

State, political subdivision of a State, or an Indian tribe where:

(1) Complying with such a requirement and a requirement of this chapter [49 U.S.C. 5101 *et seq.*], a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible (the "dual compliance test"); or

(2) Such a requirement, as applied or enforced, is an obstacle to accompanying and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulations or directive issued by the Secretary of Homeland Security (the "obstacle test").<sup>16</sup>

Congress also gave DOT the authority to preempt a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe concerning five covered subjects, including: (A) the designation, description, and classification of hazardous material and (B) the packaging, repackaging, handling, labeling, marking, and placarding of hazardous material, that are not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (the "covered subjects test").<sup>17</sup>

The Research and Special Programs Administration ("RSPA") has enacted regulations under which "any person . . . directly affected by any requirement of a State, political subdivision, or Indian tribe may apply for a determination as to whether that requirements is preempted under 49 U.S.C. 5125"<sup>18</sup> The standards established by RSPA for determining whether a requirement of a State, political subdivision, or Indian tribe is preempted are essentially the same as the standards stated in 49 U.S.C. 5125(a)(1) and (2) and (b)(1).<sup>19</sup> For the purpose of making preemption determinations, RSPA has defined "substantially the same" to mean "that the non-Federal requirement conforms in every significant respect to the Federal requirement."<sup>20</sup>

The HMR have been promulgated in accordance with the HMTA's direction that the Secretary of Transportation "prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce"<sup>21</sup> The HMR "shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate."<sup>22</sup> "Transportation" is defined as "the movement of property and loading, unloading, or storage incidental to the movement."<sup>23</sup>

*IV. The Requirements Contained in the Houston Fire Code To Submit a Hazardous Materials Management Plan and a Hazardous Materials Inventory Statement in Order To Obtain a Permit To Handle or Store Hazardous Materials Should Be Preempted in Accordance With DOT Precedent as an Obstacle to the Execution of the HMTA and the HMR*

In Inconsistency Ruling No. IR-28 (San Jose), 55 FR 8884 (March 8, 1990), RSPA held that a local ordinance requiring the submission of a HMMP and a HMIS in order to obtain a permit to store hazardous materials incidental to transportation is an obstacle to the execution of the HMTA and the HMR and thus preempted. Since the Houston Fire Department is imposing virtually identical HMMP and HMIS requirements upon Air France in order for the carrier to obtain a permit to handle or store in transit hazardous materials at its cargo facility at IAH, these requirements should similarly be preempted in accordance with IR-28 (San Jose).

The Hazardous Materials Storage Ordinance at issue in IR-28, which was contained in the San Jose Municipal Code, required Yellow Freight System, Inc., ("Yellow Freight") to obtain a Hazardous Materials Storage Permit ("HMS") and submit a HMMP to operate its expanded trucking terminal.<sup>24</sup> Among several other items, San Jose required that a HMIS, including names, hazard classes and total quantities, be included in the HMMP.<sup>25</sup> Yellow Freight argued that the fluid nature of the commerce through its facility made it impossible to comply with San Jose's inventory requirements.<sup>26</sup>

While RSPA's Director of the Office of Hazardous Materials Transportation noted that "State and local permits for hazardous materials transportation are not *per se* inconsistent [and] their consistency depends upon the nature of their requirements[.]"<sup>27</sup> the Director went on to state that: a state or local permitting system which prohibits or requires certain hazardous materials transportation activities depending upon whether a permit has been issued (regardless of whether the activity is in compliance with the HMR), applies to selected hazardous materials \* \* \* involves extensive information and documentation requirements [such as a HMMP and a HMIS], and contains considerable discretion as to permit issuance, is inconsistent with the HMTA and the HMR.

223), 66 FR 32420 (June 14, 2001). Under the proposed rule, "storage incidental to movement" would be defined as:

"Storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose 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. \* \* \*" 66 Fed. Reg. at 32448.

<sup>24</sup> See *id.* at 8885.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 8888.

<sup>27</sup> *Id.* at 8890 (citation omitted).

'Cumulatively, these factors constitute unauthorized prior restraints on shipments of hazardous materials that are presumptively safe based on their compliance with Federal regulations.'<sup>28</sup>

The Director concluded that "the City's discretionary and burdensome permit/approval requirements for the storage of hazardous materials incidental to their transportation (e.g., at motor carrier terminals) are inconsistent and thus preempted."<sup>29</sup>

With respect to San Jose's HMMP and HMIS requirement, the Director noted that "[i]nformation and documentation requirements as prerequisites to hazardous materials transportation have been considered on many prior occasions. Where such requirements exceed Federal requirements, they have been found to create potential delay or diversion of hazardous materials transportation, to constitute an obstacle to the execution of the HMTA and the HMR, and thus to be inconsistent."<sup>30</sup> The Director stated that "the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implementation of the HMTA and HMR and thus are inconsistent with them."<sup>31</sup> The Director went on to find that:

the City of San Jose has imposed extensive (practically exhaustive), extremely detailed, burdensome, open-ended, vague and impossible-to-comply-with information and documentation requirements as a condition precedent to, inter alia, the storage of hazardous materials incidental to the transportation thereof without regard to whether that transportation-related storage is in compliance with the HMR. *For example, the detailed information required to be provided concerning the identity and quantity of hazardous materials (and other materials) which a 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 for transportation virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.*<sup>32</sup>

The Director also found that San Jose's information and documentation requirements, insofar as they relate to hazardous materials to be stored at a facility incidental to transportation, constitute an inconsistent advance notice requirement since they have the potential to delay and redirect traffic.<sup>33</sup>

<sup>28</sup> *Id.* (quoting Inconsistency Ruling No. IR-19 (the Inconsistency Ruling underlying the Ninth Circuit's decision in *Southern Pac. Transp. Co. v. Public Serv. Comm'n of Nevada*, 909 F. 2d 352 (9th Cir. 1990) discussed below).

<sup>29</sup> *Id.* at 8890-91.

<sup>30</sup> *Id.* at 8891.

<sup>31</sup> *Id.* (citing IR-19).

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> See *id.* (citing IR-8 (Appeal) and IR-16).

<sup>16</sup> See 49 U.S.C. 5125(a)(1) and (2).

<sup>17</sup> See 49 U.S.C. 5125(b)(1)(A) and (B).

<sup>18</sup> 49 CFR 107.201(a)(1).

<sup>19</sup> See 49 CFR 107.202(a) and (b).

<sup>20</sup> 49 CFR 107.202(d).

<sup>21</sup> 49 U.S.C. 5103(b).

<sup>22</sup> 49 U.S.C. 5103(b)(1a)(B).

<sup>23</sup> 49 U.S.C. § 5102(12) (emphasis added). Air France is aware that the Department has issued a Notice of Proposed Rulemaking seeking to clarify the applicability of the HMR to specific functions and activities, including loading, unloading and storage of hazardous materials during transportation. Docket No. RSPA-98-4952 (HM-