

Flexibility in the use of applicable design standards is encouraged during the analysis of feasible and prudent alternatives.

Mitigation and Measures To Minimize Harm

This programmatic evaluation and approval may be used only for projects where the Administration, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm, includes appropriate mitigation measures, and that the official(s) with jurisdiction agree in writing.

Coordination

In early stages of project development, each project will require coordination with the Federal, State, and/or local agency official(s) with jurisdiction over the Section 4(f) property. For non-Federal Section 4(f) properties, *i.e.*, State or local properties, the official(s) with jurisdiction will be asked to identify any Federal encumbrances. When encumbrances exist, coordination will be required with the Federal agency responsible for such encumbrances.

Copies of the final written report required under this programmatic evaluation shall be offered to the official(s) with jurisdiction over the Section 4(f) property, to other interested parties as part of the normal NEPA project documentation distribution practices and policies or upon request.

Public Involvement

The project shall include public involvement activities that are consistent with the specific requirements of 23 CFR 771.111, Early coordination, public involvement and project development. For a project where one or more public meetings or hearings are held, information on the proposed use of the Section 4(f) property shall be communicated at the public meeting(s) or hearing(s).

Approval Procedure

This programmatic evaluation approval applies only after the Administration has:

1. Determined that the project meets the applicability criteria set forth in *Applicability* section;
2. Determined that all of the alternatives set forth in the *Findings* section have been fully evaluated;
3. Determined that the findings in the programmatic evaluation (which conclude that the alternative recommended is the only feasible and prudent alternative) result in a clear net benefit to the Section 4(f) property;

4. Determined that the project complies with the *Mitigation and Measures to Minimize Harm* section of this document;

5. Determined that the coordination and public involvement efforts required by this programmatic evaluation have been successfully completed and necessary written agreements have been obtained; and

6. Documented the information that clearly identifies the basis for the above determinations and assurances.

[FR Doc. 05-7812 Filed 4-19-05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2005-20930 (PDA-31(F))]

Application by American Trucking Associations, Inc. for a Preemption Determination as to District of Columbia Requirements for Highway Routing of Certain Hazardous Materials

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), United States Department of Transportation (DOT).

ACTION: Public notice and invitation to comment.

SUMMARY: FMCSA invites interested parties to submit comments on an application by The American Trucking Associations, Inc. for an administrative determination as to whether Federal hazardous materials transportation law preempts highway routing requirements of the District of Columbia in restricting transportation of certain hazardous materials.

DATES: Comments received on or before June 6, 2005, and rebuttal comments received on or before July 19, 2005, will be considered before an administrative ruling is issued. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: You may submit comments, identified by DOT DMS Docket Number FMCSA-2005-20930, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1-202-493-2251.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001. Please submit three copies of written comments.

- *Hand Delivery:* Submit three copies of written comments to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Comments must refer to Docket Number FMCSA-2005-20930. All comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. For detailed instructions on submitting comments, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. For a summary of DOT's Privacy Act Statement or information on how to obtain a complete copy of DOT's Privacy Act Statement please see the "Privacy Act" heading of the **SUPPLEMENTARY INFORMATION** section.

Docket: For access to the docket to read the application or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. William Quade, Chief, Hazardous Materials Division (MC-ECH), (202) 366-2172; Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation

A copy of each comment must also be sent to Richard Moskowitz, Assistant General Counsel, American Trucking Associations, 2200 Mill Road, Alexandria, VA 22314. Certification of sending a copy to Mr. Moskowitz must accompany your comments. (The following format is suggested: "I certify copies of this comment have been sent to Mr. Moskowitz at the address specified in the **Federal Register**.")

The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the DMS Web site. If you want us to notify you of receiving your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page displaying after receipt of on-line comments.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

I. Application for a Preemption Determination

The American Trucking Associations, Inc. ("ATA") has applied for an administrative determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and FMCSA regulations at 49 CFR part 397, preempt highway routing requirements under the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 [D.C. Act 16-43, February 15, 2005, 52 CDR 3048] ("DC Act"). The DC Act applies to transportation of certain hazardous materials within a 2.2-mile zone of the United States Capitol Building. The DC Act refers to this zone as the "Capitol Exclusion Zone."

A copy of the ATA application for preemption determination is in the docket for this notice. You may view or obtain a copy of the application online by visiting <http://dms.dot.gov>, clicking "Simple Search" and entering the last 5 digits of the docket number (20930).

In the application, ATA challenges the following two sections of the DC Act:

(1) Section 4 of the DC Act, titled "Prohibition on shipments of hazardous materials." Section 4 makes it illegal, except in cases of emergency, to transport in the Capitol Exclusion Zone without a permit any of the materials in the list below. Section 4 also makes it illegal in the Capitol Exclusion Zone, without a permit, to operate a vehicle which is capable of containing, and has exterior placarding or other markings indicating it contains, any of these materials:

(a) Explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 CFR 173.2, in a quantity greater than 500 kilograms;

(b) Flammable gasses of Class 2, Division 2.1, as designated in 49 CFR 173.2, in a quantity greater than 10,000 liters;

(c) Poisonous gasses of Class 2, Division 2.3, as designated in 49 CFR 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 CFR 173.116; and

(d) Poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 CFR 173.133.

Section 3 of the DC Act defines an "emergency" as an unanticipated, temporary situation that threatens the immediate safety of individuals or property, as determined by the District of Columbia Department of Transportation.

(2) Section 5 of the DC Act, titled "Permits." Section 5 of the DC Act enables the District of Columbia Department of Transportation to issue a permit authorizing transport of the materials listed in Section 4 if there is no "practical alternative route"—defined in Section 3 of the DC Act as a route which lies entirely outside the Capitol Exclusion Zone and whose use would not make shipment of the hazardous materials cost-prohibitive. The permit may require the adoption of safety measures, including time-of-day restrictions. Section 5 authorizes the District of Columbia Department of Transportation to collect fees, not to exceed the cost of implementing and enforcing the DC Act, for the issuance of the permits.

In its application for a preemption determination, ATA states the DC Act was enacted without regard to the procedures set forth in the Federal hazardous materials routing regulations. Specifically, ATA asserts the District of Columbia failed to provide the requisite notice and comment period as required by 49 CFR 397.71(b)(2) and failed to hold a public hearing. ATA further states the District of Columbia failed to consult with officials of neighboring jurisdictions as required by 49 CFR 397.71(b)(3). Additionally, ATA asserts the District of Columbia did not engage in the risk analysis required by 49 CFR 397.71(b)(4). Lastly, ATA states the DC Council's testimony and findings include no discussion or analysis of population density or special populations in the area outside the Capitol Exclusion Zone, characteristics of the alternative highways to be used, an analysis of the number of shipments that would be impacted by the DC Act, an analysis of the impact upon emergency response capabilities, consideration of comments and concerns of affected persons, impact upon commerce, delays in transportation, or traffic conditions, including motor vehicle accident experience. ATA points out FMCSA's routing regulations relating to non-radioactive hazardous materials require

analysis of these factors prior to enacting a routing restriction.¹

II. Federal Preemption

Title 49 U.S.C. 5125 includes several preemption provisions. Section 5125(c)(1) allows a State or Indian tribe to establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with 49 U.S.C. 5112(b).

Section 5112(b) requires the Secretary of Transportation (the Secretary), in consultation with the States, to prescribe by regulation standards for the States and Indian tribes to follow when designating specific highway routes for transportation of hazardous materials. The Secretary has delegated to FMCSA authority and responsibility for highway routing of hazardous materials.²

The standards required by 49 U.S.C. 5112(b) for establishing highway routing requirements for non-radioactive hazardous materials are set forth in 49 CFR part 397, subpart C, and apply to any designations established or modified on or after November 14, 1994.³ A State or Indian tribe must follow FMCSA standards when establishing highway routing requirements for hazardous materials.

The preemption provisions in 49 U.S.C. 5125 carry out Congress's view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In sec. 2 of the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) [Pub. L. 101-615, November 16, 1990, 104 Stat. 3244], Congress underscored the need for uniform regulations relating to transportation of hazardous materials:

* * * (3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements;

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable;

¹ See 49 CFR 397.71(b)(9).

² See 49 CFR 1.73(d)(2).

³ See 49 CFR 397.69(a).

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

The Committee on Commerce, Science, and Transportation, when reporting in 1990 on the bill to amend the Hazardous Materials Transportation Act (HMTA) [Pub. L. 93-633 section 112(a), 88 Stat. 2161 (1975)], stated "The original intent of HMTA was to authorize [DOT] with the regulatory and enforcement authority to protect the public against the risks imposed by all forms of hazardous materials transportation, and to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations."⁴

A Federal Court of Appeals has indicated uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments expanding the original preemption provisions.⁵ To achieve safety through consistent Federal and State requirements, Congress has also authorized the U.S. Department of Transportation to make grants to States "for the development or implementation of programs for the enforcement of regulations, standards, and orders" "compatible" with the highway-related portions of the Hazardous Materials Regulations.⁶

III. Preemption Determinations

Title 49 U.S.C. 5125(d) provides for issuance of binding preemption determinations by the Secretary. The Secretary has delegated to FMCSA authority to make determinations of preemption concerning highway routing of hazardous materials⁷. Any directly affected person may apply for a determination whether a requirement of a State, political subdivision or Indian tribe is preempted. The agency must publish notice of the application in the **Federal Register**, and the applicant must not seek judicial relief on that issue for 180 days after the application or until the preemption determination is issued, whichever occurs first. A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court

within 60 days after the determination becomes final.

Preemption determinations are governed by procedures under 49 CFR part 397, Subpart E and 49 U.S.C. 5125. The FMCSA Administrator issues the preemption determination. The preemption determination includes a written statement setting forth the relevant facts and the legal basis for the determination.⁸ After the preemption determination is issued, aggrieved persons have 20 days to file a petition for reconsideration.⁹ Any party to the proceeding may seek judicial review in a Federal district court.¹⁰

In making preemption determinations under 49 U.S.C. 5125(d), FMCSA is guided by the principles and policies set forth in Executive Order 13132, titled "Federalism."¹¹ Section 4(a) of Executive Order 13132 directs agencies to construe a Federal statute to preempt State law only when the statute contains an express preemption provision, there is other clear evidence that Congress intended preemption of State law, or the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute. Section 5125 includes express preemption provisions, which FMCSA has implemented through its regulations.

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the HMTA unless it is necessary to do so in order to determine whether a requirement is "otherwise authorized by Federal law." A State, local jurisdiction or Indian tribe requirement is not "otherwise authorized by Federal law" merely because it is not preempted by another Federal statute.¹²

IV. Public Comments

FMCSA seeks comments on whether 49 U.S.C. 5125 preempts the District of Columbia's highway routing requirements challenged by ATA. Comments should specifically address the preemption criteria detailed in Part II above.

Issued on: April 13, 2005.

Annette M. Sandberg,
Administrator.

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⁴ S. Rep. No. 101-449 (1990), reprinted in 1990 U.S.C.C.A.N. 4595, 4596.

⁵ *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). In 1994, Congress revised, codified and enacted the HMTA "without substantive change," at 49 U.S.C. Chapter 51. [Pub. L. 103-272, 108 Stat. 745].

⁶ See 49 U.S.C. 31102(a).

⁷ See 49 CFR 1.73(d)(2).

⁸ See 49 CFR 397.211.

⁹ See 49 CFR 397.211(c) and 397.223.

¹⁰ See 49 U.S.C. 5125(f) and 49 CFR 397.225.

¹¹ 64 FR 43255 (August 10, 1999).

¹² *Colorado Pub. Utilities Comm'n v. Harmon*, No. 89-1288 (10th Cir. Dec. 18, 1991), reversing No. 88-Z-1524 (D. Colo. 1989).

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Safety Advisory 2005-02

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of safety advisory.

SUMMARY: The FRA is issuing Safety Advisory 2005-02, which provides information on the potential catastrophic failure of locomotive main reservoir tanks manufactured by R&R Metal Fabricators, Incorporated, and installed on General Electric Transportation System (GETS) locomotives. The GETS has informed FRA that a total of 5,826 suspect main reservoir tanks were manufactured between 1988 and 1995. To date, four of these main reservoir tanks have failed catastrophically while in service, and additional tanks have been removed for leaking through the welded seams.

FOR FURTHER INFORMATION CONTACT:

George Scerbo, Railroad Safety Specialist, Motive Power and Equipment Division (RRS-14), FRA Office of Safety Assurance and Compliance, 1120 Vermont Avenue, NW., Washington, DC 20590, telephone: (202) 493-6249 or Darrell Tardiff, Staff Attorney, FRA Office of Chief Counsel, 1120 Vermont Avenue, NW., Washington, DC 20590, telephone: (202) 493-6037.

SUPPLEMENTARY INFORMATION: In January of 2005, FRA became aware of concerns being raised by GETS regarding locomotives with main reservoirs manufactured by R&R Metal Fabricators, Incorporated (R&R). The involved main reservoirs were manufactured between 1988 and 1995. R&R provided 5,826 main reservoirs that were manufactured during this period to GETS. At the time of GETS' notification, four of the suspect reservoirs had ruptured while in service, and the ruptures resulted in rapid splitting and deformation of the tank along the longitudinal weld seam. None of the four failed reservoirs has resulted in any injuries. The GETS has informed FRA that a hazard risk assessment process was utilized and it was determined that corrective action is required as soon as practical (i.e. within 120 days).

On January 18, 2005, GETS provided FRA a list of approximately twenty-seven hundred locomotives (2,700) that have likely been equipped with the suspect main reservoirs. Additional main reservoirs may have been mounted onto GETS locomotives through maintenance and repair. No other manufacturer's locomotives have been