46736

2200 Mill Road, Alexandria, VA 22314

ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS

(703) 838-1703 Fax (703) 519-1866

November 14, 1998

Docket Office
U.S. Department of Transportation
Room PL-40 1
400 Seventh St., SW
Washington, DC 20590

RSPA-97-2581 - 19

RE: RSPA-98-3579 - 12

Dear Sir or Madam:

I am submitting, on behalf of the Association of Waste Hazardous Materials Transporters (AWHMT), rebuttal comments in the matter of PDA-20(RF).

As the petitioner in this proceeding, AWHMT has received comments from seven entities. Comments filed by four of these entities supported AWHMT's application. Comments of the Association of American Railroads simply respond to a question RSPA had posed in the preamble to the Federal Register notice on the petition that the City of Cleveland's (City) hazardous materials permits and attendant requirements do not apply to railroads. Comments of the Public Utilities Commission of Ohio (PUCO) do not address the merits of the AWHMT petition but do request an extension of the comment period. Finally, the City filed both a request for an extension of time to file comments as well as comments that address the merits of the petition.

Petitions for Extension of Time

We agree with the PUCO that the failure of the U.S. Department of Transportation (DOT) to move decisively to implement, or even propose, the rule required by 49 U.S.C. 5 119 has contributed to the to the plethora of non-federal hazardous materials permits and permit-related requirements. However, in the case of the City, we note that Ohio has in fact adopted and is implementing the recommendations of the working group mandated by Congress under 49 U.S.C. 5 119 for a uniform, reciprocal registration and permitting program to be used by states that choose to engage in these activities. The PUCO is the administering agency. One of the recommendations of the working group is that localities not have the authority to have a registration program if the state administers one and, with respect to permitting, the local program would have to be the uniform, reciprocal program recommended by the working group which means that the City would have to recognize any carrier with a so-called "Uniform

1 63 FR 49804 (September 17, 1998).

Program" permit as satisfying its own requirements.' Since Ohio requires the highest level of the Uniform Program permit, its inconceivable to us that Cleveland would have jurisdiction to issue hazardous materials permits to any carrier under the provisions of the Uniform Program. In addition to the authority the PUCO has by virtue of implementing the Uniform Program to preempt the City's permit requirements, other provisions of the Ohio Revised Code provide for the preemption of the Cleveland requirements.[3] While the PUCO has been asked on several occasions to use its state authority to remedy the complaint we have against the City's hazardous materials requirements, we did not so ask the agency i-n the context of this filing because of its failure to address these concerns on earlier occasions.

In light of this background, we would like to briefly respond to the City's request for an extension of time to comment on the issues raised in AWHMT's petition which related comments which are contained in its reply of October 19, 1998. First, we were unaware the RSPA had, as claimed, promised the City a 45-day reply period.[4] Second, the City's comment suggests that there was a continued and persistent refusal of the AWHMT to attempt to remedy this matter outside of DOT's purview. In fact, since the filing of our petition in March 1998, we have never been approached by the City. On one occasion, we were approached by the PUCO about the possibility of negotiating a settlement? At that time, we were advised that the PUCO was willing to serve as an arbitrator, and that the City was willing to eliminate all requirements but the requirements for escort of explosives shipments and time-of-day restrictions of hazardous materials shipments, if we would withdraw our petition. As noted above, we had previously asked PUCO to serve in this capacity but to no avail! Nevertheless, we requested the PUCO to put any offers in writing and, absent any formal offer, we saw no reason to concede that escort requirements and time-of-day restrictions were allowable. If an offer was forthcoming that addressed all of our concerns, we stated that we would be happy to withdraw our petition. We never received any subsequent written or verbal communication on the substance of this matter. Third, there is no requirement, either in law or regulation, that persons affected by non-federal hazardous materials transportation requirements must exhaust local remedies prior to applying for relief either in federal court or, as was done in this case, by petition to DOT for an administrative determination of preemption. Fourth, we commend the apparent serious effort the City has made as a result of our filing to "modernize . . . and eliminate certain regulations that the City's Administration and Council may find are no longer necessary."[7] We urge the City to

---

2 Renort of the Alliance for Uniform HazMat Transnortation Procedures, submitted to Congress and DOT, November 17, 1993, pages 3-6 & 3-7.

3 Ohio Revised Code 54905.80 (Uniform Program); and §§4923.13 & 4921.25 (Renders unenforceable all local ordinances including fees imposed on motor carriers that are otherwise in compliance with state requirements. Ohio incorporates federal hazardous materials regulations (HMR) by reference. Ohio law provides one exception from this preemptive authority. The exception allows local subdivisions to have "reasonable local police regulations within their respective boundaries." The legality of the Cleveland requirements pursuant to state law hinges on the ability of the City to demonstrate that its hazmat ordinance requirements are a police regulation and that the reach of the affected ordinances does not go beyond the incorporated limits of the City.)

4 In fact, this appears to be the same kind of communication that the City condemns as "*exparte* conversations." [City of Cleveland Comment, hereinafter "City Comment", page 6.] We also note that the City requested a 60-day, not a 15-day, extension in its petition. We would not have objected to a 15-day extension.

5 Telephone conversation between Steven Lesser, PUCO, and Cynthia Hilton, AWHMT, May 1998.

6 In fact, we were told that state politics precluded the PUCO from trying to force the City to deal with these issues. Under these circumstances, we did not see the PUCO as a neutral third-party.

7 City Comment, page 6.

continue its efforts and renew our offer to withdraw our petition if our objections are addressed. We have not been provided information about how much time the City needs to complete its regulatory update. However, the petition to extend the comment period requested a delay of 60 days. We are even willing to ask RSPA to delay this proceeding for 60 days if the City provides written notice that it intends to complete its regulatory update within this time and that it will suspend the enforcement of its suspect requirements pending the outcome of the City's reform effort.

Comments in Onnosition

The City does not contest our summary of the applicability of its hazardous materials and explosives permit requirements. These permits apply only to motor carriers transporting hazardous materials of a type or quantity that requires placarding, and only to traffic using non-interstate streets within the City. The explosives permit applies only to motor carriers of explosives. The hazardous materials permit is not required by motor carriers of explosives. However, we continue to believe that the challenged City requirements violate the Hazardous Materials Transportation Act (HMTA) despite the City's attempt to defend those requirements. To some of the City's general comments about their permits and related requirements, we offer the following observations:

- Multiple Permit Fees: The City asserts that "transporters of explosive [sic] are not subject to multiple permit fees? This statement contradicts that provided by Tri-State Motor Transit, Co., in its affidavit to our petition, that it remitted fees to transport Class 1 (explosives) materials with its hazardous material permit and the City accepted the overpayments.' Nevertheless, the City seems to have missed our main point that the City's permit requirements are non-reciprocal with any other jurisdiction's hazardous materials (or explosives) permit and, consequently, carriers operating in other permit-requiring, fee-assessing jurisdictions are subject to multiple, and in cases like the City, non-apportioned fees.

- Carrier-Specific Permit: The City asserts that both its permits are issued to transporters not vehicles. Just because the City's permit is issued to the carrier rather than a vehicle does not negate the fact that the fees are assessed on a per-vehicle, not a per-company basis, or the fact that the transporter must ensure that a copy of its permit be carried in every vehicle that operates on City streets. In addition, as many of the affidavits submitted with our petition suggest, the type of information required by the permits, including routes to be taken and the types and quantities of hazardous materials to be transported, virtually require a vehicle-specific application to be accurate. In fact, the impossibility of providing such information compels all carriers to submit "incomplete" applications and exposes them to potential enforcement action."

---

8 City Comment, page 12.

9 Affidavit of Karla Simmons, Tri-State Motor Transit Co., February 24, 1998.

10 See, for example, description of circumstances that led to the return of the latest application filed by Tri-State Motor transit Co., Inc. [Affidavit of Karla Simmons, Tri-State Motor Transit Co., February 24, 1998.1

- Number of Permits Issued: The City seems to argue, since it issues a relatively small number of permits, that the compliance burden cannot be great.'[11] The burden on carriers of non-federal, non-reciprocal hazardous materials permitting requirements cannot be viewed from the narrow perspective of the issuing jurisdiction. For example, at the state level alone, AWHMT is currently aware of 64 non-federal, non-reciprocal registration and/or permits issued to motor carriers as a precondition to transport hazardous materials or a subset of such materials. The fact that any one jurisdiction issues a "small" number of permits should not shield it's permit requirements from review under the preemptive authority of the HMTA.

- Transportation Under the Jurisdiction of the Federal Government: We welcome the admission of the City that it "interprets its ordinance to be effective as to all transportation except that which is under the jurisdiction of the Federal government."[12] In 1990, Congress expanded DOT's jurisdiction over the regulation of hazardous materials transportation to include, in addition to interstate and foreign commerce, intrastate commerce.[13] On October 1, 1998, federal rules implementing this authority became effective.[14] We would suggest this is further evidence that the City's requirements are null and void.

- Delay: Safety is a preeminent reason for the federal regulation of hazardous materials in transportation. A long held belief is that safety is undermined if shipments are unnecessarily delayed." The City seems to think that its requirements, which apply to packages already in compliance with the HMRs, do not unnecessarily contribute to delay because carriers have the option of requesting a temporary permit and because the Fire Chief has authority to grant waivers to the prohibition against deliveries of hazardous materials in downtown areas of the City during certain hours of the day.[16] However, the option to obtain a temporary permit is limited to one per year. The Fire Chiefs authority to grant waivers to time-of-day restrictions does not apparently apply to explosives and is not granted in all cases.[17] The City does not disclose how long vehicles are detained pending the decision of whether a waiver will be granted from the time-of-day restrictions. However, the City admits that 30 to 45 minute delays of vehicles loaded with explosives pending inspection and assignment of police escort are typical? We believe the City's own statements provide ample evidence of unacceptable delay.

- Terrorist Activities: The City's effort to justify its permits because of its concern over possible terrorist activities is without merit.[19] Terrorists are certainly not going to adhere to the City's requirements. To the extent the City fears terrorists will attempt to hijack dangerous cargo, it could even be argued that the City's 24-hour notification and route filing requirements could be intercepted by terrorists, assisting their activity. Contrary to the

---

11 City Comment, page 12.
12 City Comment, page 13.
13 49 U.S.C. 5 103(b).
14 49 CFR 171.1(a)(1).
15 49 CFR 177.800(d).
16 City Comment, page 14.
17 Ibid.
18 City Comment, page 15.
19 City Comment, pages 15 and 17.

assertion of the City, we do not believe that an allowable use of hazardous materials transportation fees is to train local officials to prevent and respond to terrorism.[20]

- Use of Fees: In the preamble to this docket, RSPA asks the City to disclose "all purchases for which those fees were used."[21] While not an itemized accounting, the City claims that it "expends far more money for hazardous material permitting, response training, enforcement and investigations than the meager sums collected from the issuance of the permits."[22] However, the City fails to make a persuasive argument that it has properly accounted for the use of its fees. In addition to our comment challenging the legality of using the funds for terrorist activities, we note that the City represents that only about half of its response actions to hazardous materials incidents involve transportation. While this statistic roughly concurs with the average number of incidents reported to the HMIS, the City does not disclose how much was spent on these transportation-related incidents. The City also acknowledges that it "responds to hazardous material incidents in surrounding communities."[23] While we commend the City for its willingness to lend expertise and resources to other jurisdictions, transporters in Cleveland should not have to shoulder response costs in other jurisdictions. The City does not disclose what other sources of funds – federal, state, or even reimbursement from other local jurisdictions – it may receive to underwrite some of these costs. What is clear is that all of the fee revenue from motor carriers transporting placarded amounts of hazardous materials on City streets is deposited into the City's "General Fund" where it is commingled with all other revenue receipts.[24] Consequently, the City cannot claim that all of the fees go to any one purpose. Whatever uses the City makes of this general fund, arguably the hazardous materials/explosives permit fees pay for a portion of these activities. To the extent any of the activities are not "related to transporting hazardous materials", the fees are illegal.

- Impact on Surrounding Communities: The City attempts to excuse its failure to consult with its neighboring communities about its requirements because its "ordinances do not in any way export risk or divert transportation to other communities."[25] We fully disagree with this statement. The City cannot know to what extent its requirements impact other jurisdictions unless it has asked them. The City acknowledges that it detains vehicles loaded with explosives waiting for police escort and that vehicles are barred by time-of-day restrictions. The City does not disclose where these vehicles are held. While the City may have a good idea where vehicles awaiting escort are held, it cannot claim that no vehicle facing the "time-of-day" restrictions waits at some location outside the City or that no vehicle diverts, in the case of a vehicle containing less-than-truckload freight, to other delivery points outside the City for the lifting of these restrictions or for the granting by the Fire Chief of a "waiver."

---

20 The purpose of the HMTA is to protect "against the risks to life and property inherent in the transportation of hazardous material in commerce . . . ." [49 U.S.C. 5101.1 The HMTA allows non-federal entities to impose fees related to transporting hazardous material only if the fees are fair and "used for a purpose related to" such transportation. [49 U.S.C. 5 125(g).] Terrorist activities, which may even include the transportation of hazardous materials, cannot be described as being activities in "commerce."

21 63 FR 49807 (September 17, 1998).

22 City Comment, page 16.

23 City Comment, page 17.

24 City Comment, page 16.

25 City Comment, page 17.

The City did not address the potential impact on other jurisdictions of its prohibition against the transportation of explosives through the City "where an alternate route lying wholly without such cornorate limits may be available and will not place an unreasonable burden on such transportation."[26] (Emphasis added.)

Response to the Citv's Defense of It's Challenged Reauirements

Since the 1975 enactment of the HMTA, DOT has had authority to preempt non-federal requirements affecting hazardous materials transportation. In 1990, Congress reaffirmed and expanded the preemptive authority of the Act. At that time, Congress clarified that some areas of regulation are reserved to the federal government. However, as the City points out, there are regulatory areas where Congress did not intend that the HMTA or the HMRs would completely occupy the field of hazardous materials transportation as to preclude any non-federal requirements. With one exception, we agree that all of the City requirements challenged in our petition arise from these latter areas of regulation. The one exception deals with the requirements for fire extinguishers to the extent they are "accessories" to DOT authorized packagings. Requirements to qualify packagings to transport hazardous materials are an area of regulation reserved to the federal government.

Even in those regulatory areas where Congress would tolerate additional and/or different requirements from those arising from the HMTA or the HMRs, Congress clearly intended DOT to err in applying its preemptive authority on the side of promoting "consistency in laws and regulations governing the transportation of hazardous materials" in order to protect against "the potential risks to life, property, and the environment posed by" the transportation of these materials.[27] The City fails in its defense to show that its requirements compliment or support the purposes of the Act to achieve "greater uniformity and to promote the public health, welfare, and safety."[28] In fact, the City's requirements challenged in our petition are the very type of requirement Congress intended be preempted in order to avoid the "patchwork" of regulations that "confound[] . . . carriers that attempt to comply."[29]

- Environmental Regulation: The City attempts to raise a bogus claim that its requirements relating to the transportation of hazardous materials are in fact environmental regulations and that the AWHMT "must show that the City of Cleveland's regulations do not concern areas of traditional state control."[30] As spelled out in our application and as reiterated by RSPA when our petition was printed in the Federal Register, the HMTA contains express preemption provisions of non-federal requirements affecting the transportation of hazardous materials. The HMTA expressly provides that DOT may use a number of tests to determine if such non-federal requirements are preempted. On the other hand, Congress has, in environmental statutes, deferred to the HMTA for the regulation of hazardous materials in

---

26 Cleveland City Code § 387.07(b).

27 P.L. 101-615 §(2)(4).

28 P.L. 101-615 §(2)(5).

29 Southern Pac. Transp. V. Public Serv. Comm'n of Nev., 909 F2d 352 (9th Cir. 1990), and P.L. 101-6 15 § 2(3).

30 City Comment, page 18.

transportation.[31] We urge the City to reread the intent of Congress when it reaffirmed and expanded the preemption authority of DOT in the HMTA finding that,

> 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.[32] (Emphasis added.)

To address this problem, Congress declared that "Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable [] to achieve greater uniformity and to promote the public health, welfare, and safety at all levels."[33] (Emphasis added.)

- Commerce Clause: The City repeatedly claims that its requirements "do not violate the Commerce Clause."[34] Only with respect to determining if the City's fees are "fair" within the meaning intended by Congress in the HMTA have we raised Commerce Clause arguments. We have used Commerce Clause analysis in this instance because DOT has not defined "fair", because the courts have ruled that it is inconceivable Congress could have intended "fair" to mean something that would violate the Commerce Clause, and because the legislative history of the HMTA supports the court's interpretation. To the extent DOT preempts any of the City's requirements, the authority to do so will come from the HMTA not the Commerce Clause.

- Routing and Prenotification: The AWHMT petition challenged the City's routing requirements because of the requirement to prenotify routes in writing as a condition of obtaining a hazardous materials permit and in writing and verbally as a condition of obtaining the explosives permit, because of the time-of-day/day-of-week travel restrictions, and because of the requirement to avoid the City altogether if alternative routing is available irrespective of the impact on surrounding communities. The City cites as its authority to engage in these practices two court decisions and two "inconsistency rulings." All of these authorities addressed circumstances prior to the enactment of the 1990 amendments to the HMTA, which among other things, directed that the designation and restriction of routes for the transportation of hazardous materials was a state responsibility, and that surrounding communities need to be consulted. None of the cited authorities contradict our contention that shipment prenotification is a field totally occupied by the federal government. To the extent the federal government has allowed prenotification to non-federal government entities

---

31 For example, 42 U.S.C. $9656 and §6923(b).

32 P.L. 101-615, §2(3).

33 P.L. 101-615, §2(5).

34 City Comment, pages 18, 20, 23, and 24.

it has provided that the notification be given to a state not localities.[35] Keep in mind that the City's prenotification requirements apply to both pick-up and delivery within the City.[36]

- Insurance Filings: The City attempts to shield its proof of insurance filing requirement with a tortured and inaccurate portrayal of federal law, court decisions, and prior inconsistency rulings. It tries to excuse its proof of insurance requirements by citing to one 1996 federal appeals court decision – Massachusetts v. DOT – which let stand a non-federal bonding requirement imposed on a certain universe of hazardous materials transporters.[37] The Cleveland requirement can clearly be distinguished from the facts in the Massachusetts case. First, the Massachusetts case dealt with a state not a local requirement as is the case in this proceeding. Second, the Massachusetts case concerned the posting of a bond that the State argued had nothing to do with assuring compliance with federal financial responsibility requirements but was imposed to assure compliance with unique state transportation requirements. The City requirement clearly is tied to assuring compliance with federal financial responsibility requirements which are aimed at preventing "financial risk" not "safety risk" to persons, property or the environment in the event of an accident or a release of hazardous materials in transportation.[38] The Massachusetts decision, in the Federal Government's own words "runs contrary to almost 20 years of agency practice and is squarely at odds with the decisions of three appellate courts."[39] Again, the City's insurance requirements are applied to motor carriers transporting all classes of hazardous materials (except presumably Class 9). The City did not address how it, in the face of Congressional enactments that preclude states from requiring motor carriers to provide such documentation except under very narrow circumstances, can require such filings where DOT has said that state requirements in excess of that allowed under federal law are an "unreasonable burden on [interstate] transportation."[40] The City's filing requirements in no way improve safety, promote uniform regulation, or further the efficient transportation of hazardous materials in commerce.[41]

- Vehicle Inspection: While not part of the docket in this proceeding, we are concerned about the direction taken by RSPA in its PD- 1 3(R)[42] decision on the matter of vehicle inspection and wish to distinguish the inspection requirements at issue in this proceeding from those of Nassau County, NY and PD-13(R). The matter in Nassau County can be distinguished from that of Cleveland in that RSPA believes "that most propane gas dealers serve customers within 50 miles of their principle places of business [and therefore] should have adequate time to plan for and undergo inspections without disrupting actual deliveries."[43] We can

---

35 10 CFR 71 and 73 require shippers, not transporters, to notify Governors or their designees prior to transporting certain shipments of nuclear waste and spent fuel.

36 See affidavit of Karla Simmons, Tri-State Motor Transit Co., February 24, 1998.

37 Massachusetts v. DOT, No. 95-5 175 (D.C. Cir. Aug. 27, 1996).

38 City Comment, page 22. Federal financial responsibility requirements as they pertain to motor carriers are found at 49 CFR 387. Federal motor carrier safety requirements are found at 49 CFR 390-399.

39 Massachusetts v. DOT, No. 95-5 175, petition for rehearing, October 1996.

40 See again 49 U.S.C. 14504(b) and 49 CFR 1023.4(h).

41 P.L. 101-615, §2(8).

42 PD-13(R) - Nassau county, New York, ordinance on Transportation of Liquefied Petroleum Gases. [63 FR 45283 (August 25, 1998). Petitions for reconsideration have been filed.]

43 63 FR 45286 (August 25, 1998).

assure RSPA, as the affidavits to our application for a determination of preemption attest, that the companies and vehicles affected by the Cleveland inspection requirement are not engaged solely in local transportation. We also believe the City's vehicle inspection requirement can be distinguished from that of Nassau County because the City's inspections, or at least a portion of them, apparently are conducted when the vehicle is loaded.[44] In PD-13(R), RSPA let stand the vehicle inspection requirement, in part, because inspections are performed on empty vehicles.[45]

To the extent Cleveland requires vehicles to be inspected before engaging in the transportation of explosives, we take exception to RSPA's treatment of this matter in PD-13(R). In PD- 13(R), RSPA so narrowly applies its Congressionally-delegated obstacle preemption authority on the matter of non-federal vehicle inspection as to render the authority moot. Because vehicle inspections in Nassau County are performed on empty vehicles, RSPA states that "there is no 'unnecessary delay' in the transportation of hazardous materials."[46] While RSPA does concede that "it is uncertain whether the county is able to conduct inspections, collect fees, and issue permits . . . without causing [out-of-jurisdiction] trucks to wait unnecessarily", it gives Nassau County, and any other jurisdiction a shield to conduct vehicle inspections on interstate or intrastate vehicles as long at the vehicle is empty and used in local commerce.[47]

When RSPA noted, in its landmark decision on the legality of non-federal vehicle inspections[48], that "it has encouraged States and local government to adopt and enforce the requirements in the HMR, 'through both periodic and roadside spot inspections'"[49], we assumed that RSPA was referencing federal periodic vehicle inspection requirements[50] which require states to recognize one annual inspection when performed to federal standards as adequate for the period of the inspection because there are no per se "vehicle inspection" requirements in the HMRs. (Emphasis added.) Congress recognized the unacceptable burden that would result if states, let alone localities, should require motor vehicles to be produced periodically to be inspected. Again, motor vehicles operate over irregular routes and the potential of inflicting "multiple and conflicting" requirements on carriers is self-evident.

We also believed this interpretation was reasonable inasmuch as RSPA found preemption of the challenged vehicle inspection requirements under the "obstacle" test as opposed to the "substantively the same as" test. However, since RSPA has clarified in PD- 13(R) that the

---

44 The AWHMT petition cites its frustration and uncertainly about the City's inconsistency between its stated inspection requirement and apparent failure to enforce those requirements. The result is that carriers of explosives operate under a compliance cloud. However, the City has clarified that inspections take place when the "Fire officials check . . . the condition of the vehicle, tires, the load, and fire extinguishers" as a precursor to assigning escort to the vehicle. [City Comment, page 15.] Obviously, at this time, the vehicle is loaded.

45 63 FR 45285 (August 25, 1998).

46 63 FR 45285 (August 25, 1998).

47 63 FR 45286 (August 25, 1998).

48 PD-4(R), 58 FR 48933 (September 20, 1993), petition for reconsideration denied 60 FR 8800 (February 15, 1995).

49 58 FR 48940 (September 20, 1993). (Emphasis added.)

50 49 U.S.C. 3 1142(d). As "state" is used in this section it is defined to include "political subdivision[s]." [49 U.S.C. 31132(7).]

HMRs should be the focus of periodic vehicle inspections, we note that the purpose of the Cleveland, as well as the Nassau County, vehicle inspection, like the packaging standards in the HMR, is to qualify the vehicle to contain hazardous materials. Congress provided that the federal government should virtually occupy the field of what constitutes a qualified hazardous materials packaging. Under the HMTA's "substantively the same as" preemption authority, non-federal entities are precluded from enforcing rules for the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous materials.[51]" Consequently, we suggest that RSPA also review the Cleveland vehicle inspection requirements under its "substantively the same as" preemption authority, particularly as its inspection requirements apply to any vehicle which is an authorized packaging into which explosives may be placed.

In PD- 13, RSPA attempts to draw a line between "delay experienced by a . . . company in being able to compete or do business within Nassau County [and] delay in the transportation of trucks loaded with propane."[52] RSPA seems to believe if the non-federal requirement demands the production of the vehicle for inspection without hazardous materials that the HMTA is not implicated. However, we would like to suggest otherwise:

(1) Vehicle inspection is a condition for approval to transport hazardous materials[53], not other cargo or for the purpose of qualifying the vehicle irrespective of whether any cargo is carried in the vehicle, on the streets of Nassau County or, as is the case in this proceeding, Cleveland streets.
(2) RSPA states that Nassau County's use of fees to perform vehicle inspections is a use approved under the HMTA.[54] RSPA cannot hold, on the one hand, that non-federal requirements to produce empty vehicles for inspection prior to transporting hazardous materials do not affect the transportation of hazardous materials and, on the other hand, find that the use of hazardous materials fees to perform inspections of the empty vehicles is a legitimate use of these fees under the Act.
(3) Nassau County, and other non-federal entities, have tried to minimize the consequences of their vehicle inspection requirements by exempting vehicles traveling through these jurisdictions. However, what is a "through" vehicle one day can be a vehicle used in local delivery the next. The requirement to produce a vehicle for inspection applies whether or not any given vehicle engages in local delivery or pick up one day or 365 days of the permit year. RSPA has to consider the consequences if every locality demanded the production of vehicles for inspection prior to transporting hazardous materials.[55] Hazardous materials transportation, at least by motor vehicle, would indeed become "local", as companies would be unable to produce vehicles, without limitation,

---

51 49 U.S.C. 5 125(b)(l)(E).

52 63 FR 45285 (August 25, 1998).

53 In Nassau County, the hazardous materials to be transported in the vehicles were liquefied petroleum gases. In Cleveland, the hazardous materials are DOT-regulated explosives.

54 63 FR 45286 (August 25, 1998).

55 RSPA now has evidence of at least four localities requiring separate, non-reciprocal inspections: Nassau County, NY, Broward County, FL, Houston, TX and Cleveland, OH.

for inspection by local authorities prior to transporting such materials.[56] We believe the extra handling that would result from passing hazardous materials between carriers at these service area boundaries would increase risk far more than the risk presented by forgoing locally-required periodic vehicle inspections.

(4) Nowhere is it established that "unnecessary delay" is the only standard by which obstacle preemption may be triggered. A non-federal requirement is an obstacle if it frustrates the accomplishing and carrying out of the HMTA.[57] RSPA advocates this interpretation of the HMTA arguing in federal court that to hold otherwise "runs contrary to almost 20 years of agency practice and is squarely at odds with the decisions of three appellate courts, all of which have construed the Act to preempt state rules that create an 'obstacle' to HMTA despite the absence of a direct conflict with a specific federal regulation."[58] The law provides that a purpose of the HMTA is to facilitate "the movement of hazardous materials in commerce [in order] to maintain economic vitality and meet consumer demands [and that this commerce] shall be conducted in a safe and efficient manner."[59] (Emphasis added.) Congress charged DOT to "prescribe regulations for the safe transportation of hazardous materials in . . . commerce."[60] (Emphasis added.) Congress underscored the importance of this mission finding that "a high degree of uniformity of Federal, State, and local laws is required in order to promote safety and to encourage the free flow of commerce."[61] (Emphasis added.) RSPA must look to impacts on commerce produced by proliferating non-federal hazardous materials requirements.

- Escort: The City's defense of its escort requirements is simply to note that in its view the escort requirement "does not in any way hinder interstate commerce"[62] – a remarkable statement considering the City believes "interstate commerce" is transportation that never leaves the interstate highway system as opposed to transportation that crosses state lines. The City then cites a 1978 Court decision that is not relevant to the state of the law post-1990. Rather than deal with AWHMT's cited authorities, the City "reserves the right to provide additional argument and legal support . . . in [its] rebuttal comments."[63] To the extent, the City files such comments, we reserve the right to respond.

- Fire Extinguisher Requirements: Again, the City's defense of its fire extinguisher requirements is to "reserve[] the right to provide additional argument and legal support . . . in [its] rebuttal comments."[64] To the extent, the City files such comments, we also reserve the right to respond on this matter. In the meantime, we again point to the City's parochial view of its unique requirements. According to the City, the requirement for an additional fire

---

56 In fact, Karla Simmons, Tri-State Motor Transit Co., states in her affidavit of February 24, 1998, that "to avoid jeopardizing its compliance record, . . . every attempt is being made to avoid even passing through the City with hazardous materials and/or explosives."

57 49 U.S.C. 5 I 15(a)(2).

58 Commonwealth of Massachusetts v. U.S. Dept. of Transportation, No. 95-5175 (D.C. Cir. Aug. 27, 1996), petition for rehearing, October 1996, page 1.

59 P.L. 101-615, Section 2(8).

60 49 U.S.C. 5 103(b).

61 House Rept. 10 l-444, Part 1, page 22.

62 City Comment, page 24.

63 Ibid.

64 Ibid.

extinguisher is of "minimal consequence to transportation."[65] If every community and non-federal jurisdiction saw fit to impose its own unique "minimal" safety apparatus requirements, hazardous materials transportation would be unreasonably burdened. This is the one area where AWHMT has requested RSPA to review this requirement under its substantively-the-same-as preemption authority. Non-federal entities cannot be allowed to require unique safety equipment as a precondition to transport hazardous materials that are otherwise in compliance with the HMRs.

- Permit Requirements: As the City points out, RSPA has long held that permit requirements are not *per* se preempted. Preemption of such requirements hinges on the requirements of the permit. We have pointed out the onerous aspects of the City's permit requirements, including the impossibility of complying in any meaningful way with the notice of routes and types and quantities of hazardous materials to be transported. Also bear in mind that copies of the City's permits must be carried in each vehicle using City streets. This paperwork burden serves no safety purpose and, since information about types and quantities of hazardous materials must be declared on the document, could cause confusion with DOT-prescribed shipping papers? We also urge RSPA to relook at this issue in light of the Congressional mandate that even the states be precluded from imposing registration and/or permitting requirements on motor carriers transporting hazardous materials unless the requirements are uniform and reciprocal.[67]

- Fees: In its comments, the City claims that its flat, per-vehicle fees ($50 for each of the nine classes of hazardous materials carried by the truck or as much as $450 annually per-truck) satisfy the Commerce Clause – and are thus "fair" for the purposes of a federal preemption analysis – under the criteria set forth in Evansville-Vanderburgh Airport Authority District v. Delta Airlines? The City's reliance on Evansville is misplaced.

  Evansville sanctioned a per-use charge (a $1 enplaning fee) that was inherently apportioned to the feepayer's presence or activities. Like other per-use charges, the fee was collected each time a feepayer used the State's service or facility. The charge was upheld because it charged every user for the value of each use of a particular service and it was therefore "based on some fair approximation of use or privilege of use."[69] This sort of per-use or proportional charge necessarily varies with the level of service provided to the feepayer by the taxing jurisdiction.[70]

---

65 Ibid.

66 Congress felt so strongly about the importance of shipping papers that non-federal requirements that impinge on shipping papers including the "contents, and placement of those documents" are reviewable under the "substantively the same as" test of preemption. [49 U.S.C. 5 125(b)(l)(C). Also see, Op. Cit., Harmon.]

67 49 U.S.C. 5 119.

68 Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972).

69 American Trucking Associations. Inc. v. Scheiner, 483 U.S. 266,289 (1987) quoting Evansville, 405 U.S. at 716.

70 In PD-13(R), Nassau County claimed the fee was applied solely for the purpose of performing an annual vehicle inspection. Accepting this defense, RSPA found that the annual inspection fee was also a "per-use" fee assessed to recoup the cost of the inspection service. In short, the feepayer's payment was found to be equivalent to the approximate value of the services received from the County.

However, we believe that RSPA erred in not considering the impact on interstate commerce of multiple jurisdictions requiring so-called "per-use" fees on vehicles engaged in hazardous materials transportation. The fees

In contrast, the Cleveland flat unapportioned fees are assessed at the same level whether a vehicle operates a single time in the City or has hundreds of operations in the City during the course of the year. Yet the vehicle that has hundreds of operations receives benefits (and imposes costs) on the City that are enormously greater than those associated with the vehicle that makes only a single trip into the City. The Cleveland flat fees, thus, do not fairly approximate the value of any benefit received from the City or any cost imposed on the City. The fees can in no way be said to be designed to measure the cost or value of the use of the City's services.

Flat, unapportioned fees like Cleveland's indisputably chill interstate operations. Since the flat charge is the same regardless of the level of a transporters activities, to minimize total annual fee exposure, transporters will limit their operations to limit their fees, ultimately operating less in interstate commerce.[71] The cumulative burden of such flat charges is illustrated by the Supreme Court's "internal consistency" test: an analysis of the impact of the charge if exactly replicated by all other jurisdictions.[72] If only 100 of the thousands of municipalities in the United States imposed a fee system like Cleveland's, an interstate truck would have to pay $45,000 in total fees, compared to $450 for a truck with the same level of total operations but conducted in only one jurisdiction. The pressure to localize operations and draw back from full participation in the interstate market is apparent.

Because of just those negative impacts on interstate commerce, nearly two dozen flat fees have been struck down since the 1987 ATA v. Scheiner decision as being structurally discriminatory and thus inherently unconstitutional, including a number of flat hazardous material or hazardous waste transporter fees.[73]

---

in Nassau County and Cleveland can be replicated in other jurisdictions. The per-use fees found Constitutional in Evansville and later Oklahoma Tax'n v. Jefferson Lines, 115 S. Ct. 133 1 were not replicated in other jurisdictions. Under the Supreme Court's "internal consistency" test, a law's impact on interstate commerce is examined in the context of its impact if every other jurisdiction imposed an identical requirement. [Jefferson, 1338.1 There can be little dispute that interstate hazardous materials transporting commerce would come to a halt if every jurisdiction in which a truck operated required that truck to undergo a separate, duplicative fee-supported inspection. If RSPA is concerned about the theoretical nature of the internal consistency analysis and believes it needs actual proof of multiple burdens, RSPA need look no further than the vehicle inspection requirements of Nassau and Broward Counties [PDA- 18(R)] as well as the Cities of Houston [PDA-15(R)] and Cleveland. Together these jurisdictions provide that proof that multiple fees and duplicative inspections imposed on a vehicle would surely affect its ability to operate fully in interstate commerce.

[71] See Scheiner at 286-87 (noting that flat fees have "a forbidden impact on interstate commerce because [they] exert[] inexorable hydraulic pressure on interstate businesses to ply their trade within [the taxing state] rather than among the several States.").

[72] Scheiner at 284.

[73] See American Trucking Associations. Inc. v. State of New Jersey, No. 11562-92 (N.J.T.C., March 11, 1998) (enjoined State from collecting annual per vehicle hazardous waste permit fees in excess of $200); American Trucking Associations. Inc. v. Wisconsin, 556 N.W. 2d 761 (1996) pet. for review denied, No. 95-1714 (Wis. Sup. Ct. Dec 17, 1996) (striking down per-company annual $400 per-hazardous-material-activity fee); American Trucking Associations. Inc. v. Secretary of Administration, 613 N.E. 2d 95 (Mass. 1993) (finding unconstitutional a $200 per-vehicle annual hazardous waste transporter fee); American Trucking Associations. Inc. v. Secretary of State, 595 A.2d 1014 (Me. 1991) (striking down $25 per-truck hazardous materials transporter fee).

Finally, the City attempts to save its inherently discriminatory charge by claiming that collection of a fairly apportioned charge is impractical. But the City ignores Scheiner's observation that the administrative machinery of revenue collection is sufficiently sophisticated to take into account at least the gross variations of a feepayer's highway usage – a relevant proxy for the level of a truck's presence in the taxing jurisdiction.[74] Thus, Cleveland could apportion its fees based on a truck's in-City mileage or on other factors relating to the trucks presence in the City, number of trips, length of time spent in the City, etc. As the Courts have found in Maine, Massachusetts, New Jersey and Wisconsin, hazardous materials transporter fees must be apportioned and governments have the administrative capabilities to do so.

Conclusion

The Cleveland permits and attendant requirements do not enhance safety or enforce the HMRs. Uniformity has been described by the courts as the "linchpin" of the HMTA[75] – not uniformity for uniformity's sake, but "uniformity to promote the public health, welfare, and safety."[76] Safety is not enhanced by fostering even abetting a non-federal regulatory scheme that will balkanize hazardous materials transportation by motor carrier as these requirements are replicated by other jurisdictions in America. Cleveland's requirements simply do not further the federal purpose of promoting safety though uniformity.

Certification

I certify that a copy of this comment has been sent to Mr. Sylvester Summers at the address specified in the Federal Register.

Sincerely,

Michael Camey

Michael Camey
Chairman

---

74 See Scheiner at 297.
75 Op. Cit., Harmon.
76 P.L. 101-615, Section 2(5).