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Associate Administrator for Hazardous Materials Safety.

Appendix A

Application of Soci   Air France for a Preemption Determination

Pursuant to 49 CFR 107.203 and 49 U.S.C. 5125, Soci   Air France ("Air France") hereby applies for a determination that certain permit requirements contained in the Fire Code of the City of Houston, as well as certain secondary containment and segregation requirements imposed by the Houston Fire Department, are preempted under Federal hazardous materials transportation law as these requirements are being applied to the handling or storage by Air France of hazardous materials incidental to their movement by air at the Air France cargo facility at George Bush Intercontinental Airport ("IAH"), Houston, Texas.

I. Local Ordinances and Requirements at Issue

Air France seeks a Department determination that the following local Houston Fire Code and Fire Department requirements are preempted:

1. *   105.8.h.1 and    8001.3.1. of the Fire Code*—requirement for a local permit to handle or store hazardous materials.

2. *   8001.3.2. and Appendix II-E of the Fire Code*—requirement that carriers must submit a Hazardous Materials Management Plan ("HMMP") as specified therein in support of a    105.8.h.1. and    8001.3.1 permit application.

3. *   8001.3.3 and Appendix II-E of the Fire Code*—requirement that carriers must submit a Hazardous Materials Inventory Statement ("HMIS") as specified therein in support of a    105.8.h.1 and    8001.3.1 permit application.

4. *   105.8.f.3 and    7901.3.1 of the Fire Code*—requirement for a local permit to handle or store flammable or combustible liquids.¹

5. *   8001.10.6    8001.11.8,    7902.5.9 and    7902.1.6 of the Fire Code and requirements imposed under the Lynxs/Air France Agreement*—requirements for the use of hazardous materials storage cabinets.

6. *   8003.1.33 and    7901.8 of the Fire Code*—requirements for the secondary containment of hazardous materials liquids and solids.

These local Houston requirements are inconsistent with Federal hazardous materials law and specific provisions of the Hazardous Materials Regulations ("HMR"), 49 CFR part 171–180, enforced by the Department and adhered to by Air France in its United States operations, including those conducted at IAH in Houston, Texas.

II. Statement of Facts

Air France is a foreign air carrier licensed and regulated by the United States Department of Transportation ("DOT" or "Department") and is authorized to transport air cargo between points in the United States and points in France. Air France has been providing cargo air transportation, including the transportation of hazardous materials, at IAH since 1969. Currently, Air France operates a daily passenger/cargo combination flight and an all-cargo flight three times per week between IAH and Paris, France.

Air France has applied for and received a permit from the Houston Fire Department to handle or store hazardous materials on an annual basis since 1979 in connection with its IAH cargo warehouse. On June 11, 2002, Air France received the paperwork from the Houston Fire Department to renew its permit to handle or store hazardous materials. On this occasion, Air France was required for the first time to submit two additional items to renew its permit: (1) a HMMP and (2) a HMIS. Air France had never been asked to provide these items on any other occasion when renewing its local permit to store or handle hazardous materials.

The City of Houston has adopted the 1997 edition of the Uniform Fire code, with certain amendments ("Fire Code").² The requirement for a permit to handle or store hazardous materials over certain amounts is found in    105.8.h.1 of the Fire Code. This section also contains a general exception which states "EXCEPTION": A permit is not required for any activity where the requirement of local permits is preempted by Federal or State law.³ In addition, Article 80—Hazardous Materials states that "[p]ermits are required to store, dispense, use or handle hazardous material in excess of quantities specified in Section 105, Permit h.1."⁴ Article 80 further provides that, when required by the fire chief, and applicant for a permit is required to submit a HMMP and a HMIS.⁵ Fire Code    105.8.f.3 and    7901.3.1 of Article 79—Flammable and Combustible Liquids also require a permit to handle or store flammable or combustible liquids in excess of certain amounts. Both of these sections also provide for an exception where the requirement of a local permit is preempted by Federal or State law.

Appendix II-E,    2.1 of the Fire code requires that the HMIS list by hazard class all hazardous materials stored in a building and include the following information for each hazardous material listed: (1) Hazard class; (2) common or trade name; (3) chemical name, major constituents and concentrations if a mixture. If a waste, the waste category; (4) Chemical Abstract Service number found in 29 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; and (7) storage conditions related to the storage type, temperature and pressure. An amended HMIS is required to be provided 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 the quantity that exceeds 5 percent for any hazard class.⁶ Pursuant to Column 6.2 of Section II of Figure A-II-E-1 (Sample Format) contained in Appendix II-E, an applicant is also required to estimate the average daily amount of hazardous material on site during the past year.

Appendix II-E,    3.2 of the Fire Code requires that the HMMP include the following information: (1) General business information; (2) a general site plan; (3) a building floor plan; (4) information on hazardous materials handling; (5) information on chemical compatibility and separation; (6) a monitoring program; (7) inspection and record keeping; (8) employee training; and (9) emergency response procedures.

On July 3, 2002, Air France first applied to the Houston Fire Department for renewal of its permit to handle or store hazardous materials at its IAH cargo facility. Air France, however, was unable to obtain such a permit due, in part, to its inability to provide the Houston Fire Department with the detailed information it sought as part of the HMIS requirement. Given the nature of its operations, the hazardous materials that are present at the Air France cargo facility changes on a day-to-day basis (or even on an hour-to-hour basis) at these materials are in transit and are only present for palletization and other procedures related to their carriage by air. All hazardous material shipments present in the Air France facility are under active shipping papers (air waybills) and are only present there incidental to prior or subsequent air transportation. As a result, hazardous materials typically spend only a very short period of time at the Air France cargo facility. In addition, 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.

Nevertheless, Air France has attempted to comply with the Houston Fire Department's requirements. At the request of the Houston Fire Department, Air France revised its HMIS and HMMP on several occasions subsequent to its July 3, 2002 submission (the Fire Department's rejection of Air France's submitted HMMP and HMIS is evidenced by the Notice of Violation, dated October 23, 2002, attached hereto as Exhibit 2). As none of these submissions were satisfactory to the Fire Department, Air France ultimately found it necessary to retain Loss Control Associates, Inc., a fire protection engineering firm, to assist it in completing these forms. At the suggestion of the Houston Fire Department, Loss Control Associates conducted a survey of NOTOCs (Notifications to Captains) and manifests for shipments transiting the Air France IAH cargo facility during a prior sixth-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. In addition, as the common names and trade names of hazardous materials are not contained on

¹ To the extent that a HMMP or a HMIS is required by the Fire Department to obtain a permit to handle or store flammable or combustible liquids under Article 79 of the Fire Code, Air France also requests that such requirements be preempted.

² Applicable provisions of the Fire Code are attached hereto as Exhibit 1.

³ Fire Code    105.8.1

⁴ Fire Code    8001.3.1

⁵ Fire Code    8001.3.2 and 8001.3.3.

⁶ Fire Code App. II-E,    2.2