

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

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

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

Id., quoted at 64 FR at 33952.

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

In the recently-issued final rule in HM-223, RSPA has reaffirmed that "storage incidental to movement of a hazardous material" is a "transportation function," and the HMR apply to the "[s]torage if a * * * package containing a hazardous material by any person between the time that a carrier takes

possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium * * *" 49 CFR 171.1(c)(4), as added in 68 FR 61906, 61938 (Oct. 30, 2003); "see also" the definition of "storage incidental to movement" added to § 171.8. *Id.* at 61940-41. RSPA also reaffirmed in new § 171.1(f)(1) that State and local requirements may apply to a "facility at which pre-transportation or transportation functions are performed," but that those State and local requirements remain subject to preemption under the criteria set forth in 49 U.S.C. 5125 (discussed in part II, below). *Id.* at 61938.

As stated in the preamble to the final rule,

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

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

In PD-14(R), RSPA addressed the provisions in the prior edition of the Fire Code that excepted the "[t]ransportation of flammable and combustible liquids when in accordance with DOT regulations on file with and approved by DOT" (In Sec. 7901.1.1), and for "[o]ff site hazardous materials transportation in accordance with DOT requirements" (in Sec. 8001.1.1). 63 FR at 67507, 67510, 64 FR at 33950, 33951.

The current edition of the Fire Code has retained the exception in Sec. 7901.1.1 with respect to flammable and combustible liquids, but eliminated the previous exception in Sec. 8001.1.1. Accordingly, to the extent that flammable and combustible liquids are stored in the course of transportation, they cannot be considered subject to any requirements in Article 79 of the Fire Code. 63 FR at 67510, 64 FR at 33951. The Fire Code also contains "exceptions" in Secs. 105.8.f.3, 105.8.h.1, and 7901.3.1 that "A permit is not required for any activity when the requirement of local permits is preempted by federal or state law."

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

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

II. Federal Preemption

Section 5125 or 49 U.S.C. contains express preemption provisions that are relevant to this proceeding. 66 FR at 41933-34. As amended by Section 1711 of the Homeland Security Act of 2002 (Pub. L. 107-296, 116 Stat. 2319), 49 U.S.C. 5125(a) provides that—in the absence of a waiver of preemption by DOT under § 5125(e) or specific