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

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone No. 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

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

A. Permits

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

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

3. Sections 8001.3.2 and 8001.3.3, which specify that the HFD chief may require an applicant for a permit to provide a hazardous materials

management plan (HMMP) and a hazardous materials inventory statement (HMIS), respectively, in accordance with the provisions of Appendix II–E of the Fire Code.

B. Containment

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

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

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

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

Air France also states that it moved into a new cargo warehouse facility at IAH in July 2003, where, as a condition of issuing a certificate of occupancy, the HFD has required the installation of "a hazardous materials storage cabinet * * * for the storage by Air France of

certain in transit hazardous materials." Air France indicates it operates cargo warehouses at six other locations in the United States, and none of these jurisdictions requires it to obtain a local permit or install and use storage cabinets when it handles and stores hazardous materials in the course of transportation.

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

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

the transportation of hazardous materials in commerce subject to the Federal hazardous material transportation law and the HMR includes the storage of these materials "incidental to [their] movement." 49 U.S.C. 5102(12). Accordingly, RSPA has stated that HMR clearly apply to "transportation-related storage." IR–19, Nevada Public Service Commission Regulations Concerning Transportation of Hazardous Materials, 52 FR 24404, 24409 (June 30, 1987), decision on appeal, 53 FR 11600 (Apr. 7, 1988). And RSPA reiterated in PDs 8(R)–11(R) that the HMR apply to "[s]torage that is incidental to transportation," which includes "storage by a carrier between the time a hazardous material is offered for transportation and the time it reached its intended destination and is accepted by the consignee." 60 FR [8774] at 8778 [Feb. 15, 1995]. See also PD–12(R), New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Waste, 60 FR 62527, 62541 (Dec. 6, 1995), decision on petition for reconsideration, 62 FR 15970, 15971 (Apr. 3, 1997) ("transportation-related