

FR 67506 (December 7, 1998)) finding that certain provisions of the Houston Fire Code (the 1994 edition of the Uniform Fire Code), including the permit requirements in § 105.8.h.1, § 8001.3.1, § 105.8.f.3 and § 7901.3.1 were not preempted (to the extent that these sections require a permit for a vehicle to transport hazardous materials in commerce within the City) because the local Fire Code provisions by explicit exception did not apply to the transportation of hazardous materials subject to the HMR.<sup>44</sup> In PD-14(R), the Association of Waste Hazardous Materials Transporters ("AWHMT") had challenged certain provisions of the Fire Code, including provisions requiring inspections and fees in order to obtain an annual permit for cargo tank motor vehicles to pickup or deliver hazardous materials within the City.<sup>45</sup> In that case, RSPA reasoned that the specific exceptions in §§ 7901.1.1 and 8001.1.1 for transportation "in accordance with" DOT regulations makes it clear that the Fire Code is not intended to apply to vehicles when they are transporting hazardous materials subject to the HMR.<sup>46</sup> RSPA therefore concluded that there was no inconsistency with Federal hazardous material transportation law or the HMR when the Fire Code is properly applied in this manner.<sup>47</sup>

In reaching this conclusion, RSPA noted that:

the City specifically acknowledged that the 'express exceptions for DOT-regulated activities' in Secs. 7901.1.1 and 8001.1.1 mean that 'the Fire Code should not be read as applicable to over-the-road (off-site) transportation \* \* \*'. The City elaborated that 'permits will not be required for DOT-regulated activities'[,]<sup>48</sup>

In its initial Preemption Determination, RSPA noted that the City had stopped requiring permits of vehicles meeting DOT requirements.<sup>49</sup> RSPA concluded that [b]ecause the City now correctly equates the exceptions in the Houston Fire Code for vehicles 'meeting DOT requirements' with 'subject to regulation by DOT' under the HMR, AWHMT's challenges to these requirements have become moot."<sup>50</sup>

While AWHMT did not challenge the City's requirements that apply to a facility that stores hazardous materials, as opposed to vehicles that move those materials, RSPA nevertheless undertook a discussion of the issue stating that:

RSPA has long encouraged States and localities to adopt and enforce requirements on the transportation of hazardous materials that are consistent with the HMR. *See, e.g.,* PD-12(R), 60 FR at 62530. This applies to storage that is incidental to the movement of hazardous materials in commerce, as well as the actual movement of those materials. *The enforceability of non-Federal requirements on 'incidental' storage depends on the*

*consistency of those requirements with the HMR and, of course, the applicability of the requirements themselves in terms of exceptions such as Secs. 7901.1.1 and 8001.1.1 of the Uniform Fire Code.*<sup>51</sup>

Citing IR-28 (San Jose), RSPA reiterated its position that:

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 virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.<sup>52</sup>

RSPA concluded that "[t]o the extent that the exceptions in Secs. 7901.1.1 and 8001.1.1 mean that provisions of the Uniform Fire Code do not apply to transportation of hazardous materials in commerce, including incidental storage, that result derives from the plain language of the Uniform Fire Code and not from any inconsistency with the HMR."<sup>53</sup>

Although RSPA held in Preemption Determination No. 14(R) that the permit requirements contained in § 105.8.h.1, § 8001.3.1, § 105.8.f.3 and § 7901.3.1 of the Fire Code were not preempted by Federal hazardous materials law (to the extent that these sections require a permit for a vehicle to transport hazardous materials in commerce within the City), RSPA's holding rested on the exceptions contained in the Fire Code that permits are not required for transportation of hazardous materials in accordance with DOT requirements and the fact that the city had stopped requiring permits for the activities in question.

In addition, in PD-14(R), RSPA specifically noted that the enforceability of non-Federal requirements on incidental storage depends on the consistency of those requirements with the HMR and the applicability of the requirements themselves in terms of exceptions contained in the Houston Fire Code. The Fire Department, however, assuredly is not enforcing its permit requirements in accordance with the express terms of the Houston Fire Code (*i.e.,* the exceptions contained in § 105.8.h.1, § 105.8.f.3 and § 7901.3.1 for activity where the requirement for a local permit has been preempted by Federal or state law) since it is enforcing the permit requirements against carriers such as Air France under circumstances that have already been determined to be preempted, including requiring the submission of a HMMP and a HMIS (*see e.g.,* IR-28 (San Jose) and Southern Pac. Transp. Co., 909 F.2d 352 (9th Cir. 1990)).

<sup>51</sup> *Id* at 33952 (emphasis added).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

*V. The Fire Department's Hazardous Materials Storage Cabinet Requirement Should Also Be Preempted as an Obstacle to the Execution of the HMTA and the HMR*

The hazardous materials storage cabinet requirement imposed by the Houston Fire Department on Air France pursuant to Exhibit 6 should also be preempted by the HMTA and the HMR.<sup>54</sup> This requirement is an obstacle to compliance with specific HMR provisions and conflict with the Department's ruling in IR-28 (San Jose).

In IR-28 (San Jose), RSPA noted that "state or local prohibition of transportation-related storage at places where, and at times when, the HMR allow such storage is inconsistent with the HMTA and the HMR."<sup>55</sup> In that case, Yellow Freight had complained that the City of San Jose desired to have every shipment of hazardous material that is not moving directly across the dock into an immediately available vehicle moved instead into one of a series of specially constructed and segregated storage bunkers, with materials divided by hazard classification.<sup>56</sup> Yellow Freight maintained that the movement of these materials in and out of such bunkers would cause confusion, delay and safety problems for its employees.<sup>57</sup>

In addressing the secondary containment and segregation requirements for hazardous materials imposed by San Jose, the Director noted that § 177.848(f) (now § 177.848(d)) provided that "[h]azardous materials must not be loaded, transported, or stored together, except as provided in" a detailed Segregation and Separation Chart of Hazardous Materials, which is a part of that Section."<sup>58</sup> Accordingly, the Director found that:

State or local imposition of containment or segregation requirements for the storage of hazardous materials incidental to the transportation thereof different from, or additional to those in, § 177.848(f) of the HMR [which applies to carriage by public highway] create confusion concerning such requirements and [increase] the likelihood of noncompliance with § 177.848(f). Since such state or local requirements, therefore, are obstacles to the execution of an HMR provision, they are inconsistent with the HMR—insofar as they apply to transportation-related storage.<sup>59</sup>

The Houston Fire Department's requirement that Air France use a hazardous materials storage cabinet for the temporary storage of certain in transit hazardous materials also has the potential to create confusion and increase the likelihood of noncompliance with the hazardous materials segregation and separation rules established for air carrier cargo facilities contained in

<sup>54</sup> Air France also requests that Fire Code § 8001.10.6, § 8001.11.8, § 8003.1.3.3, § 7901.8, § 7902.5.9 and § 7902.1.6 be preempted to the extent that the Fire Department relies on these provisions to require Air France to use a hazardous materials storage cabinet.

<sup>55</sup> 55 FR at 8893 (citing IR-19).

<sup>56</sup> *See id* at 8888.

<sup>57</sup> *See id.*

<sup>58</sup> *Id* at 8893.

<sup>59</sup> *Id.*

<sup>44</sup> 64 FR at 33953.

<sup>45</sup> *See id* at 33949.

<sup>46</sup> *See id* at 33951.

<sup>47</sup> *See id.*

<sup>48</sup> *Id* (emphasis added).

<sup>49</sup> *See* (No. PD-14(R), 63 FR at 67510.

<sup>50</sup> 64 FR at 33951.