authority Under Federal Hazardous Materials Transportation Law

The Hazardous Materials Transportation Act (''HMTA''), former 49 App. U.S.C. 1801 *et seq.,* was enacted in 1975 to give DOT greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.''[11] The HMTA ''replace[d] a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations.''[12] On July 5, 1994, President Clinton signed Public Law 103–272, codifying the provisions of the HMTA without substantive change, which are now found at 49 U.S.C. §§ 5101–5127.[13]

When Congress substantively amended the HMTA in 1990, it 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 risk 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.[14]

In amending the HMTA, Congress affirmed that ''uniformity was the linchpin'' of the statute.[15] Accordingly, Congress gave DOT the authority to preempt a requirement of a

[7] In addition, § 7902.5.9 provides quantity limitations and construction requirements when other sections of the Fire Code require that liquid containers be stored in storage cabinets.

[8] § 7902.1.6 also provides that the storage of flammable and combustible liquids are required to be separated from incompatible hazardous materials in accordance with § 8001.11.8.

[9] § 7901.8 also provides that rooms, buildings or areas used for storage or handling of flammable and combustible liquids shall be provided with spill control and secondary containment in accordance with, *inter alia,* § 8003.1.3.

[10] Air France also requests that the Houston Fire Department's requirement that the carrier submit a HMMP and a HMIS in order to obtain a permit to handle or store flammable or combustible liquids (§ 105.8.f.3 and § 7901.3.1) also be preempted.

[11] 49 App. U.S.C. 1801.

[12] *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990).

[13] Pub. L. 103–272, 108 Stat. 745 (1994).

[14] Pub. L. 101–615, § 2, 104 Stat. 3244 (1990) (emphasis added.)

[15] *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

State, political subdivision of a State, or an Indian tribe where:

(1) Complying with such a requirement and a requirement of this chapter [49 U.S.C. 5101 *et seq.*], a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible (the ''dual compliance test''); or

(2) Such a requirement, as applied or enforced, is an obstacle to accompanying and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulations or directive issued by the Secretary of Homeland Security (the ''obstacle test'').[16]

Congress also gave DOT the authority to preempt a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe concerning five covered subjects, including: (A) the designation, description, and classification of hazardous material and (B) the packaging, repackaging, handling, labeling, marking, and placarding of hazardous material, that are not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (the ''covered subjects test'').[17]

The Research and Special Programs Administration (''RSPA'') has enacted regulations under which ''any person . . . directly affected by any requirement of a State, political subdivision, or Indian tribe may apply for a determination as to whether that requirements is preempted under 49 U.S.C. 5125'' [18] The standards established by RSPA for determining whether a requirement of a State, political subdivision, or Indian tribe is preempted are essentially the same as the standards stated in 49 U.S.C. 5125(a)(1) and (2) and (b)(1).[19] For the purpose of making preemption determinations, RSPA has defined ''substantially the same'' to mean ''that the non-Federal requirement conforms in every significant respect to the Federal requirement.'' [20]

The HMR have been promulgated in accordance with the HMTA's direction that the Secretary of Transportation ''prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce'' [21] The HMR ''shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate.'' [22] ''Transportation'' is defined as ''the movement of property and loading, unloading, or *storage incidental to the movement.*'' [23]

IV. The Requirements Contained in the Houston Fire Code To Submit a Hazardous Materials Management Plan and a Hazardous Materials Inventory Statement in Order To Obtain a Permit To Handle or Store Hazardous Materials Should Be Preempted in Accordance With DOT Precedent as an Obstacle to the Execution of the HMTA and the HMR

In Inconsistency Ruling No. IR–28 (San Jose), 55 FR 8884 (March 8, 1990), RSPA held that a local ordinance requiring the submission of a HMMP and a HMIS in order to obtain a permit to store hazardous materials incidental to transportation is an obstacle to the execution of the HMTA and the HMR and thus preempted. Since the Houston Fire Department is imposing virtually identical HMMP and HMIS requirements upon Air France in order for the carrier to obtain a permit to handle or store in transit hazardous materials at its cargo facility at IAH, these requirements should similarly be preempted in accordance with IR–28 (San Jose).

The Hazardous Materials Storage Ordinance at issue in IR–28, which was contained in the San Jose Municipal Code, required Yellow Freight System, Inc., (''Yellow Freight'') to obtain a Hazardous Materials Storage Permit (''HMSP'') and submit a HMMP to operate its expanded trucking terminal.[24] Among several other items, San Jose required that a HMIS, including names, hazard classes and total quantities, be included in the HMMP.[25] Yellow Freight argued that the fluid nature of the commerce through its facility made it impossible to comply with San Jose's inventory requirements.[26]

While RSPA's Director of the Office of Hazardous Materials Transportation noted that ''State and local permits for hazardous materials transportation are not *per se* inconsistent [and] their consistency depends upon the nature of their requirements[,]'' [27] the Director went on to state that:

> a state or local permitting system which prohibits or requires certain hazardous materials transportation activities depending upon whether a permit has been issued (regardless of whether the activity is in compliance with the HMR), applies to selected hazardous materials * * * involves extensive information and documentation requirements [such as a HMMP and a HMIS], and contains considerable discretion as to permit issuance, is inconsistent with the HMTA and the HMR. 'Cumulatively, these factors constitute unauthorized prior restraints on shipments of hazardous materials that are presumptively safe based on their compliance with Federal regulations.' [28]

The Director concluded that ''the City's discretionary and burdensome permit/approval requirements for the storage of hazardous materials incidental to their transportation (*e.g.,* at motor carrier terminals) are inconsistent and thus preempted.'' [29]

With respect to San Jose's HMMP and HMIS requirement, the Director noted that ''[i]nformation and documentation requirements as prerequisites to hazardous materials transportation have been considered on many prior occasions. Where such requirements exceed Federal requirements, they have been found to create potential delay or diversion of hazardous materials transportation, to constitute an obstacle to the execution of the HMTA and the HMR, and thus to be inconsistent.'' [30] The Director stated that ''the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implementation of the HMTA and HMR and thus are inconsistent with them.'' [31] The Director went on to find that:

> the City of San Jose has imposed extensive (practically exhaustive), extremely detailed, burdensome, open-ended, vague and impossible-to-comply-with information and documentation requirements as a condition precedent to, inter alia, the storage of hazardous materials incidental to the transportation thereof without regard to whether that transportation-related storage is in compliance with the HMR. *For example, the detailed information required to be provided concerning the identity and quantity of hazardous materials (and other materials) which a transportation carrier might store at its facility during a given year is impossible to compile and provide in advance because a common carrier is at the mercy of its customers, including the general public, who may without advance notice offer to the carrier for transportation virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.*[32]

The Director also found that San Jose's information and documentation requirements, insofar as they relate to hazardous materials to be stored at a facility incidental to transportation, constitute an inconsistent advance notice requirement since they have the potential to delay and redirect traffic.[33]

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[16] *See* 49 U.S.C. 5125(a)(1) and (2).

[17] *See* 49 U.S.C. 5125(b)(1)(A) and (B).

[18] 49 CFR 107.201(a)(1).

[19] *See* 49 CFR 107.202(a) and (b).

[20] 49 CFR 107.202(d).

[21] 49 U.S.C. 5103(b).

[22] 49 U.S.C. 5103(b)(1a)(B).

[23] 49 U.S.C. § 5102(12) (emphasis added). Air France is aware that the Department has issued a Notice of Proposed Rulemaking seeking to clarify the applicability of the HMR to specific functions and activities, including loading, unloading and storage of hazardous materials during transportation. Docket No. RSPA–98–4952 (HM–223), 66 FR 32420 (June 14, 2001). Under the proposed rule, ''storage incidental to movement'' would be defined as:

''Storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium. * * *'' 66 Fed. Reg. at 32448.

[24] *See id* at 8885.

[25] *See id.*

[26] *See id* at 8888.

[27] *Id* at 8890 (citation omitted).

[28] *Id* (quoting Inconsistency Ruling No. IR–19 (the Inconsistency Ruling underlying the Ninth Circuit's decision in *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n of Nevada*, 909 F. 2d 352 (9th Cir. 1990) discussed below).

[29] *Id* at 8890–91.

[30] *Id* at 8891.

[31] *Id* (citing IR–19).

[32] *Id* (emphasis added).

[33] *See id* (citing IR–8 (Appeal) and IR–16).

As the Director correctly explained:

It is impossible for a common carrier to comply with the City's requirements concerning advance identification of hazardous materials and quantities thereof. As a result, when the carrier/facility operator receives or is offered hazardous materials not previously identified or in quantities exceeding those projected, it faces a dilemma: Whether to comply with its obligations under the HMR to transport the materials without delay, to hold the materials pending an amended application to the City, to divert the materials to another jurisdiction for any necessary transportation-related storage, or to violate its common carrier obligation by refusing to accept any such materials.[34]

The Director also found that ''the City's information requirements are inconsistent with the HMR insofar as they require emergency response information as a prerequisite to the loading, unloading, and storage of hazardous materials incidental to their transportation.'' [35] In reaching this conclusion, the Director stated that:

With the promulgation of these regulations [49 CFR Part 172, subpart G], RSPA's emergency response information requirements for hazardous materials transportation, including the loading, unloading, or storage incidental to such transportation exclusively occupy that field. Therefore, state and local requirements not identical to these HMR provisions will cause confusion concerning the nature of such requirements, undermine compliance with the HMR requirements, constitute obstacles to implementation of those provisions, and thus be inconsistent and preempted.[36]

The rationale used by the Department to preempt the HMMP and HMIS permit requirements in IR–28 (San Jose) applies with equal force with respect to the present Houston requirements. In IR–28 (San Jose), the Department found that where extensive information and documentation is required in order to obtain a permit (such as with a HMMP and a HMIS), such requirements might constitute an unauthorized prior restraint on the shipment of hazardous materials. With respect to the HMIS, the Department held that detailed information concerning the identity and quantity of hazardous materials that a carrier might store at its facility incidental to transportation is impossible to compile and provide in advance since such information depends on what the carrier's customers choose to ship. The Department also found that extensive information and documentation requirements, insofar as they relate to hazardous materials to be stored at a facility incidental to transportation, might constitute an inconsistent advanced notice requirement since they have the potential to delay and redirect traffic. Finally, DOT found that the HMR exclusively occupy the field of emergency response information requirements for the transportation of hazardous materials. In this Application, Air France respectfully request that RSPA follow its decision in IR–28 (San Jose) by holding that the virtually identical HMMP and HMIS permit requirements contained in the Houston Fire Code are similarly incidental to their movement by air at the Air France cargo facility at IAH.

A similar Department Inconsistency Ruling was upheld by the Ninth Circuit Court of Appeals in *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n of Nevada,* 909 F.2d 352 (9th Cir. 1990). There the Ninth Circuit reversed an order of the district court granting summary judgment to the Public Service Commission of Nevada (''PSC'') and reinstated the DOT Inconsistency Ruling. In that case, Southern Pacific Transportation Company (''SPTC'') argued that PSC regulations requiring rail carriers to obtain an annual permit prior to loading, unloading, transferring or storing hazardous material on railroad property within the state of Nevada were preempted by the HMTA and the Federal Railroad Safety Act.[37] In order to obtain the permit, applicants were required to submit, among several other items, ''[a] summary of all hazardous material carried by the railroad during the proceeding 12 months[.]'' [38]

In reversing the district court's decision for failing to accord sufficient deference to the underlying Inconsistency Ruling issued by DOT (IR–19 (Appeal), 53 FR 11600 (April 7, 1988)), the Ninth Circuit stated that:

The DOT found that its regulations and the Nevada regulations address many of the same matters. For instance, it found that several of its own regulations already addressed storage incident to the transportation of hazardous materials, the primary focus of the Nevada regulations * * * Because the Nevada regulations address matters already covered by the federal regulations, impose substantial burdens on applicants, and create the risk of confusion, conflicts, and delays, the DOT determined that they were inconsistent with the federal regulations.[39]

The court went on to cite numerous HMR provisions that address loading, unloading, and storage (including temporary storage) of hazardous materials during carriage by rail, concluding that ''[a]t least one Federal court has recently held that 'the extent of Federal regulation in the area of transportation, loading, unloading and storage of hazardous materials is comprehensive.' '' [40] The court found that ''[d]espite DOT's extensive regulation of loading, unloading, transfer and storage incidental to the transportation of hazardous materials, the Nevada regulations require a carrier to obtain an annual permit prior to engaging in these activities within the State of Nevada. The Nevada regulations, thus, create a separate regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation.'' [41] In addition, the court noted that ''Federal regulations also impose specific information and documentation requirements deemed necessary for the safe transportation of hazardous materials. * * *'' and that the Nevada regulations ''indicate the State's attempt to regulate areas clearly addressed in the Federal regulations.'' [42]

The same can be said of the HMMP and the HMIS requirements contained in the Houston Fire Code. For example, despite the fact that 49 CFR 172.600(c)(2) requires emergency response information to be immediately available to any Federal, State or local government agency representative that responds to an incident involving a hazardous material (including providing the basic description and technical name of the hazardous material as required by §§ 172.202 and 172.203(k), the ICAO Technical Instruction, the IMDG Code or the TDR Regulations as required by § 172.602(a)(1)), Air France is also required by the Fire Code to submit a HMIS on which it must list all hazardous materials that it might store in its cargo facility, including the common names or trade names of the hazardous materials and the maximum aggregate quantity stored at any one time.[43] In addition to being impossible to accurately compile and provide in advance because the amount and type of hazardous materials that are present at the Air France cargo facility is a function of what its customers choose to ship, such a requirement also indicates an attempt by the Houston Fire Department to regulate an area (emergency response information) that is already addressed in the HMR.

Moreover, the confusion that the court in *Southern Pac.* suggested would be fostered by two separate regulatory regimes is illustrated by the inability of Air France to comply with the HMIS requirement to provide common names or trade names for the hazardous material shipped through its cargo facility at IAH. Neither the common names nor trade names of hazardous materials are required by the HMR to be included on a carrier's shipping papers. Air France should not be required to retain a fire protection engineering firm to conduct a survey of prior shipping papers and investigate the common names and trade names of the hazardous materials with the shippers and manufacturers of the materials in order to provide this information to the Fire Department. At best, conducting such a time-consuming and expensive survey only results in a sampling of the common names and trade names of the various hazardous materials shipped through the Air France warehouse and might not even accurately reflect which materials are actually present in the facility at any given time. For these reasons, the local Houston permit, HMIS and HMMP requirements should be preempted by the Department as obstacles to the execution of the HMTA and the HMR.

Interestingly, the Houston Fire Code permit requirements have been the subject of a prior DOT preemption proceeding. In Preemption Determination No. PD–14(R), 64 FR 33949 (June 24, 1999), RSPA affirmed its earlier Preemption Determination (No. PD–14(R), 63

[34] *Id* at 8892.

[35] *Id.*

[36] *Id.*

[37] *See id* at 353.

[38] *Id* at 354 (citing Nev. Admin. Code § 705.330(e)).

[39] *Id* at 355–56.

[40] *Id* at 357 (quoting *Consolidated Rail Corp.* v. *Bayonne,* 724 F. Supp. 320, 330 (D.N.J. 1989)).

[41] *Id* at 358.

[42] *Id.*

[43] Fire Code App. II–E, § 2.1

FR 67506 (December 7, 1998)) finding that certain provisions of the Houston Fire Code (the 1994 edition of the Uniform Fire Code), including the permit requirements in § 105.8.h.1, § 8001.3.1, § 105.8.f.3 and § 7901.3.1 were not preempted (to the extent that these sections require a permit for a vehicle to transport hazardous materials in commerce within the City) because the local Fire Code provisions by explicit exception did not apply to the transportation of hazardous materials subject to the HMR.[44] In PD–14(R), the Association of Waste Hazardous Materials Transporters (''AWHMT'') had challenged certain provisions of the Fire Code, including provisions requiring inspections and fees in order to obtain an annual permit for cargo tank motor vehicles to pickup or deliver hazardous materials within the City.[45] In that case, RSPA reasoned that the specific exceptions in §§ 7901.1.1 and 8001.1.1 for transportation ''in accordance with'' DOT regulations makes it clear that the Fire Code is not intended to apply to vehicles when they are transporting hazardous materials subject to the HMR.[46] RSPA therefore concluded that there was no inconsistency with Federal hazardous material transportation law or the HMR when the Fire Code is properly applied in this manner.[47]

In reaching this conclusion, RSPA noted that:

the City specifically acknowledged 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'[.]*[48]

In its initial Preemption Determination, RSPA noted that the City had stopped requiring permits of vehicles meeting DOT requirements.[49] RSPA concluded that [b]ecause 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.''[50]

While AWHMT did not challenge the City's requirements that apply to a facility that stores hazardous materials, as opposed to vehicles that move those materials, RSPA nevertheless undertook a discussion of the issue stating that:

RSPA has long encouraged States and localities to adopt and enforce requirements on the transportation of hazardous materials that are consistent with the HMR. *See, e.g.,* PD–12(R), 60 FR at 62530. This applies to storage that is incidental to the movement of hazardous materials in commerce, as well as the actual movement of those materials. *The enforceability of non-Federal requirements on 'incidental' storage depends on the consistency of those requirements with the HMR and, of course, the applicability of the requirements themselves in terms of exceptions such as Secs. 7901.1.1 and 8001.1.1 of the Uniform Fire Code.*[51]

Citing IR–28 (San Jose), RSPA reiterated its position that:

detailed information required to be provided concerning the identity and quantity of hazardous materials (and other materials) which a transportation carrier might store at its facility during a given year is impossible to compile and provide in advance because a common carrier is at the mercy of its customers, including the general public, who may without advance notice offer to the carrier virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.[52]

RSPA concluded that ''[t]o to the extent that the exceptions in Secs. 7901.1.1 and 8001.1.1 mean that provisions of the Uniform Fire Code do not apply to transportation of hazardous materials in commerce, including incidental storage, that result derives from the plain language of the Uniform Fire Code and not from any inconsistency with the HMR.[53]

Although RSPA held in Preemption Determination No. 14(R) that the permit requirements contained in § 105.8.h.1, § 8001.3.1, § 105.8.f.3 and § 7901.3.1 of the Fire Code were not preempted by Federal hazardous materials law (to the extent that these sections require a permit for a vehicle to transport hazardous materials in commerce within the City), RSPA's holding rested on the exceptions contained in the Fire Code that permits are not required for transportation of hazardous materials in accordance with DOT requirements and the fact that the city had stopped requiring permits for the activities in question.

In addition, in PD–14(R), RSPA specifically noted that the enforceability of non-Federal requirements on incidental storage depends on the consistency of those requirements with the HMR and the applicability of the requirements themselves in terms of exceptions contained in the Houston Fire Code. The Fire Department, however, assuredly is not enforcing its permit requirements in accordance with the express terms of the Houston Fire Code (*i.e.*, the exceptions contained in § 105.8.h.1, § 105.8.f.3 and § 7901.3.1 for activity where the requirement for a local permit has been preempted by Federal or state law) since it is enforcing the permit requirements against carriers such as Air France under circumstances that have already been determined to be preempted, including requiring the submission of a HMMP and a HMIS (*see e.g.*, IR–28 (San Jose) and Southern Pac. Transp. Co., 909 F.2d 352 (9th Cir. 1990)).

V. The Fire Department's Hazardous Materials Storage Cabinet Requirement Should Also Be Preempted as an Obstacle to the Execution of the HMTA and the HMR

The hazardous materials storage cabinet requirement imposed by the Houston Fire Department on Air France pursuant to Exhibit 6 should also be preempted by the HMTA and the HMR.[54] This requirement is an obstacle to compliance with specific HMR provisions and conflict with the Department's ruling in IR–28 (San Jose).

In IR–28 (San Jose), RSPA noted that ''state or local prohibition of transportation-related storage at places where, and at times when, the HMR allow such storage is inconsistent with the HMTA and the HMR.''[55] In that case, Yellow Freight had complained that the City of San Jose desired to have every shipment of hazardous material that is not moving directly across the dock into an immediately available vehicle moved instead into one of a series of specially constructed and segregated storage bunkers, with materials divided by hazard classification.[56] Yellow Freight maintained that the movement of these materials in and out of such bunkers would cause confusion, delay and safety problems for its employees.[57]

In addressing the secondary containment and segregation requirements for hazardous materials imposed by San Jose, the Director noted that § 177.848(f) (now § 177.848(d)) provided that ''[h]azardous materials must not be loaded, transported, or stored together, except as provided in' a detailed Segregation and Separation Chart of Hazardous Materials, which is a part of that Section.''[58] Accordingly, the Director found that:

State or local imposition of containment or segregation requirements for the storage of hazardous materials incidental to the transportation thereof different from, or additional to those in, § 177.848(f) of the HMR [which applies to carriage by public highway] create confusion concerning such requirements and [increase] the likelihood of noncompliance with § 177.848(f). Since such state or local requirements, therefore, are obstacles to the execution of an HMR provision, they are inconsistent with the HMR—insofar as they apply to transportation-related storage.[59]

The Houston Fire Department's requirement that Air France use a hazardous materials storage cabinet for the temporary storage of certain in transit hazardous materials also has the potential to create confusion and increase the likelihood of noncompliance with the hazardous materials segregation and separation rules established for air carrier cargo facilities contained in

[44] 64 FR at 33953.

[45] *See id* at 33949.

[46] *See id* at 33951.

[47] *See id.*

[48] *Id* (emphasis added).

[49] *See* (No. PD–14(R), 63 FR at 67510.

[50] 64 FR at 33951.

[51] *Id* at 33952 (emphasis added).

[52] *Id.*

[53] *Id.*

[54] Air France also requests that Fire Code § 8001.10.6, § 8001.11.8, § 8003.1.3.3, § 7901.8, § 7902.5.9 and § 7902.1.6 be preempted to the extent that the Fire Department relies on these provisions to require Air France to use a hazardous materials storage cabinet.

[55] 55 FR at 8893 (citing IR–19).

[56] *See id* at 8888.

[57] *See id.*

[58] *Id* at 8893.

[59] *Id.*

§ 175.78 of the HMR.[60] Air France should not be required to choose between following the Fire Department's storage requirements or complying with the segregation and separation requirements contained in the HMR.

Let us be clear that the local Houston requirement is clearly restricting storage that is incidental to transportation subject to the HMR. All hazardous material shipments at the Air France IAH facility are under active shipping papers (through air waybills); they are in transit prior to continuing transportation by truck or by aircraft to the ultimate consignee.

The local Houston requirement to store certain in transit hazardous materials in a storage cabinet also has the potential to create delays and diversions in the transportation of such materials. Obviously, the storage cabinet required by the Fire Department is only able to hold a limited amount of hazardous materials, *i.e.*, 48 55-gallon drums. When the cabinet is full (or other incompatible hazardous materials are already stored in the cabinet) hazardous materials may have to be shipped through other jurisdictions using a more circuitous routing in order to reach their final destination. Thus, the Fire Department's storage cabinet requirement could have a direct impact on the length of time certain shipments of hazardous materials remain in transit thereby increasing the risk associated with their transportation. In fact, within the first few days of using the storage cabinet, Air France had to delay for two days the acceptance of a shipment of flammable liquid due to the lack of space in the cabinet. As RSPA noted in IR–28 (San Jose) ''[t]he manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation.'' [61]

In addition, if the Fire Department's storage cabinet requirement is allowed to remain in place, Air France will be required to load and unload certain hazardous materials into and out of the cabinet increasing the number of times that the hazardous materials are handled. As one court has recognized, ''the more frequently hazardous material is handled during transportation, the greater the risk of mishap. Accordingly, these provisions [the HMTA] require that the material reach its destination as quickly as possible, with the least amount of handling and temporary storage.'' [62] Since the hazardous materials storage cabinet being required by the Houston Fire Department has the potential to create delays and diversions in the transportation of hazardous materials and will increase the amount that the materials are required to be handled, this requirement should be preempted as an obstacle to the execution of the HMTA and the HMR.

Given the obvious potential for delays and diversions in the transportation of hazardous materials associated with the Houston Fire Department's storage cabinet requirement, the current situation can easily be distinguished from PD–12(R), 62 Fed. Reg. 15970 (April 3, 1997), in which RSPA reversed its earlier decision in the same proceeding concluding that certain secondary containment requirements of the New York State Department of Environmental Conservation were not preempted due to a lack of information from which to determine that the requirements actually cause delays or diversions in the transportation of hazardous materials.

Nor is there a rational and compelling local governmental interest for requiring Air France to use storage cabinets to store certain in transit hazardous materials in its warehouse while not imposing the same requirement on comparably constructed retail establishments like a Home Depot or a Wal-Mart. According to Table 7902.5–A, Air France is required to store a shipment of paint thinner (a class I–B flammable liquid) over 120 gallons in a storage cabinet (the Air France facility is equipped with an approved automatic sprinkler system), while Table 7902.5–B provides a 15,000-gallon to 30,000-gallon exemption (depending on the size of the store) for paint thinner stored in retail establishments. The Houston Building Code also appears to provide an exception to the city's H-occupancy requirements for wholesale and retail establishments that store flammable and combustible liquids.[63] The irrational nature of the Fire Department's differing treatment of these two types of facilities becomes even more apparent when one considers that hazardous materials temporarily stored in the Air France warehouse will have the added security of being enclosed in DOT-approved packaging rendering them suitable for carriage by air; hazardous materials stored in retail establishments, on the other hand, are most likely packaged and stored in ordinary boxes or other types of containers. Absent a rational and compelling regulatory scheme, any claim of local governmental interest must be rejected and the local requirement preempted as an obstacle to the execution of the HMTA and the HMR.

VI. Conclusion

Pursuant to 49 CFR 107.205(b), Air France respectfully requests that a notice of this Application be published in the **Federal Register** with an opportunity for public comment. Air France further requests that upon consideration of the comments received and the prior Inconsistency Rulings, Preemption Determinations and court decisions discussed in this Application, that RSPA issue a determination finding that: (1) the Hazardous Materials Management Plan and Hazardous Materials Inventory Statement provisions contained in the Houston Fire Code are preempted to the extent that these items are required to be submitted in order for Air France to obtain a permit to handle or store in transit hazardous materials at its cargo facility at George Bush Intercontinental Airport; and (2) the Houston Fire Department's requirement that Air France use a hazardous materials storage cabinet for the storage of certain in transit hazardous materials is preempted.

VII. Certification

Pursuant to 49 CFR 107.205(a), I hereby certify that a copy of this Application has been sent via first class mail postage pre-paid with an invitation to submit comments to:

Randy Rivin, Esquire, Legal Department, City of Houston, P.O. Box 1562, Houston, TX 77251–1562.

Mr. Richard M. Vacar, Director of Aviation, Bush Intercontinental Airport, P.O. Box 60106, Department of Aviation, Houston, TX 77205–0106.

Dated: October 15, 2003.

Respectfully submitted,

Michael F. Goldman,

L. Jeffrey Johnson,

Silverberg, Goldman & Bikoff, L.L.P., 1101 30th Street, NW., Suite 120, Washington, DC 20007. Counsel for Societé Air France.

List of Exhibits

Exhibit 1—Applicable Houston Fire Code Provisions

Exhibit 2—Fire Department Notice of Violation, dated October 23, 2002

Exhibit 3—HMMPs and HMISs prepared for Air France by Loss Control Associates, Inc.

Exhibit 4—City of Houston permits issued to Air France to handle or store hazardous materials and flammable or combustible liquids

Exhibit 5—Fire Department Violation Citations, dated February 10, 2003

Exhibit 6—Letter Agreement between Lynxs Group and Air France, dated April 15, 2003

Exhibit 7—Certificate of occupancy, issued June 27, 2003

Exhibit 8—Fire Code tables of exempt amounts

Exhibit 9—Applicable Houston Building Code Provisions

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BILLING CODE 4910–60–M

[60] § 175.78 provides a similar hazardous materials segregation and separation chart for air carriers (including air carrier cargo facilities) as that found in § 177.848(d).

[61] 55 FR at 8892.

[62] *Consolidated Rail Corp.* v. *Bayonne*, 724 F. Supp. 320, 330 (D.N.J. 1989).

[63] *See* § 307.9, paragraph 4 of the Building Code of the City of Houston, the 2000 edition of the International Building Code as adopted with certain amendments, attached hereto as Exhibit 9.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Office of Thrift Supervision

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Office of