

Issued in Washington, DC, on July 31, 2008

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[FR Doc. E8-18134 Filed 8-7-08; 8:45 am]

BILLING CODE 4910-13-M

**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA-2008-0204]

**Application by American Trucking Associations, Inc. for a Preemption Determination on the City of Boston's Routing and Transportation Restrictions Applicable to Certain Hazardous Materials**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of application for preemption determination; request for comments.

**SUMMARY:** FMCSA provides notice and invites interested parties to submit comments on an application by the American Trucking Associations, Inc. (ATA) for an administrative determination on whether Federal law preempts highway routing designations issued by the City of Boston (Boston) restricting transportation of certain hazardous materials. ATA submits that Boston failed to comply with the Federal routing requirements set in 49 CFR 397.71 and that such routing designations are therefore preempted under 49 U.S.C. 5125 and 49 CFR 397.69.

**DATES:** Comments received on or before September 22, 2008 and rebuttal comments received on or before November 6, 2008 will be considered before an administrative ruling is issued. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

**ADDRESSES:** You may submit comments identified by Federal Docket Management System Number FMCSA-2008-0204 by any of the following methods:

- Web Site: <http://www.regulations.gov>. Follow the instructions for submitting comments on the Federal electronic docket site.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building

Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- *Fax:* 1-202-493-2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to <http://www.regulations.gov>, including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to <http://www.regulations.gov> at any time or Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476; Apr. 11, 2000). This information is also available at <http://Docketinfo.dot.gov>.

*Public Participation:* The <http://www.regulations.gov> Web site is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the <http://www.regulations.gov> Web site and also at the DOT's <http://docketsinfo.dot.gov> Web site. If you want confirmation of receipt of your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

**FOR FURTHER INFORMATION CONTACT:** James O. Simmons, Chief, Hazardous Materials Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, or at [james.simmons@dot.gov](mailto:james.simmons@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:** A copy of each comment must also be sent to Richard Moskowitz, Vice President and Regulatory Affairs Counsel, American Trucking Associations, 950 North Glebe Road, Arlington, VA 22203. You are required to include with your comments a certification that you provided a copy of your comments to Mr. Moskowitz. (The following format is suggested: "I certify copies of this comment were sent to Mr. Moskowitz at the address specified in the **Federal Register**.")

**Background**

Title 49 U.S.C. 5125 includes several preemption provisions. Section 5125(c)(1) allows a State or Indian tribe to establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with 49 U.S.C. 5112(b).

Section 5112(b) requires the Secretary of Transportation (the Secretary), in consultation with the States, to prescribe by regulation standards for the States and Indian tribes to follow when designating specific highway routes for transportation of hazardous materials. The Secretary has delegated to the Administrator of the FMCSA authority and responsibility for highway routing of hazardous materials. See 49 CFR 1.73(d)(2).

The standards required by 49 U.S.C. 5112(b) for establishing highway routing requirements for non-radioactive hazardous materials are set forth in 49 CFR part 397, subpart C, and apply to any designations established or modified on or after November 14, 1994. See 49 CFR 397.69(a). A State or Indian tribe must follow FMCSA standards when establishing highway routing requirements for hazardous materials. See 49 CFR 397.71 (Federal standards for routing of nonradioactive hazardous materials (NRHM)). Except as provided in §§ 397.75 (dispute resolution) and 397.219 (waiver), a NHRM route designation made in violation of § 397.69(a) is preempted pursuant to section 105(b)(4) of the Hazardous Materials Transportation Act, as amended, 49 U.S.C. 5125(c), 49 CFR 397.69(b).

ATA alleges that Boston, in the course of the construction of the Central Artery Tunnel (often referred to as the "Big Dig"), changed designated hazardous materials routes through Boston and, in doing so, failed to comply with the requirements of § 397.71. ATA has submitted an application for a preemption determination pursuant to

the procedures set forth in 49 CFR part 397, subpart E—Preemption Procedures. ATA requests that the FMCSA Administrator make a determination on whether the highway routing designations established by Boston are preempted pursuant to § 397.69(b). A copy of the ATA application for preemption determination is available for review in the docket for this notice. You may view or obtain a copy of the application online by visiting <http://www.regulations.gov> and going to the docket number for this matter (FMCSA–2008–0204).

#### Public Comments

FMCSA seeks comments on whether 49 CFR 397.69(b) preempts Boston's highway routing designations that are being challenged by ATA. Comments should specifically address the preemption standard established under 49 CFR 397.69(b) and 49 U.S.C. 5125(c).

Issued on: August 1, 2008.

John H. Hill,

Administrator.

[FR Doc. E8–18344 Filed 8–7–08; 8:45 am]

BILLING CODE 4910–EX–P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No. FTA–2008–0024]

#### Notice of Buy America Waiver for the National Fuel Cell Bus Technology Development Program

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Buy America waiver.

**SUMMARY:** On May 22, 2008, the Federal Transit Administration (FTA) published a Notice of Proposed Buy America Waiver for the National Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program). After careful review of comments, FTA has decided to waive its Buy America requirements for projects funded under the Fuel Cell Bus Program. This Notice sets forth FTA's justification and response to comments.

**FOR FURTHER INFORMATION CONTACT:** For program questions please contact Christina Gikakis at (202) 366–2637 or [christina.gikakis@dot.gov](mailto:christina.gikakis@dot.gov). For legal questions please contact Jayme L. Blakesley at (202) 366–0304 or [jayme.blakesley@dot.gov](mailto:jayme.blakesley@dot.gov).

**SUPPLEMENTARY INFORMATION:** This Notice sets forth the Federal Transit Administration's (FTA) justification for waiving its Buy America requirements for projects funded under the National

Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program).

#### The National Fuel Cell Bus Technology Development Program

Section 3046 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, instructed FTA “to establish a national fuel cell bus technology program [Fuel Cell Bus Program] to facilitate the development of commercially viable fuel cell bus technology and related infrastructure.”

By notice dated April 14, 2006, FTA solicited applications to the Fuel Cell Bus Program and restated the statutory criteria for evaluating applications. These criteria included the ability of the project “to contribute significantly to furthering fuel cell technology as it relates to transit bus operations, including hydrogen production, energy storage, fuel cell technologies, vehicle systems integration, and power electronics technology,” and to advance “different fuel cell technologies, including hydrogen-fueled and methanol-powered liquid-fueled fuel cell technologies, that may be viable for public transportation systems.” 71 FR 19612 (April 14, 2006).

FTA selected three consortia to participate in the Fuel Cell Bus Program: the Center for Transportation and the Environment in Atlanta, the Northeast Advanced Vehicle Consortium in Boston, and Westart/CALSTART in Pasadena. These consortia will manage fourteen projects. Of these, eight are development and demonstration projects, two are component technology development, and four support analysis, outreach and coordination.

The Fuel Cell Bus Program seeks to develop commercially viable fuel cell buses by demonstrating that buses powered by fuel cell technology can achieve several technical targets, including a four to six year (20,000 to 30,000 hour) fuel cell durability, a cost of less than five times that of an equivalent diesel, greater than 90% reliability, twice the fuel efficiency of a comparable bus, emissions below the 2010 Environmental Protection Agency standards and vehicle performance comparable to a diesel bus.

#### Public Interest Waiver

The purpose of this notice is to articulate FTA's justification for waiving its Buy America requirements for all projects funded under the Fuel Cell Bus Program.

With certain exceptions, FTA's “Buy America” requirements prevent FTA from obligating an amount that may be

appropriated to carry out its program for a project unless “the steel, iron, and manufactured goods used in the project are produced in the United States.” 49 U.S.C. 5323(j)(1). One such exception is if applying the Buy America requirements “would be inconsistent with the public interest.” 49 U.S.C. 5323(j)(2)(A). After considering all appropriate factors on a case-by-case basis, 49 CFR 661.7(b), if FTA determines that the conditions exist to grant a public interest waiver, FTA will issue a detailed written statement justifying why the waiver is in the public interest, and will publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days. 49 CFR 661.7(b).

#### Justification

Because the U.S. market for fuel cell bus technology and related infrastructure is not fully developed, participants in the Fuel Cell Bus Program asked FTA to waive its Buy America requirements for projects funded under the Fuel Cell Bus Program. According to one participant, “[a] successful Fuel Cell transit bus must meet and be consistent with the public transit market's ability to incorporate and afford such technology on a mass scale. \* \* \* At this stage of technology development more engineering data is necessary to accurately specify a fuel cell for a competitive bid. [Requiring participants to comply with FTA's Buy America requirements] would significantly delay the development effort, would be extremely expensive, and would result in a huge set back to the overall development of Fuel Cell technology. [Allowing participants to use all available technology, regardless of origin,] is the fastest, soundest method to perfect the technology, assure future competition, and hasten the advent of fuel cell buses in transit.”

In order to develop commercially viable fuel cell buses, FTA's Fuel Cell Bus Program must examine all current technologies. But at this time, because fuel cell technologies for transit are still in the developmental and technical validation phase, it is impossible to determine which configurations are most likely to reach commercialization. As development continues, the industry will require objective demonstrations and evaluations of different bus propulsion systems. Permitting participants to use foreign and domestic suppliers will allow FTA to evaluate which technologies are closest to successful deployment. If certain