

carrier is not fit to transport the hazardous materials for which a safety permit is required; loss of its operating rights; and suspension of its registration for failure to pay a civil penalty or abide by a payment plan.

The SNPRM contains procedures for administrative review of a denial, suspension, or revocation of a safety permit. A motor carrier's rights to administrative review would depend on the ground for denial, suspension, or revocation of the safety permit. In summary, where there already exists a right to administrative review of the underlying basis for denial, suspension, or revocation, the carrier must pursue its existing rights to review.

Accordingly, if the basis for denial, suspension, or revocation of a safety permit is the carrier's failure to receive or maintain a "satisfactory" safety rating, its review rights are limited to those set forth in 49 CFR 385.15 (administrative review of a proposed safety rating) and 385.17 (change to safety rating based on corrective actions). If the basis for denial, suspension, or revocation of a safety permit is the carrier's failure to pay a civil penalty or abide by a payment plan, its review rights are limited to the show cause proceedings set forth in 49 CFR 386.83(b) and 386.84(b).

When a denial, suspension, or revocation of a safety permit is based on another ground, the SNPRM proposes that the carrier may submit a written request for administrative review within 30 days after service of a written notification that FMCSA has (1) denied a safety permit, (2) immediately suspended or revoked a safety permit (when an imminent hazard exists), or (3) proposed to suspend or revoke a safety permit. The specific procedures that would apply to a request for administrative review are contained in proposed § 385.423(d).

State Permits

The 1993 NPRM contemplated that many States would continue to require carriers to obtain a permit in order to transport hazardous materials within the State. In the SNPRM, FMCSA proposes that the Federal safety permit would be in addition to any required State permit, but that FMCSA would issue a safety permit to a carrier without further inspection or investigation when FMCSA is able to verify that the carrier holds a safety permit issued by a State under a program that is equivalent to the Federal safety permit program.

As stated in the 1993 NPRM, a State permit requirement would be preempted "if compliance with both the State and Federal permit requirements

is not possible, or if the State requirement creates an obstacle to the accomplishment" of Federal hazardous material transportation law and the regulations." (58 FR at 33419) In addition to these general preemption criteria now set forth in 49 U.S.C. 5125(a), a State may impose a fee for a permit to transport hazardous materials, "only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response." (49 U.S.C. 5125(g)(1)).

RSPA has stated that "[a] permit may serve several legitimate State police power purposes, and the bare requirement * * * that a permit be applied for and obtained is not inconsistent with Federal requirements. However, a permit itself is inextricably tied to what is required in order to get it" so that a permit requirement "must be considered together with the application requirements."

Inconsistency Ruling (IR) No. 2 (Rhode Island), 44 FR75566, 75570-71 (Dec. 20, 1979). Accordingly, a State and local permit for hazardous materials transportation is not preempted in all cases, but only when the underlying requirements that must be fulfilled in order to obtain the permit conflict with Federal hazardous materials law or the HMR. *Id.*; Preemption Determination (PD) No. 14 (Houston), 63 FR 67506, 67510 (Dec. 7, 1998), 64 FR 949, 33952 (June 24, 1999); IR-28 (San Jose, California), 55 FR 8884, 8890 (Mar. 8, 1990); IR-20 (Triborough Bridge and Tunnel Authority), 52 FR 24396, 24397-98 (June 30, 1987); IR-3 (Boston), 46 FR 18918, 18923 (Mar. 26, 1981).

The November 17, 1993 report of the Alliance discussed the two primary reasons that States carry out their own permit and registration programs: (1) The issuance of a permit provides an enforcement mechanism (suspension or revocation of the permit) if a carrier acts irresponsibly or violates State transportation or environmental laws, and (2) the registration or permit process provides a State information about the business activities of persons who operate within the State but are not based within the State. In its letter transmitting that report, the Alliance stated that its members had operated under the assumption that Federal hazardous material transportation law "authorized a dual system for registering and permitting motor carriers," and that a 1992 technical amendment to the law made this explicit. The Alliance stated that the language in the two separate sections of

the law on a Federal safety permit and State permits (now §§ 5109 and 5119) does not restrict "the types of hazardous materials" that may be covered under a State permit, and expressed opposition to finding that a Federal safety permit program "would preempt state permitting of carriers of hazardous materials covered under the federal program."

CWTI concurred that a uniform State permit system proposed by the Alliance and implemented under Federal regulations would not be subject to preemption under the dual compliance and obstacle criteria, contained in 49 U.S.C. 5125(a). It recommended that the applicability of these criteria to State permits should be clarified in several respects by placing the preemption standard in the regulations (rather than just in the preamble) and explicitly stating that "a motor carrier holding a valid federal safety permit would be exempt from all non-federal permit requirements."

The Public Utilities Commission of Ohio stated that it would be "against the public interest" to establish a Federal program under which a State permit program would be preempted with respect to the hazardous materials for which a safety permit would be required, but not with respect to other, "lower risk" materials. CHP asked for further clarification of the preemption standard to be applied to State permits, in light of the statement in the 1993 NPRM that a State permit covering the "same hazardous materials * * * based on a demonstration of safety fitness" would be preempted after implementation of a Federal safety permit program. (58 FR at 33423)

Other persons submitting comments on the 1993 NPRM urged alignment of the Federal and State programs, suggesting that States "accept the FHWA program" (IME), "closely align this permit program with the work of the Alliance" (Yellow Freight), "see if one program could be established" under the Alliance proposal (Montana DOT), or "consider waiving the FHWA permitting requirement" if a uniform State program contained requirements that "duplicate or exceed those contained in the NPRM" (DuPont).

FMCSA agrees that Federal hazardous materials transportation law allows States to continue their permit requirements after the implementation of a Federal safety permit requirement, and that, if a State has a safety permit program that is equivalent to the requirements in 49 U.S.C. 5109, FMCSA may properly accept the findings of the State that a motor carrier is "fit, willing, and able" to transport the designated