Management Facility, Room PL–401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://dms.dot.gov*.

FRA wishes to inform all potential commenters that 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*.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on February 14, 2006.

Grady C. Cothen, Jr. ,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E6–2548 Filed 2–22–06; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–03–16456 (PD–30(R))]

Houston, TX Requirements on Storage of Hazardous Materials During Transportation

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

ACTION: Notice of administrative determination of preemption.

Local Laws Affected: Houston Fire Code.

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: Air and Highway.

SUMMARY: A. Federal hazardous material transportation law preempts the following requirements in the Houston Fire Code as applied by the Houston Fire Department to the storage of hazardous materials during transportation at George Bush Intercontinental Airport, because (a) the designation, description, and classification of hazardous materials in the Fire Code is not substantively the same as in the HMR; (b) these requirements are not substantively the same as requirements in the HMR regarding the use of shipping documents to provide emergency response information in the event of an incident during the transportation of hazardous material; and (c) these requirements require advance notification of the transportation of hazardous materials which creates an obstacle to accomplishing and carrying out the purposes and goals of Federal hazardous material transportation law and the HMR:

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 the Houston Fire Chief may require an applicant for a permit to provide a hazardous materials management plan and a hazardous materials inventory statement in accordance with the provisions of Appendix II–E of the Fire Code.

B. Federal hazardous material transportation law preempts the separation requirements in sections 7902.1.6 and 8001.11.8 of the Houston Fire Code as applied by the Houston Fire Department to the storage of hazardous materials during transportation at George Bush Intercontinental Airport, because these requirements are not substantively the same as the segregation requirements in 49 CFR 175.78.

C. There is insufficient information to find Federal hazardous material transportation law preempts the secondary containment requirements in sections 7901.8 and 8003.1.3.3 in the Houston Fire Code as enforced and applied by the Houston Fire Department to the storage of hazardous materials during transportation at George Bush Intercontinental Airport, including the construction and capacity requirements for storage cabinets for secondary containment in sections 7902.5.9 and 8001.10.6, because the application and comments do not show (a) it is impossible to comply with both these requirements and the Federal hazardous material transportation law, the regulations issued under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (DHS), or (b) these requirements, as enforced and applied, are likely to cause diversions or delays in the transportation of hazardous materials. If the applicant wishes to provide further information regarding the secondary containment requirements in the Houston Fire Code, it may submit a new application.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Background

A. Local Requirements Considered

In this determination, PHMSA considers the following requirements in the Houston Fire Code (Fire Code) as those requirements are applied by the Houston Fire Department (HFD) to the temporary storage of hazardous materials at George Bush Intercontinental Airport (IAH) during transportation.

• *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 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) in accordance with the provisions of Appendix II–E of the Fire Code.

• *Containment and Separation:*

1. Sections 8003.1.3.3 and 7901.8, which require secondary containment in buildings, rooms or areas used for storage of hazardous materials and

flammable or combustible liquids, respectively, in excess of specified quantities.

2. Sections 8001.11.8 and 7902.1.6, which require separation of incompatible materials in storage by one of several specific alternative measures.

3. Sections 8001.10.6 and 7902.5.9, which contain provisions on the construction and use of storage cabinets for hazardous materials.

B. Application

Societé Air France (Air France) has applied for a determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts these permit and containment requirements. In its application, Air France states it transports cargo on both passenger-carrying and all-cargo aircraft between Paris, France and IAH and, since 1979, it has received a permit from HFD to handle and store hazardous materials at its IAH cargo facility. It states the hazardous materials stored at IAH ''are in transit * * * under active shipping papers (or waybills) and are only present there incidental to prior or subsequent air transportation.'' It says activities at IAH involving these hazardous materials include ''palletization and other procedures related to their carriage by air.''

According to Air France, beginning in June 2002, HFD has required it to submit an HMMP and an HMIS in order to obtain a permit, both of which require extensive information. It relates HFD refused to accept the HMMP and HMIS submitted by Air France until June 2003, and, during the interval, 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 it moved into a new cargo warehouse at IAH in July 2003, where, as a condition of issuing a certificate of occupancy, 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 states it operates cargo warehouse facilities at six locations in the United States, and Houston is the only location where it is required to obtain a local permit or install and use storage cabinets to temporarily store hazardous materials.

C. Public Notice

In a notice published in the **Federal Register** on November 13, 2003 (68 FR 64413), the Research and Special Programs Administration (PHMSA's predecessor agency) [1] invited interested persons to submit comments on Air France's application. In that notice, we discussed our prior consideration of the Fire Code in Preemption Determination (PD) No. 14(R), Houston, Texas Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 67506 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33939 (June 24, 1999). In PD–14(R), we explained ''the HMR clearly apply to transportation-related storage,'' including ''storage by a carrier between the time a hazardous material is offered for transportation and the time it is accepted by the consignee,'' and ''transportation-related activities'' include the interim storage of hazardous materials at a transfer facility. 64 FR at 33952 (internal quotations omitted), quoted at 68 FR at 64414–15. We also noted the ''current edition of the Fire Code has retained the exception in Sec. 7901.1.1'' that the permit and other requirements in that Article do not apply to ''[t]ransportation of flammable and combustible liquids when in accordance with DOT regulations on file with and approved by DOT.'' 68 FR at 64415.

In the November 13, 2003 notice, we further discussed our October 30, 2003 final rule in Docket No. RSPA–98–4952 (HM–223), ''Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage,'' 68 FR 61906, where we

> reaffirmed that ''storage incidental to movement of a hazardous material'' is a ''transportation function'' and the HMR apply to the ''[s]torage of 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.''

68 FR at 64415, quoting from 49 CFR 171.1(c)(4), as added at 68 FR at 61938. In HM–223, we ''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.'' *Id.*[2]

In response to the November 13, 2003 public notice, comments were submitted by the City of Houston (City); Air France; Air Transport Association of America, Inc.; American Trucking Associations, Inc.; Cargolux Airlines, International, S.A.; Council on Radionuclides and Radiopharmaceuticals, Inc. (CORAR); Dangerous Goods Advisory Council (DGAC); Federal Express Corporation (FedEx); IAH Air Cargo L.P., doing business as Lynxs Houston CargoPort (Lynxs); International Air Transport Association (IATA); Nuclear Energy Institute (NEI); and the Radiopharmaceutical Shippers and Carriers Conference (RSCC). Air France and the City submitted rebuttal comments. In September 2005, Air France submitted a copy of HFD's Hazardous Materials Inventory Routing Form and the accompanying instructions for completing these forms.

II. Federal Preemption

As discussed in the November 13, 2003 notice, 49 U.S.C. 5125 contains express preemption provisions relevant to this proceeding. 68 FR at 64415–16. As amended by section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2320), 49 U.S.C. 5125(a) provides—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] Effective February 20, 2005, PHMSA was created to further the ''highest degree of safety in pipeline transportation and hazardous materials transportation,'' and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C. 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108–426, § 2, 118 Stat. 2423 (Nov. 30, 2004)); and 49 CFR 1.53(b), as amended at 70 FR 8301–02 (Feb. 18, 2005). For consistency, the terms ''PHMSA'' and ''we'' are used in the remainder of this determination, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

[2] In response to administrative appeals, PHMSA's further final rule in HM–223 moved from § 171.1(f)(1) to § 171.1(f)(2) the provision that State and local requirements applicable to a ''facility at which functions regulated under the HMR are performed'' remain subject to the preemption criteria in Federal hazardous material transportation law and reiterated DOT uses the procedures in 49 CFR part 107, subpart C to make preemption determinations regarding non-Federal requirements (other than highway routing requirements which are considered under 49 CFR part 397). 70 FR 20018, 20033 (Apr. 15, 2005). The April 15, 2005 final rule made no change to the long-standing principle that storage during transportation remains fully subject to the requirements in the HMR. See §§ 171.1(c)(4), 171.8, 70 FR at 20032, 20033. Petitions for judicial review of both the October 30, 2003 and April 15, 2005 final rules are pending in *American Chemistry Council* v. *Department of Transportation,* Nos. 03–1456 & 05–1191 (DC Cir.), but those petitions do not challenge those parts of the HM–223 final rules making it explicit the HMR apply to storage of hazardous materials during transportation.

(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 PHMSA had applied in issuing inconsistency rulings (IRs) prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Public Law 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 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 DHS:

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

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

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

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

(E) The designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.[3]

[3] Subparagraph (E) was editorially revised in Sec. 7122(a) of the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, which is Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119. Stat. 1891 (Aug. 10, 2005).

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).

The 2002 amendments and 2005 reenactment of 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. More than thirty 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 Congress expanded the preemption provisions in 1990, it specifically found:

(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.

Public Law 101–615 section 2, 104 Stat. 3244. (In 1994, Congress revised, codified and enacted the HMTA ''without substantive change,'' at 49 U.S.C. Chapter 51. Public Law 103–272, 108 Stat. 745 (July 5, 1994).) A United States Court of Appeals has found uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

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

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

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

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

III. Discussion

A. Application of the HMR to Storage During Transportation

In its application, Air France states it transports cargo on both passenger-carrying and all-cargo aircraft between

Paris, France and IAH and, since 1979, it has received an annual permit from HFD to handle and store hazardous materials in transit at its IAH cargo facility. It stresses ''hazardous materials typically spend only a very short period of time at the Air France cargo facility,'' and ''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.''

According to the City, IAH and the other two Houston airports (Hobby and Ellington) make up the fourth-largest multi-airport system in the United States and the sixth-largest such system in the world. The City states 602 million pounds of cargo were transported through IAH during 2002. It indicates ten scheduled all-cargo airlines serve IAH, and most of the 25 scheduled passenger airlines serving Houston also carry cargo; for many of them ''the transportation of hazardous materials constitutes a very significant portion of their cargo business'' which is ''vital to the well-being of the Houston airports and the local, Texas and regional economies.'' It states the ''protection of public safety and the smooth flow of commerce * * * are each extremely important to the City,'' and the City has a ''strong interest in ensuring that hazardous materials stored at City airports or in connection with air transportation through the Houston airports are managed appropriately'' because City employees ''bear both the responsibility and the risk of responding'' to incidents involving hazardous materials in transportation. It refers to a purported ''tension between Federal and local requirements'' and asserts, ''[u]nless it is clear that a specific provision is indeed preempted, the Houston Fire Department understands that it is required to enforce the requirements and regulations imposed by local law.''

As discussed in the November 13, 2003 public notice, the HMR clearly apply to the storage of hazardous materials ''incidental to [their] movement.'' 68 FR at 64415; *see also* 49 U.S.C. 5102(12). In the October 30, 2003 final rule in HM–223, we reaffirmed that ''storage incidental to movement of a hazardous material'' is a ''transportation function,'' and the HMR apply to the ''[s]torage of a * * * package containing a hazardous material by any person between the time that a carrier takes physical possession of the hazardous material for the purposes of transporting it until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium * * *'' 49 CFR 171.1(c)(4), as added at 68 FR 61938; *see also* the definition of ''storage incidental to movement'' added to § 171.8. *Id.* at 61940–41.

We also reaffirmed that State and local requirements may apply to a ''facility at which pre-transportation or transportation functions are performed,'' but those State and local requirements remain subject to preemption under the criteria set forth in 49 U.S.C. 5125 (discussed in Part II, above). 49 CFR 171.1(f)(1) & (2), as added at 68 FR 61938, and revised in the April 15, 2005 final rule, 70 FR at 20032–33. Accordingly,

> 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.

68 FR at 61924. We also explained ''the definitions adopted in [the HM–223] 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, PHMSA 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.

These prior decisions include IR–28, ''San Jose Restrictions on the Storage of Hazardous Materials,'' 55 FR 8884 (March 8, 1990), appeal dismissed as moot, 57 FR 41165 (September 9, 1992). In IR–28, PHMSA examined provisions in the San Jose Hazardous Materials Storage Ordinance as it was being applied to a motor carrier's transfer facility where ''local shipments and those arriving at the terminal from around the world may move directly to another truck or be temporarily stored at the terminal until an appropriate outgoing truck is present.'' 55 FR at 8888. As with Air France's operations at IAH, ''all these shipments are under active shipping papers prepared and certified by the shipper and using DOT-specified terminology.'' *Id.* Among the local requirements considered in IR–28 were (1) the need to submit an HMMP, including an HMIS, in order to obtain a permit to store hazardous materials, and (2) secondary containment and segregation requirements.

Citing several prior rulings and court decisions, we stated ''State and local permits for hazardous materials transportation are not *per se* inconsistent [with Federal hazardous material transportation law]; their consistency depends upon the nature of their requirements.'' 55 FR at 8890. We specifically found San Jose's requirement to submit an HMMP and HMIS is preempted because it created ''potential delay or diversion of hazardous materials'' (*Id.* at 8891), and local requirements for emergency response information which are ''not identical to these HMR provisions will cause confusion concerning the nature of such requirements, undermine compliance with the HMR requirements, constitute obstacles to the implementation of those provisions, and thus be inconsistent and preempted.'' *Id.* at 8892. We also found ''strict but subjective secondary containment and segregation requirements'' which differ from, or are in addition to, those in the HMR ''create confusion * * * and the likelihood of noncompliance with'' requirements applicable to motor carriers now located at 49 CFR 177.848(d) and ''are obstacles to the execution of an HMR provision * * * insofar as they apply to transportation-related storage.'' *Id.* at 8893. We made it clear these requirements are not preempted ''when applied to non-transportation-related storage.'' *Id.*

In PD–12(R), New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation, 60 FR 62527 (Dec. 6, 1995), decision on petition for reconsideration, 62 FR 15970 (April 3, 1997), PHMSA cautioned ''it may be too broad to read IR–28 as finding that any non-Federal requirement for secondary containment at a transfer facility is unnecessary and an obstacle to accomplishment and carrying out of the HMR.'' 62 FR at 15972. We noted ''San Jose applied both a subjective secondary containment standard and provisions for separation (or segregation) of different classes of hazardous materials'' which differed from those in the HMR. *Id.* Moreover, in IR–28, ''no one disputed the effect of the San Jose storage requirements'' which would

force a transfer of the carrier's hazardous materials operations to a different facility and delay deliveries. *Id.* In PD–12(R), we concluded there was not sufficient information to find New York's secondary containment requirement is an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR, ''[i]n the absence of more specific evidence of the effects of this requirement on the transportation of hazardous waste, including the repackaging and consolidation of wastes.'' 62 FR at 15973.

Accordingly, in PD–14(R), PHMSA stated the HMR clearly apply to the transportation of hazardous materials by a carrier, and ''[c]ertain activities that take place on private property, including the 'loading, unloading, or storage [of hazardous material] incidental to the movement' of that material in commerce, fall within the scope of 'transportation' in commerce, 49 U.S.C. 5102(12), and are subject to regulation under the HMR.'' 63 FR at 67510, n.5. Moreover, ''[t]he 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 8000.1.1 of the Uniform Fire Code.'' 64 FR at 33952.

It is not possible to accept the City's broad assertion that ''local fire codes applicable to facilities in which hazardous materials are stored are not preempted.'' Local requirements which affect the transportation of hazardous material, contained in fire codes or other regulations, remain subject to preemption under the criteria in 49 U.S.C. 5125. Nothing in the HM–223 final rules has changed the applicability of the HMR to specific functions and activities, including the ''storage of hazardous materials during transportation.'' 68 FR at 61906.

Moreover, because storage of hazardous materials incidental to their movement in commerce is part of ''transportation,'' the specific exception in section 7901.1.1 for ''Transportation of flammable and combustible liquids when in accordance with DOT regulations on file and approved by DOT,'' should mean the permit and storage requirements at issue here apply only to other hazardous materials besides flammable and combustible liquids. As stated in the November 13, 2003 public notice, ''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,'' including sections 7901.3.1, 7901.9, 7902.1.6, and 7902.5.9 (and the compatible provisions in section 105). 68 FR at 64415. The City has failed to discuss this issue and, we assume, adheres to the same inherently inconsistent position it took in PD–14(R) that some requirements in Article 79 ''are not affected'' by the exception in section 7901.1.1. *See* 63 FR at 67510. As a result, PHMSA finds it necessary to address requirements in both Articles 79 and 80.

B. Permit

In its application, Air France states it has received an annual permit from HFD since 1979 to handle and store hazardous materials at IAH. The Fire Code requires a permit to (1) store, handle, transport, dispense, mix, blend, or use flammable or combustible liquids in excess of specified quantities (sections 108.f.3 and 7901.3.1), or (2) store, transport on site, dispense, use or handle hazardous materials in excess of specified quantities (sections 108.h.1 and 8001.3.1). In addition, sections 8001.3.2 and 8001.3.3, respectively, authorize the Fire Chief to require an HMMP and HMIS.

Appendix II–E to the Fire Code contains standard forms for the HMMP and the HMIS and sets forth the information to be provided. The HMMP must include general business information, a general site plan (whose requirements are also set forth in Section 8001.3.2), a building floor plan, information on hazardous materials handling, information on chemical compatibility and separation, a monitoring program, inspection and record keeping, employee training, and emergency response procedures. The HMIS must list all hazardous materials stored in a building and include the following information:

1. Hazard class.
2. Common or trade name.
3. Chemical name, major components and concentrations if a mixture. If a waste, the waste category.
4. Chemical Abstract Service number (CAS number) found in 29 Code of Federal Regulations (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.
7. Storage conditions related to the storage type, temperature and pressure.

Section 2.2 of Appendix II–E also requires the submission of an amended HMIS ''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 quantity which exceeds 5 percent for any hazard class.''

Air France states in its application that, beginning in June 2002, HFD required submission of an HMMP and HMIS in order to obtain a permit to store hazardous materials, as well as an additional HMMP and HMIS for a second permit to store or handle flammable and combustible liquids. It relates HFD refused to accept the HMMPs and HMISs submitted by Air France until June 2003, and, during the interval, HFD cited the local Air France cargo manager for several violations of the Fire Code, including the alleged failures to provide a proper HMIS for the storage of hazardous materials and post the required local permit for the storage, handling or use of flammable liquids. According to Air France, the only way to satisfy HFD's demands was to conduct a survey of the shipping papers (manifests and notifications to pilot-in-command) for ''a prior six-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.'' It also states its consultant had to contact ''numerous shippers and manufacturers'' to obtain common names and trade names of hazardous materials which ''are not contained on shipping papers.''

Air France argues these permit requirements create obstacles to the accomplishing and carrying out the Federal hazardous material transportation law and the HMR, for the same reasons PHMSA found ''virtually identical HMMP and HMIS requirements'' to be preempted in IR–28. According to Air France, the following passage in IR–28, 55 FR at 8891, describes the City's permit requirements which impose

> 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 the thousands of hazardous materials listed in, or covered by, the HMR.

Air France also points to the additional finding in IR–28 that ''the City's information and documentation requirements, insofar as they relate to the hazardous materials to be stored at a facility incidental to transportation, * * * constitute an inconsistent advance notice requirement.'' *Id.* In prior inconsistency rulings, PHMSA had found ''local requirements for advance notice of hazardous materials transportation have potential to delay and redirect traffic and thus are inconsistent.'' *Id.*

In response, the City described its ''only concern'' as follows:

> [E]mergency response personnel, including in particular the Fire Department, must have immediate access to an HMIS and an HMMP in order to determine how to address the emergency, and also to ensure that local firefighters and other emergency response personnel are protected from injury. To the extent that suitable federal versions of these documents are available, such as pursuant to 49 CFR 172.600 *et seq.*, Houston is willing to accept these documents as substitutes.

In its reply comments, the City states it ''would not oppose a determination'' that its HMIS and HMMP requirements are preempted. However, it appears the City has not been accepting the emergency response information required by 49 CFR 172.600 *et seq.*, in place of its requirements for more detailed information. HFD's six-page Hazardous Materials Inventory Routing Form lists 42 categories and classes of materials for which an applicant must indicate whether it has ''amounts that require a permit'' or ''above exempt amounts.'' The instructions define ''hazardous material'' as ''chemicals or substances which are physical hazards or health hazards as defined and classified by Fire Code Chapter 27 and Code of Federal Regulations CFR 29,'' and provide that the inventory form must be submitted ''with permit applications or when there is any change in your inventory of more than (10) ten percent.'' These documents indicate the City is still requiring the detailed information in the HMIS and HMMP.

Other than the City, the commenters agree the requirements to submit the detailed information in the HMMP and HMIS are preempted for the same reasons PHMSA set forth in IR–28. The Air Transport Association states air carriers ''have no advance notice of the type or quantity of dangerous goods that their customers may present for carriage,'' and the ''fluid nature of air transportation makes it impossible for carriers to comply with detailed local inventory, documentation and emergency response requirements without impeding their operations under the HMRs.'' The American Trucking Associations states ''requirements such as Houston's HMMP and HMIS will operate to divert certain hazardous materials around Houston, because many transportation companies will find it impossible to comply,'' and such potential diversion

> is exactly the result Congress sought to eliminate in ensuring uniform hazardous materials regulations over the loading, unloading and storage incidental to transportation. Requirements such as these merely transfer the burden to neighboring jurisdictions and have the additional effect of requiring the hazardous materials to travel additional miles and spend additional time in transportation. Statistically, the amount of time the materials spend in transit and the number of miles traveled is directly proportional to the number of incidents that will occur. Increased miles will translate to an increase in incidents.

FedEx wrote that, on December 10, 2003, its Houston facility also received a notice of violation concerning its HMMP and HMIS and, if these requirements ''are allowed to be enforced against carriers, they will likely cause the diversion of hazardous materials shipments around Houston.'' FedEx states it handles 3.1 million packages each day and it has no ''prior knowledge of the contents of each of these packages * * *. Essentially, the nature of such packages would change with each inbound flight or truck'' and ''generally such packages would not be at our facility for more than twenty-four hours.''

DGAC states ''Houston's HMMP and HMIS [requirements] will likely result in the diversion of hazardous materials to avoid Houston,'' and it referred to PHMSA's prior findings that information and documentation requirements which ''exceeded Federal requirements'' and ''create potential delay or diversion of hazardous materials during transportation'' are an ''obstacle'' and preempted by Federal hazardous material transportation law. NEI comments that HFD's collection of ''information on hazardous materials in storage'' must be in accordance with the HMR.

RSCC states it ''represents manufacturers and carriers of medical products destined for patient care'' which ''require expeditious handling in all modes. Delay is destructive to the products and harmful to the patients who desperately need the treatment these medical products provide.'' RSCC compares the City's permit requirements to ''those addressed in earlier rulings, namely San Jose (IR–28)'' and states those requirements give local officials unfettered discretion, delay materials in transit, frustrate movement, and provide an incentive to divert traffic. RSCC further urges DOT to ask a Federal court to enjoin enforcement of the City's permit and containment requirements, expressing concern the City will continue to ''reinterpret[] its requirements to frustrate the DOT ruling process'' and, further, the Fire Code is model legislation and ''other municipal governments are looking at the same provisions for application in their communities.''

A fundamental problem with the City's information requirements in an HMIS and HMMP is that the Fire Code designates, describes and classifies hazardous materials in a different manner than the HMR. For example, the Fire Code lists materials as ''physical'' and ''health'' hazards—which the HMR do not—and includes materials not regulated under the HMR, such as carcinogens. Another example is found in the Fire Code's definitions of ''flammable'' and ''combustible'' liquids, which differ from those in the HMR; a liquid with a flash point between 100 °F and 141 °F is classified as ''combustible'' in the Fire Code but ''flammable'' in the HMR. *See* 49 CFR 173.120. Further, a liquid with a flash point above 200 °F is not regulated under the HMR, but it may still be considered ''combustible'' under the Fire Code.

The Fire Code and the HMR differ because the hazardous material categories in the Fire Code are based on Title 29 CFR, which ''do not necessarily match the classifications used by other federal agencies such as the Department of Transportation and EPA.'' Shapiro, ''Using the Hazardous Materials Provisions in U.F.C. Article 80 and U.B.C. Chapter 9,'' *International Fire Code Institute Fire Code Journal*, vol. 1, No. 3 (Summer 1992), p. 4. The information available to a carrier from the shipping paper is not sufficient for the HMIS required under the Fire Code, as confirmed by the fact Air France's consultant had to contact shippers and manufacturers for common names and trade names of materials transported through IAH during a prior six-month period. The Federal hazardous materials transportation law preempts permit requirements in the Fire Code which require the submission of information for hazardous materials being stored during transportation, because those materials are designated, described, and classified in a manner which is not substantively the same as in the HMR. 49 U.S.C. 5125(b)(1)(A).

A second problem, discussed in IR–28, is a conflict with the emergency

response information requirements in the HMR, which provide certain emergency response information must be provided by an offeror and maintained by a carrier at ''a facility where a hazardous material is received, stored or handled during transportation * * * in a location that is immediately accessible to facility personnel in the event of an incident involving the hazardous material.'' 49 CFR 172.602(c)(2); *see* 55 FR at 8892. This information must be ''[a]vailable for use away from the package containing the hazardous material'' and may be presented on a shipping paper or on a separate document which describes the hazardous material or is ''[r]elated to the information on a shipping paper * * * in a manner that cross-references the description of the hazardous material on the shipping paper.'' 49 CFR 172.602(b)(2) & (3). Accordingly, under the HMR, the document(s) containing this emergency response information form part of the ''shipping documents'' which must accompany a hazardous materials shipment. However, the City requires additional information in the HMMP and HMIS and effectively precludes the use of these shipping documents to provide the necessary emergency response information. Federal hazardous material transportation law preempts the Fire Code's permit requirement, which includes the submission of an HMMP and HMIS, because this requirement is not substantively the same as requirements in the HMR concerning the ''use of shipping documents related to hazardous material.'' 49 U.S.C. 5125(b)(1)(C).

Moreover, the detailed information requirements required in order to obtain a permit from the HFD in order to temporarily store hazardous materials at IAH constitute an advance notice requirement which causes the likelihood for diversion and delay in the transportation of hazardous material. As discussed in IR–28, HMMP and HMIS requirements are extensive, extremely detailed, and, in the case of a common carrier, ''impossible to comply with'' 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 list in, or covered by, the HMR.'' 55 FR at 8891. In the case of Air France, every incoming or outgoing flight at IAH (or vehicle delivery to or from IAH) could result in an increase or decrease of more than 10% in its ''inventory'' of one or more of the 42 categories and classes of materials on the Hazardous Materials Inventory Routing Form. Under these circumstances, Federal hazardous material transportation law preempts the HMMP and HMIS requirements in the Fire Code because the potential for diversion and delay reduces safety in the transportation of hazardous materials and creates an obstacle to accomplishing and carrying out the purposes and goals of Federal hazardous material transportation law and the HMR.

C. Containment and Separation

In its application, Air France states HFD issued an annual permit to handle or store hazardous materials on June 17, 2003, and, ten days later, a separate permit to handle or store flammable and combustible liquids—but Air France did not actually receive the permits until August 6, 2006, when hazardous material storage cabinets were installed at the new cargo facility which it subleases from Lynxs. According to Air France, HFD required the installation of ''a hazardous materials storage cabinet * * * for the storage by Air France of certain in transit hazardous materials,'' as a condition of issuing a certificate of occupancy. 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.

Lynxs states ''the subject of hazardous materials transportation on premises did come up several times,'' prior to construction of this facility.

> The overwhelming opinion of all the building developers and airlines who occupy these buildings was that the handling standards which had been issued by DOT * * * were fair, adequate and appropriate for proper transport of various types of goods that might be coming through the buildings on their way to and from the aircraft.
>
> Nevertheless, in January 2003, we were informed that new standards would be proposed by the Houston Fire Marshall based on his own evaluation of the situations of two of our tenants, one of which was Air France. We worked closely with Air France personnel, a hazardous materials consultant and the Fire Marshall to find a solution that would allow the tenants to occupy and operate in the building, but made it clear that we did not agree with either the Fire Marshall's jurisdiction or conclusions in this matter. We did install specialized hazardous materials lockers outside of the buildings for storage of certain in-transit goods.

In its application, Air France states HFD never identified the specific provisions in the Fire Code under which the storage cabinets were required, but its application refers to the following provisions:

Sections 8003.1.3.3 and 7901.8, which require secondary containment in buildings, rooms or areas used for storage of hazardous materials and flammable or combustible liquids, respectively, in excess of certain quantities and also require the separation of incompatible materials.

Sections 8001.11.8 and 7902.1.6, which require separation of incompatible materials in storage, in packages larger than 5 pounds or one-half gallon, by separating the materials by at least 20 feet, isolating the materials by a noncombustible partition, storing liquid and solid materials in storage cabinets, or storing compressed gases in gas cabinets or exhausted enclosures.

Sections 8001.10.6 and 7902.5.9, which set forth standards for storage cabinets and limit the total quantity of flammable and combustible liquids in a storage cabinet to 120 gallons.

Air France also states HFD provided Air France with a copy of tables of ''exempt amounts'' in the Fire Code and indicated that hazardous materials exceeding these amounts must be stored in cabinets.

Air France asserts the storage cabinet requirement ''has the potential to create confusion'' and ''create delays and diversions in the transportation of hazardous materials.'' It states ''the storage cabinet required by the Fire Department is only able to hold a limited amount of hazardous materials,'' and

> When the cabinet is full (or other incompatible 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.

Air France also states the requirement to store hazardous materials in a cabinet will increase the number of times that hazardous materials must be handled at the warehouse and therefore increases the risk of mishap. It argues ''the obvious potential for delays and diversions'' distinguishes this storage cabinet requirement from lack of information in PD–12(R) on which to base a decision whether the New York secondary containment requirement

''actually cause[d] delays or diversions in the transportation of hazardous materials.'' It states HFD was being irrational in treating it differently from ''retail establishments like a Home Depot or a Wal-Mart'' which it states are allowed to store many more times the amount of flammable and combustible liquids before exceeding the ''exempt'' limits.

In response, the City states these storage cabinets or ''lockers were not and are not mandated by the City,'' but, rather,

> The installation and use of the lockers was in fact proposed by Air France as an alternative to complying with standard facility safety systems and construction requirements applicable to buildings in which hazardous materials over an exempt amount are stored. This includes such basic items as sprinkler systems adequate to contain a hazardous materials incident, ventilation systems, emergency power supplies for these systems, and secondary containment requirements that are required by the Houston Fire Code for all buildings in which hazardous materials over a certain volume are stored. Had these measures been installed as part of the building's construction, or thereafter, the lockers would not be necessary. In other words, the lockers provide an equivalent level of safety to local facilities construction requirements. The alternative to using the lockers would be to install the safety measures that are basic to any local facility that stores hazardous materials.

The City also states the ''Fire Code provisions applicable to facilities construction'' are ''of particular importance in Houston because the City has no zoning requirements,'' and ''a warehouse in which hazardous materials are stored may be located next to a school or a neighborhood.'' It asserts if there is ''preemption on the facilities issues, the City could be left without the power to require such basic items as sprinkler systems and secondary containment systems in facilities throughout the City where hazardous materials are stored.'' The City asks that any decision of preemption ''be limited to on-airport property.'' In its reply comments, the City states the ''public interest would be served by establishing the extent to which any preemption determination in this docket is applicable not just to the City but other municipalities, airports, and entities.''

The City also acknowledges that any differing ''packaging requirements applicable to the air transportation of hazardous materials are preempted by federal law.'' It disputes the arguments of several commenters, including FedEx and the American Trucking Associations, that a requirement for storage cabinets or lockers is preempted as a packaging requirement and refers to PD–5(R), Massachusetts Requirement for an Audible Back-up Alarm on Bulk Tank Carriers Used to Deliver Flammable Material, 58 FR 62707 (Nov. 29, 1993). In this determination, PHMSA found a ''back-up'' alarm is not ''a part of the package or container in which flammable materials are transported'' and also stated a '' 'package or container that is represented, marked, certified or sold as qualified for use in the transportation of hazardous materials' * * * does not include the equipment or vehicle used to hold or transport that 'package or container.' '' *Id.* at 62710.

American Trucking Associations (ATA), FedEx, DGAC, and RSCC all argue the requirement for temporarily storing hazardous materials at IAH in a storage cabinet conflicts with the packaging requirements in the HMR. ATA and FedEx assert the ''specialized storage cabinet is nothing more than a temporary additional packaging that complicates the loading and unloading processes'' because this requirement means ''hazardous materials that are being transferred from one vehicle, across a dock, into another vehicle [must be] temporarily placed in a hazardous materials storage cabinet.'' RSCC states a requirement for secondary containment, including the use of a storage cabinet or locker, challenges ''the adequacy of the packaging for hazmat in transportation—a covered subject under 49 U.S.C. 5125(b) in which the community has no discretion to regulate.'' DGAC states:

> The required use of storage cabinets certainly is a form of packing or repacking that goes beyond the extensive federal packaging requirements; and the required secondary containment certainly is a form of handling since special handling would be necessary to place packages in some form of secondary containment.

ATA and FedEx also argue the City's requirements for ''transloading operations'' and the storage of hazardous materials in excess of certain quantities in storage cabinet requirements ''go far beyond the requirements of the HMRs and create an obstacle to the transportation of hazardous materials.'' ATA states ''on at least one occasion, the Applicant has been forced to delay transportation of hazardous materials as a result of the Houston Fire Code requirements,'' according to Air France's application. ATA also contends the City's ''secondary containment requirements will lead transportation carriers to locate their facilities outside of Houston, thereby requiring the transportation of greater quantities of hazardous materials for greater distances.'' It states the possible ''diversion[s] of hazardous materials to neighboring jurisdictions * * * result in additional vehicle miles traveled and additional time that the hazardous materials must remain in transportation,'' which create ''obstacles to the safe and efficient transportation of hazardous materials.''

Lynxs states the storage lockers ''provide effective protections'' but ''inhibit[] the free flow of materials to and from the aircraft and create extra handling in some cases'' and are ''not consistent with our understanding of [PHMSA] design intentions in the case of air cargo facilities.'' IATA states differing local requirements on the transportation of hazardous materials will ''complicate the procedures that apply to transportation companies'' and ''also add to the confusion of employees who are being trained in the proper handling of hazardous materials.'' CORAR states local requirements for storing flammable liquids in cabinets ''pose an obstacle to compliance with the HMR.''

The HMR define ''package'' as ''a packaging plus its contents'' and a ''[p]ackaging means a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter.'' 49 CFR 171.8. Air France transports hazardous materials in individual ''packages'' to and from IAH, and these individual packages may be transferred between Air France and other carriers in the course of transportation. A storage cabinet for temporary in-transit storage at IAH is not any part of a ''package'' or ''packaging.'' Rather than serving as any type of ''packaging,'' the storage cabinets appear to have two entirely different purposes, regardless of whether the cabinets were required by HFD or a ''solution'' worked out with HFD to allow Air France to use its new cargo warehouse: (1) Separation of incompatible materials (*see* sections 7902.1.6 and 8001.11.8), and (2) secondary containment (*see* Sections 7902.5.9 and 8001.10.6, construction requirements).

In contrast to the Fire Code's specific requirements in Sections 7902.1.6 and 8001.11.8 for separating ''incompatible'' materials by a 20-foot distance, partitions, or storage cabinets, the HMR require ''packages containing hazardous materials which might react dangerously with one another may not be placed next to each other or in a position that would allow a dangerous

interaction in the event of leakage.'' 49 CFR 175.78(a). The segregation table in § 175.78(b) also sets forth specific classes and divisions of materials which, at a minimum, ''may not be stowed next to or in contact with each other, or in a position which would allow interaction in the event of leakage of the contents.'' These segregation requirements in the HMR apply to the ''handling'' of hazardous materials in temporary storage during transportation. Federal hazardous materials transportation law preempts the separation requirements in sections 7902.1.6 and 8001.11.8 which are not substantively the same as the requirements in the HMR. 49 U.S.C. 5125(b)(1)(B).

Otherwise, the HMR do not contain requirements regarding secondary containment at a facility where hazardous materials are stored during transportation. As stated in PD–12(R), it is ''too broad to read IR–28 as finding that any non-Federal requirement for secondary containment at a transfer facility is unnecessary and an obstacle to the accomplishment and carrying out the HMR.'' 62 FR at 15972. A requirement for secondary containment, including storage cabinets or lockers, does not appear to be inherently inconsistent with the handling or packaging requirements in the HMR, as those terms apply to the standard in 49 U.S.C. 5125(b)(1)(B) that non-Federal requirements on ''the packing, repacking, [and] handling * * * of hazardous materials'' must be ''substantively the same as'' the requirements in the HMR.

In the situation described in Air France's application, a shipment is unloaded from an aircraft or vehicle at IAH, placed in temporary storage, and later removed from temporary storage for loading on the aircraft or vehicle transporting the shipment from IAH. Air France has not explained how the requirement to temporarily store a package containing hazardous materials in a cabinet or locker will change or increase the ''handling'' of hazardous materials shipments between different aircraft or between an aircraft and a motor vehicle. PHMSA does not interpret the City's secondary containment requirements to apply to a shipment which is not actually ''stored'' at IAH, such as when it is possible for the shipment to be ''transferred [directly] from one vehicle, across a dock, into another vehicle,'' as ATA discusses.

The application and comments do not contain sufficient evidence the City's storage cabinet requirements, when considered solely as a means of achieving secondary containment, are likely to cause diversions and delays in the transportation of hazardous materials. Any limitation on the capacity of the storage cabinets does not appear to have resulted directly from the City's requirements, but rather Air France's estimate of how much storage space it would need. There do not appear to be any restrictions preventing Air France from delaying acceptance of a shipment, or holding a shipment at another location, for a short period because the storage lockers constructed by Lynxs are not large enough, especially when Lynxs stated it ''worked closely with Air France personnel, a hazardous materials consultant and the Fire Marshall to find the solution'' of storage cabinets.

In summary, Federal hazardous material transportation law preempts the requirements in sections 7902.1.6 and 8001.11.8 for separation of incompatible materials when applied to hazardous materials being stored at IAH during transportation, because these are ''handling'' requirements which are not substantively the same as the segregation requirements in the HMR. 49 U.S.C. 5125(b)(1)(B). On the other hand, there is insufficient information to find the secondary containment requirements in sections 7901.8 and 8003.1.3.3 in the Fire Code, as enforced and applied including the use of storage cabinets described in sections 7902.5.9 and 8001.10.6, create an obstacle to accomplishing and carrying out the Federal hazardous material transportation law, the regulations issued under that law, or a hazardous materials transportation security regulation or directive issued by DHS.

PHMSA is currently considering adopting further requirements on storage of certain hazardous materials during transportation, in Docket No. PHMSA–2005–22987 (HM–238), ''Hazardous Materials: Requirements for the Storage of Explosives and Other High-Hazard Materials During Transportation,'' 70 FR 69493 (Nov. 16, 2005). The City, Air France, and the other persons who have participated in this proceeding are invited to submit comments in PHMSA's HM–238 rulemaking proceeding.

IV. Ruling

A. Federal hazardous material transportation law preempts the following requirements in the Houston Fire Code as applied by the Houston Fire Department to the temporary storage of hazardous materials during transportation at George Bush Intercontinental Airport, because (a) the designation, description, and classification of hazardous materials in the Fire Code is not substantively the same as in the HMR; (b) these requirements are not substantively the same as requirements in the HMR regarding the use of shipping documents to provide emergency response information in the event of an incident during the transportation of hazardous material; and (c) these requirements require advance notification of the transportation of hazardous materials which creates an obstacle to accomplishing and carrying out the purposes and goals of Federal hazardous material transportation law and the HMR:

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 the Houston Fire chief may require an applicant for a permit to provide a hazardous materials management plan and a hazardous materials inventory statement in accordance with the provisions of Appendix II-E of the Fire Code.

B. Federal hazardous material transportation law preempts the separation requirements in sections 7902.1.6 and 8001.11.8 of the Houston Fire Code as applied by the Houston Fire Department to the temporary storage of hazardous materials during transportation at George Bush Intercontinental Airport, because these requirements are not substantively the same as the segregation requirements in 49 CFR 175.78.

C. There is insufficient information to find Federal hazardous material transportation law preempts the secondary containment requirements in sections 7901.8 and 8003.1.3.3 in the Houston Fire Code as enforced and applied by the Houston Fire Department to the temporary storage of hazardous materials during transportation at George Bush Intercontinental Airport, including the construction and capacity requirements for storage cabinets for secondary containment in sections 7902.5.9 and 8001.10.6, because the application and comments do not show (a) it is impossible to comply with both these requirements and the Federal hazardous material transportation law, the regulations issued under that law, or a hazardous materials transportation security regulation or directive issued

by the DHS, or (b) these requirements, as enforced and applied, are likely to cause diversions or delays in the transportation of hazardous materials.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(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**. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the **Federal Register**, the action by PHMSA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

Issued in Washington, DC, on February 15, 2006.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. E6–2503 Filed 2–22–06; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34825]

Gordon Reger—Continuance in Control Exemption—New Amsterdam & Seneca Railroad Company, LLC

Gordon Reger (Reger) has filed a verified notice of exemption to continue in control of New Amsterdam & Seneca Railroad Company, LLC (NASR), upon NASR's becoming a Class III rail carrier.

The transaction was scheduled to be consummated after January 31, 2006, the effective date of this exemption (7 days after the exemption was filed).

This transaction is related to a verified notice of exemption wherein NASR seeks to acquire by lease from Sunny Farms Landfill, LLC (Sunny Farms), and operate approximately 1.25 miles of rail line in Fostoria, OH. *See New Amsterdam & Seneca Railroad Company, LLC—Lease and Operation Exemption—Line in Fostoria, OH*, STB Finance Docket No. 34811. Notice of the exemption was served and published in the **Federal Register** on January 20, 2006 (71 FR 3349–50).[1]

Reger, a noncarrier individual, directly controls Mid Atlantic New England Rail, LLC (Mid Atlantic), a noncarrier. Mid Atlantic, through ownership of GJ Railco Acquisition, LLC, also a noncarrier, controls New York Cross Harbor Railroad Terminal Corp (NYCH), a Class III rail carrier. Thus, Reger indirectly controls NYCH.

Reger also owns New York New Jersey Rail LLC (NYNJ), a newly formed limited liability company. NYNJ and NYCH have filed a verified notice of exemption for a corporate family transaction wherein NYCH seeks to transfer to NYNJ all or substantially all of its railroad assets and intangible assets required for railroad operation. NYNJ would then assume all of NYCH's rights and obligations to provide service as a common carrier. *See New York New Jersey Rail LLC and New York Cross Harbor Railroad Terminal Corp.—Corporate Family Transaction Exemption*, STB Finance Docket No. 34813 (STB served Jan. 10, 2006) (proceeding being held in abeyance until further notice to allow Conrail to discuss its concerns with NYCH regarding the effect of the proposed transaction on NYCH's contractual obligations to Conrail).

Applicant states that: (1) The lines being leased and operated by NASR do not connect with the rail lines in its corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect the leased lines with any other rail lines in NASR's corporate family; and (3) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34825, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on James E. Howard, One Thompson Square, Suite 201, Charlestown, MA 02129.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: February 14, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–2551 Filed 2–22–06; 8:45 am]

BILLING CODE 4915–01–P

[1] NASR and Sunny Farms are both wholly owned subsidiaries of Regus Industries, LLC, which is in turn controlled by Gordon Reger.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–303 (Sub-No. 28X)]

Wisconsin Central Ltd.—Abandonment Exemption—in Ashland County, WI

Wisconsin Central Ltd. (WCL)[1] has filed a notice of exemption under 49 CFR part 1152 Subpart F—*Exempt Abandonments* to abandon its line of railroad in Ashland, Ashland County, WI, referred to herein as the ''Ore Dock Line'', starting from a point of switch off WCL's mainline through Ashland at milepost 434.49 and continuing 5,160 feet to the end of WCL's Ashland Ore Dock. The line traverses United States Postal Service Zip Code 54806.

WCL has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line that would have to rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR

[1] WCL is a wholly owned subsidiary of Canadian National Railway Company.