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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2014-0003; PD-37(R)]

Hazardous Materials: New York City Permit Requirements for Transportation of Certain Hazardous Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

Applicant: American Trucking Associations, Inc.

Local Law Affected: New York City Fire Code (FC) 2707.4 and 105.6.

Applicable Federal Requirements: Federal hazardous material transportation law (HMTA), 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

Mode Affected: Highway.

SUMMARY: Inspection and Permit Requirement – Federal hazardous material transportation law preempts the Fire Department of the City of New York’s permit and inspection requirements, FC 2707.4 and 105.6 (transportation of hazardous materials), with respect to trucks based outside the inspecting jurisdiction, because scheduling and conducting a vehicle inspection (as required for a permit) may cause unnecessary delays in the transportation of hazardous materials from locations outside the City of New York.

Permit Fee – Federal hazardous material transportation law preempts FDNY’s permit fee requirement.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Application and Public Notice.

The American Trucking Associations (ATA) applied to PHMSA for a determination on whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts the City of New York's requirement that those wishing to transport hazardous materials by motor vehicle must, in certain circumstances, obtain a permit. This requirement is set forth in the FC in Title 29 of the New York City Administrative Code. The Fire Department of the City of New York (FDNY) implements the FC rules in Title 3 of the Rules of the City of New York. The relevant provisions of the FC and the FDNY rules regarding the City of New York's hazardous materials inspection and permitting program, and related fees, include:

- FC 2707 – sets forth the requirements for the transportation of hazardous materials;
- FC 2707.3 – prohibits the transportation of hazardous materials in quantities requiring a permit without such permit;
- FC 2707.4 and 105.6 – permit requirement and exclusions;

- FDNY Rule 2707-02 – sets forth routing, timing, escort, and other requirements for the transportation of hazardous materials; provides that permit holders need not conform to these requirements; and
- FC Appendix A, Section A03.1(39) and (67) – specifies the permit (inspection and re-inspection) fees.

ATA states that motor carriers “must file a separate application for each tractor or trailer,” and pay a \$210 fee “for each tractor or trailer to be inspected, and, if approved, must be ready to present copies of the permit to enforcement officials at their request.”¹ The copy of the permit form provided by ATA contains spaces for the truck and trailer numbers and the date of inspection of the vehicle or trailer. The permit form also indicates that the “PERMIT EXPIRES (1) ONE YEAR FROM THE ABOVE DATE” and the requirement that “THIS LETTER SHALL BE CARRIED IN THE CAB OF THE TRUCK AND IT SHALL BE PRESENTED UPON REQUEST TO FIRE DEPARTMENT REPRESENTATIVE.”

In summary, ATA contends that:

the City of New York’s regulatory regime is deficient in several ways.

Only motor carriers are required to obtain the City of New York’s permit, which imposes an unfair burden on a single mode of transportation. The permit requirements apply only to some carriers and impedes their drivers’ ability to comply with 49 C.F.R. § 177.800(d), which mandates that “hazardous materials must be transported without unnecessary delay.”

Finally, the City of New York (City) cannot show that it is using funds

¹ ATA states that the “\$210 fee to inspect each tractor or trailer” is “far above the prevailing norm” and that “[o]ther hazardous materials transportation permits cost significantly less. For instance, the entire state of California mandates only \$100 per motor carrier.”

generated from its permit fees for hazardous materials enforcement and emergency response training.

PHMSA published notice of ATA's application in the Federal Register on April 17, 2014. 79 FR 21838. On June 2, 2014, the comment period closed without any interested parties submitting comments. On April 27, 2015, we published a notice of delay in processing ATA's application in order to conduct additional fact-finding and legal analysis in response to the application. 80 FR 23328. In order to ensure PHMSA had all of the relevant information before making a determination, we sent a letter to FDNY and requested that it submit its position on whether the HMTA preempts the New York City requirements that are the subject of this proceeding. On August 20, 2015, FDNY submitted its comments on ATA's application. On October 1, 2015, we published a notice announcing that we were reopening the comment period in the proceeding to provide interested parties the opportunity to address any of the issues raised by the FDNY comments. 80 FR 59244.

In response to the October notice, we received written comments from ATA, Nouveau, Inc. (Nouveau), and the American Coatings Association (ACA). ATA indicated that its comments were intended to "provide clarity" to the FDNY comments submitted by demonstrating that the City's registration requirement for transporting certain hazardous materials imposes an unnecessary delay and that the associated fees are significantly higher than similar fees charged by other jurisdictions. Moreover, ATA argues that that revenue collected by the City is not being used for an acceptable purpose.

Additionally, ATA in its comments sought to demonstrate for the first time that other requirements in the City's regulations were preempted, including requirements for

loading and unloading, as well as the display requirement for FNDY's inspection sticker. However, because ATA did not raise these arguments in its initial petition, they cannot be considered now.

Generally, Nouveau and ACA support ATA's position that certain provisions of FDNY's hazardous materials requirements are preempted by the HMTA.

B. Prior Administrative Proceedings.

As FDNY points out in its submission, this is not the first time that the City's regulations governing the transportation of hazardous materials have been adjudicated by the U.S. Department of Transportation (DOT or Department). Specifically, in support of its position, FDNY points to the Research and Special Programs Administration's (RSPA)² determination in the proceeding, City of New York Application for Waiver of Preemption as to the Fire Department Regulations Concerning Pickup/Delivery Transportation of Flammable and Combustible Liquids and Flammable and Combustible Gases, Waiver of Preemption Determination (WPD)-1, 57 FR 23278 (June 2, 1992), and asserts that the Department had "previously considered FDNY's inspection and permitting program, and related fees, and determined that they were not preempted[.]" However, FDNY's discussion of the past administrative action involving its hazardous materials inspection and permitting program does not accurately reflect the agency's prior position on this issue. Therefore, as a preliminary matter, PHMSA believes it is

² Effective February 20, 2005, PHMSA was created to further the "highest degree of safety in pipeline transportation and hazardous materials transportation," and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C. 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108-426, section 2, 118 Stat. 2423 (Nov. 30, 2004)); and 49 CFR 1.96(b), as amended at 77 FR 49987 (Aug. 17, 2012). For consistency, the terms "PHMSA," "the agency," and "we" are used in the remainder of this determination, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

important to review the significant actions taken by the agency in prior administrative proceedings involving the City's hazardous materials inspection and permit requirements.

In Inconsistency Ruling (IR)-22, City of New York Regulations Governing Transportation of Hazardous Materials, 52 FR 46574 (December 8, 1987), Decision on Appeal, 54 FR 26698 (June 23, 1989), the agency addressed a preemption challenge to the City's directives requiring tank truck carriers to receive permits before transporting hazardous materials in the city. In IR-22, the agency "found that the City created its own independent set of cargo containment, equipment and related requirements that overlap extensive HMR requirements, are likely to encourage noncompliance with the HMR, and concern subjects that [PHMSA] has determined are its exclusive province under the HMTA. Furthermore, [the agency] found that the City's directives result in serious delays in the transportation of hazardous materials." 54 FR at 26699. Because the City's containment system and equipment requirements were found to be intimately tied to a permitting system, the agency "determined that the City's permitting system for transportation of certain hazardous materials is inconsistent with the HMTA and the HMR, and, therefore, preempted." Id.

The City appealed the IR-22 ruling, challenging the agency's findings, and arguing that its permitting system does not cause delays. In the Decision on Appeal, PHMSA's Administrator affirmed IR-22, upholding the preemption of the City's permitting system. City of New York Regulations Governing Transportation of Hazardous Materials, Decision on Appeal, 54 FR 26698 (June 23, 1989). PHMSA, in affirming the finding that the permit system caused delay, said the City's "burdensome permit application requirements, its unfettered discretion in granting permits, and the

time needed to process applications create delays in the transportation of hazardous materials.” Furthermore, the agency said “the delays caused by the City’s permit system are unnecessary because the City’s permit requirements are inconsistent with the HMTA.” 54 FR at 26705.

Subsequently, the City sought a waiver of preemption for many of the requirements found to be preempted in the IR-22 proceeding, including the permit requirements. WPD-1, City of New York Application for Waiver of Preemption as to the Fire Department Regulations Concerning Pickup/Delivery Transportation of Flammable and Combustible Liquids and Flammable and Combustible Gases, 57 FR 23278 (June 2, 1992). In WPD-1, PHMSA denied the City’s application for a waiver of preemption as to the design and construction requirements for trucks transporting flammable and combustible liquids; granted a waiver of preemption as to the requirements on emergency transfers and discharging gasoline by gravity into underground tanks; and dismissed the City’s application without prejudice for lack of information as to the requirements for transporting compressed gases. In addition, PHMSA found that the City’s “inspection and permit requirements (as general safety measures, separate from its equipment requirements) . . . are not preempted” and therefore, took no action with respect to those requirements. 57 FR at 23278. However, the agency was careful to note that its finding on this issue was a narrow one, limited by statutory requirements. Specifically, the agency initially said “[t]he permit requirements of the City are part of, and tied to, the City’s design and construction requirements which [PHMSA] found to be preempted by the HMTA. For that reason, the permit requirements were held [in IR-22] to be preempted as well.” 57 FR at 23294, referencing IR-22; 52 FR 46582. Thus, while

PHMSA denied the request for a waiver of preemption as to the City's permit requirements, the agency noted that the permit requirements, when considered separate and apart from the City's design and construction requirements, might not be preempted by the HMTA, "provided that (1) the annual permit fee is 'equitable' and is 'used for purposes related to the transportation of hazardous materials . . .'" 57 FR at 23295.

The WPD-1 decision does not mandate a finding in favor of the City here, for two reasons. First, PHMSA was addressing arguments based on the City's design and construction requirements, and merely noted in the abstract that preemption might not apply to the City's inspection and permit requirements, providing that other factors were met. The WPD-1 decision did not address the argument that ATA now presents in this proceeding specifically that the City's inspection and permitting program requirements, and related fees, should be preempted because the program causes unnecessary delay and unreasonable cost. Second, PHMSA expressly noted that the City's permit requirement could avoid being preempted only if the annual permit fee was "equitable" and "used for purposes related to the transportation of hazardous materials." ATA contends that the City fails to meet these requirements.

C. Preemption under Federal Hazardous Material Transportation Law.

As discussed in the April 17, 2014 notice, 49 U.S.C. 5125 contains express preemption provisions relevant to this proceeding. 79 FR 21838, 21839 – 40. Subsection (a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted – unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under section 5125(e) – if:

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement 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 is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.³

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects is preempted – unless authorized by another Federal law or DOT grants a waiver of preemption – when the non-Federal requirement is not "substantively the same as" a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

³ These two paragraphs set forth the "dual compliance" and "obstacle" criteria that are based on U.S. Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). PHMSA's predecessor agency, the Research and Special Programs Administration, applied these criteria in issuing inconsistency rulings under the original preemption provisions in Section 112(a) of the Hazardous Materials Transportation Act (HMTA), Pub. L. 93-633, 88 Stat. 2161 (Jan. 3, 1975).

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.⁴

In addition, 49 U.S.C. 5125(f)(1) provides that a State, political subdivision, or Indian tribe “may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.”⁵

The preemption provisions in 49 U.S.C. 5125 reflect Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Some forty years ago, when considering the Hazardous Materials Transportation Act, the Senate Commerce

⁴ To be "substantively the same," the non-Federal requirement must conform "in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

⁵ See also 49 U.S.C. 5125(c) containing standards which apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported.

Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1192, 93rd Cong. 2nd Sess. 37 (1974). A United States Court of Appeals has found uniformity was the "linchpin" in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or Indian tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.97(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. *See* 49 CFR 107.209(c). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is “fair” within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, above, 951 F.2d at 1581 n.10. In addition, PHMSA does not generally consider issues regarding the proper application or interpretation of a non-Federal regulation, but rather how such requirements are actually “applied or enforced.” Rather, “isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent” with Federal hazardous material transportation law, but are more appropriately addressed in the appropriate State or local forum. Preemption Determination (PD)-14(R), Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials, 63 FR 67506, 67510 n.4 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999), quoting from IR-31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25584 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), and PD-4(R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48940 (Sept. 20, 1993), decision on reconsideration, 60 FR 8800 (Feb. 15, 1995).

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled

"Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations.

II. Discussion

A. Inspection and Permit Requirement.

ATA argues that the FDNY permit and inspection requirements cause unnecessary delays because the process "delays drivers whose fastest route is through the city[.]"

FDNY believes its permit and inspection process is "lawful and proper, consistent with Federal law and regulations, promotes public safety . . . and does not unreasonably burden interstate commerce or motor carriers."

According to FDNY, the permit process has been streamlined in recent years to provide for the immediate issuance of the permit, provided of course, that the vehicle passes the inspection. FDNY explains that a motor carrier can obtain a same day inspection by simply showing up at FDNY's Hazardous Cargo Unit (HCU). Or

alternatively, the motor carrier can make arrangements to have its fleet inspected at its own facility. FDNY estimates the whole process takes approximately 30 minutes.

PHMSA has acknowledged that vehicle and container inspections are an “integral part of a program to assure the safe transportation of hazardous materials in compliance with the HMR.” PD-28(R), Town of Smithtown, New York Ordinance on Transportation of Liquefied Petroleum Gas, 67 FR 15276, 15278 (Mar. 29, 2002).

Also, the agency has specifically found that inspections conducted by State or local governments to assure compliance with Federal or consistent requirements are themselves consistent with Federal hazardous material transportation law and not preempted. PD-28(R) at 15278; PD-4(R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48933, 48940 (Sept. 20, 1993), Decision on Petition for Reconsideration, 60 FR 8800 (Feb. 15, 1995), quoting IR-20, Triborough Bridge and Tunnel Authority Regulations, etc., 52 FR 24396, 24398 (June 30, 1987).

Accordingly, the agency “has encouraged States and local governments to adopt and enforce the requirements in the HMR ‘through both periodic and roadside spot inspections.’” PD-28(R) at 15278, quoting PD-4(R), 58 FR at 48940 and PD-13(R), Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases, 63 FR 45283, 45286 (Aug. 25, 1998), Decision on Petition for Reconsideration, 65 FR 60238 (Oct. 10, 2000), quoting from WPD-1, New York City Fire Department Regulations, etc., 57 FR 23278, 23295 (June 2, 1992).

But to be consistent with the HMTA and the HMR, a non-Federal inspection of a vehicle or container used to transport a hazardous material must not conflict with the requirement in 49 CFR 177.800(d), which states:

All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.

In prior decisions, the agency has identified several principles regarding unnecessary delay that are relevant to this proceeding.

First, travel and wait times associated with an inspection are not generally considered unnecessary delays. PD-13(R), Decision on Petition for Reconsideration, 65 FR 60238, 60243 (Oct. 10, 2000); PD-4(R) at 48941.

However, a delay of hours or days waiting for the arrival of an inspector from another location is unnecessary, because it substantially increases the time hazardous materials are in transportation, increasing exposure to the risks of the hazardous materials without corresponding benefit. PD-28(R) at 60243; PD-4(R) at 48941.

Second, a State's annual inspection requirement applied to vehicles that operate solely within the State is presumptively valid because it would not create the potential for delays associated with entering the State or being rerouted around the State. A carrier whose vehicles are based within the inspecting jurisdiction should be able to schedule an inspection at a time that does not disrupt or unnecessarily delay deliveries. 65 FR at 60243; 60 FR at 8803; PD-13(R) at 45286.

But, when applied to vehicles based outside of the inspecting jurisdiction, a State or local periodic inspection requirement has an inherent potential to cause unnecessary

delays because the call and demand nature of common carriage makes it impossible to predict in advance which vehicles may be needed for a pick-up or delivery within a particular jurisdiction and impractical to have all vehicles inspected every year (or alternatively, inspection of select vehicles dedicated to the inspecting jurisdiction). PD-28(R) at 15279, referring to the discussion in PD-4(R) 58 FR at 48938-41, and PD-13(R), 65 FR 60242-44.

Last, a State or local government may apply an annual inspection requirement to trucks based outside its jurisdictional boundaries “only if the [State or local government] can actually conduct the equivalent of a ‘spot’ inspection upon the truck’s arrival within the local jurisdiction. The [State or local government] may not require a permit or inspection for trucks that are not based within the local jurisdiction if the truck must interrupt its transportation of [hazardous materials] for several hours or longer in order for an inspection to be conducted and a permit to be issued.” 65 FR at 60244.

Applying these principles to FDNY’s permit and inspection program, it appears that the program would not cause unnecessary delays in the transportation of hazardous materials with respect to motor vehicles that are based within FDNY’s jurisdiction. As noted in PD-13(R), motor carriers based within the inspecting jurisdiction “should be able to present their trucks for an inspection . . . without incurring an unnecessary delay in the delivery of [hazardous materials]. They should be able to plan and schedule inspections without any interruption of deliveries.” 65 FR at 60244. And on the few occasions where an inspection must be performed on short notice, it is reasonable to consider this an exception and simply a part of doing business, rather than an unreasonable delay under the HMR. *Id.*

However, with respect to motor vehicles that are based outside the inspecting jurisdiction, FDNY's process doesn't appear to be as flexible or accommodating as it portrays. For example, although FDNY says a same-day inspection at the HCU is possible, the unit is only open for operation, Monday through Friday, from 7:30 am to 3:00 pm. Since the permit and inspection program is not limited to one specific class of hazardous material, and considering that the HCU is only open weekdays until 3:00 pm, an unpermitted motor carrier based outside FDNY's jurisdiction would have no recourse when it arrives to pick up or deliver hazardous materials in the City (requires a permit) and discovers that the HCU is closed. FDNY indicates that there is some flexibility in performing inspections, i.e., a motor carrier can arrange for fleet inspections at its own facility, and that it has co-located FDNY inspection operations with other regulatory departments. But fleet inspections at a motor carrier's own facility appear to be impractical where the facility is located outside the City's jurisdiction. And, although co-locating the HCU with the City's other regulatory departments may be an operational convenience, it is not relevant to the issue here. More importantly, FDNY is silent on whether it is capable of performing a 'spot' inspection upon a motor carrier's arrival within its jurisdiction. Therefore, it does not appear that FDNY is able to conduct inspections and issue permits "on demand." As ATA pointed out, FDNY is "unable to apply the inspection and permitting process at the roadside[.]" and "FDNY's policy requires the truck to 'interrupt its transportation . . . for several hours' by traveling to the FDNY inspection site and being inspected before returning to productive service[.]" Comments of ATA at 5, quoting 67 FR at 15279. Although ATA did not specify that its members have actually experienced delays of this kind and duration, our prior

determinations on this issue support the position that when FDNY is confronted with the unannounced arrival of a motor carrier based outside its jurisdiction, it should be capable of conducting the equivalent of a spot or roadside inspection to avoid unnecessary delays. FDNY has not shown that its program has this flexibility.

PHMSA, for the reasons set forth above, finds that the HMTA does not preempt FDNY's permit and inspection requirements, FC 2707.4 and 105.6 (transportation of hazardous materials), with respect to motor vehicles that are based within the inspecting jurisdiction. On the other hand, PHMSA finds that FDNY's permit and inspection requirements create an obstacle to accomplishing and carrying out the HMR's prohibition against unnecessary delays in the transportation of hazardous materials on vehicles based outside of the inspecting jurisdiction. Accordingly, the HMTA preempts FDNY's permit and inspection requirements, FC 2707.4 and 105.6 (transportation of hazardous materials), with respect to trucks based outside the inspecting jurisdiction.

B. Permit Fee.

ATA challenges FDNY's transportation of hazardous materials permit fee on the grounds that it is not "fair" and that it is not being used for purposes that are related to the transportation of hazardous material. ATA also alleges that FDNY has not sufficiently accounted for the revenues generated by its "hazardous materials registration program." Nouveau echoed ATA's assertion that FDNY is not using the revenue generated from the fees for authorized purposes and contends that FDNY has not provided any evidence regarding the collection and use of the fees.

According to FDNY, permit revenues, like all revenues received by City agencies, are paid into a general City fund, with the amounts credited toward agency, bureau and unit operations. Over the past three years, annual revenue generated from the permit fees ranged from \$250,000 to \$450,000.⁶ FDNY claims it expends on an annual basis, “tens of millions of dollars” for its hazardous materials response operations, including staffing, training and equipping the HMU and other specialized units, but it provided no specific figures.

It is FDNY’s position that its inspection and permitting program, and related fees, are not preempted because it believes the agency already addressed this issue, and found that the requirements were not preempted. However, as discussed above in the prior administrative proceedings section, the WPD-1 language was conditioned on the City separating and severing the permit fee requirements from the preempted truck design and construction requirements. More importantly however, PHMSA expressly noted that the City’s permit requirement could only avoid being preempted if the annual permit fee was “equitable” and “used for purposes related to the transportation of hazardous materials.” Since that time, the City’s current inspection and permitting (including fees) regulatory scheme has not been challenged on these issues. Therefore, FDNY’s contention that its permit fees are valid based on the language in WPD-1 is not persuasive. The challenge to the validity of the permit fees as now raised in this proceeding, requires that PHMSA determine that the fees satisfy the statutory requirements.

The HMTA provides that “[a] State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement

⁶ FY2013; FY2015 (July 1 through June 30).

and planning, developing, and maintaining a capability for emergency response.” 49 U.S.C. 5125(f)(1). In prior preemption determinations, PHMSA has utilized tests for determining whether a fee is “fair” and whether it is “used for a purpose related to transporting hazardous material.”

1. The Fairness Test.

PHMSA has determined that the test of reasonableness in *Evansville-Vanderburgh Airport Auth. v. Delta Airlines, Inc.* 405 U.S. 707, 92 S.Ct. 1349 (1972) “appears to be the most appropriate one for interpreting the fairness requirement in [the HMTA].” PD-21, Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 FR 54474, 54478 (October 6, 1999)⁷.

In *Evansville-Vanderburgh*, the Supreme Court found that a state or local “toll” would pass constitutional muster “so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred[.]” 405 U.S. at 716-17, 92 S.Ct. at 1355. Following *Evansville-Vanderburgh*, the Court stated that “a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.” *Northwest Airlines, Inc. v. Kent*, 510 U.S. 355, 367-68, 114 S.Ct. 855, 864 (1994).

⁷ Complaint for judicial review, *Tennessee v. U.S. Dept. of Transportation*, C.A. No. 3-99-1126 (M.D. Tenn.), filed Dec. 3, 1999; order denying claim of state sovereignty (Feb. 27, 2001); affirmed and remanded, 326 F.3d 729 (6th Cir.); cert. denied, 124 S.Ct. 464 (2003); judgment in favor of DOT and AWHMT (June 28, 2004).

In PD-21, PHMSA evaluated Tennessee’s requirement for hazardous waste transporters to pay an annual \$650 remedial action fee. In that matter, PHMSA observed that there was no evidence that Tennessee’s annual fixed fee had any approximation to a transporter’s use of roads or other facilities within the State or that there were genuine administrative burdens that prevented the application of a more finely graduated fee. *Id.* PHMSA thus concluded that the fee was not “fair” and was preempted.

In PD-18, Broward County, Florida’s Requirements on the Transportation of Certain Hazardous Materials to or From Points in the County, 65 FR 81950 (December 27, 2000), Decision on Petition for Reconsideration, 67 FR 35193 (May 17, 2002), PHMSA preempted the County’s licensing fee for hazardous waste transporters. In making its determination, the agency followed the fairness test discussed in Tennessee and emphasized that a fee discriminates against interstate commerce if there is a “lack of any relationship between the fees paid and the respective benefits received by interstate and intrastate carriers.” PD-18 at 81959 (quoting PD-21). The agency went on to say that the case in Broward County was similar to the situation in Tennessee because the County “requires that any person transporting . . . waste ‘to from, and within’ the County must obtain a waste transporter license.” PHMSA also noted that the fee for obtaining the waste transport license “apparently is the same for every transporter” without being based on some fair approximation of use of facilities, i.e., roads or other facilities within the State. PD-18 at 81959.

Here, FDNY has acknowledged its permit fee is a flat fee applicable to motor carriers whether they are engaged in interstate or intrastate transportation of hazardous materials. Moreover, FDNY admitted that it does not maintain statistics as to whether

motor carriers are engaged in interstate or intrastate commerce. Consequently, since there is no evidence showing that FDNY's flat fee is apportioned to a motor carrier based on some approximation of the benefit conferred to the permit holders, it discriminates against interstate commerce. Furthermore, there is no evidence that a more finely graduated fee would pose genuine administrative burdens on the City. PHMSA therefore finds that the FDNY's permit fee is not fair and is preempted.

2. The "Used For" Test.

Under the HMTA, a State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material, but only if the fee is used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. 49 U.S.C. 5125(f)(1). Therefore, non-Federal fees that are collected in relation to the transportation of hazardous materials must be used for a related purpose; otherwise they are preempted. PD-22, New Mexico Requirements for the Transportation of Liquefied Petroleum Gas, 67 FR 59386 (Sept. 20, 2002); PD-18 at 81959; PD-21 at 54479.

In prior preemption determinations, PHMSA has acknowledged that a State, political subdivision of a State, or Indian tribe does not have to create and maintain a separate account for fees related to the transportation of hazardous materials. However, "[i]f the [non-Federal entity] prefers not to create and maintain a separate fund for fees paid . . . then it must show that it is actually spending these fees on the purposes permitted by the law. In this area where only the [non-Federal entity] has the information

concerning where these funds are spent, more specific accounting is required.” PD-21 at 54479.

FDNY acknowledged that the revenue it receives through its permit program is put into a general City fund; which is permissible, provided it can show the funds are used for purposes related to the transportation of hazardous materials. FDNY believes that the revenue is used for permitted purposes because it contributes to the cost of staffing, training, and equipping its HCU. However, FDNY also indicated that the inspection fee largely covers the cost of the inspection and the administrative processing of the permit. Here, apart from general statements about how the revenue is used, FDNY does not provide specific figures. FDNY’s failure to provide definitive information on the allocation of permit revenues is not sufficient to refute ATA’s direct challenge of the permit fee on the grounds that FDNY has not sufficiently accounted for revenues generated by its hazardous materials registration program. Therefore, without any evidence from FDNY on how it uses the permit fees that it collects, PHMSA cannot find that the fees are used for purposes related to hazardous materials transportation, and thus, FDNY’s permit fee is preempted under the “used for” test.

III. Ruling

Inspection and Permit Requirement – PHMSA finds that FDNY’s permit and inspection requirements, FC 2707.4 and 105.6 (transportation of hazardous materials), create an obstacle to accomplishing and carrying out the HMR’s prohibition against unnecessary delays in the transportation of hazardous materials on vehicles based outside of the inspecting jurisdiction. Accordingly, the HMTA preempts FDNY’s permit and inspection requirements with respect to vehicles based outside the inspecting jurisdiction.

PHMSA, however, finds that the HMTA does not preempt FDNY's permit and inspection requirements with respect to motor vehicles that are based within the inspecting jurisdiction.

Permit Fee – PHMSA finds that FDNY has not shown that the fee it imposes with respect to its permit and inspection requirements is “fair” or “used for a purpose related to transporting hazardous material,” as required by 49 U.S.C. 5125(f)(1). Accordingly, the HMTA preempts FDNY's permit fee requirement.

IV. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the Federal Register. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the Federal Register if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the Federal Register, the action by PHMSA's Chief Counsel on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

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Vasiliki Tsaganos,

Acting Chief Counsel.

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