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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: Decision on petition for reconsideration of an administrative determination of preemption.

PETITIONER: The Fire Department of the City of New York (FDNY).

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: On July 6, 2017, PHMSA published in the Federal Register an administrative determination that Federal hazardous material transportation law preempts, in part, FDNY's permit, inspection, and fee requirements. FDNY has petitioned for reconsideration of that determination. FDNY's petition for reconsideration is granted in part, and denied in part, as follows:

1. Permit and Inspection Requirement – PHMSA affirms its determination that the HMTA preempts FDNY's permit and inspection requirements, FC 2707.4 and 105.6, with respect to vehicles based outside the inspecting jurisdiction, and its determination

that the HMTA does not preempt these requirements with respect to vehicles that are based within the inspecting jurisdiction. PHMSA's determination is based on its conclusion 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 material on vehicles based outside the inspecting jurisdiction.

2. Permit Fee – Based on new information supplied by FDNY, PHMSA reverses its determination that FDNY is not using the revenue it collects from its permit fee for authorized purposes. However, PHMSA affirms its determination that the permit fee is not “fair,” as required by 49 U.S.C. 5125(f)(1), and therefore affirms its determination that the permit fee is preempted.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Preemption Determination.

The American Trucking Associations, Inc. (ATA) applied to PHMSA for a determination of whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts the City of New York (FDNY)'s requirement that those wishing to transport hazardous materials by motor vehicle must, in certain circumstances, obtain a

permit. The relevant provisions of the FC and the FDNY rules regarding FDNY'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 – sets forth 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.

The following parties submitted comments in the proceeding: ATA, FDNY, Nouveau, Inc., and the American Coatings Association. On July 6, 2017, PHMSA published in the Federal Register its determination with respect to ATA's application, in accordance with 49 U.S.C. 5125(d) and 49 CFR 107.203. Preemption Determination 37-R (PD-37(R)), 82 FR 31390. PHMSA found that Federal hazardous material transportation law preempts the FDNY requirements as follows:

1. Permit and Inspection Requirement – 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 material on vehicles based outside the inspecting jurisdiction. Accordingly, we determined that the HMTA preempts FDNY's

permit and inspection requirements with respect to vehicles based outside the inspecting jurisdiction, but that the HMTA does not preempt those requirements with respect to motor vehicles that are based within the inspecting jurisdiction. PD 37(R), 82 FR at 31393-31395.

2. Permit Fee – The permit fee is preempted because we determined that FDNY had not shown that the fee it imposes with respect to its permit and inspection requirements is “fair” and “used for a purpose related to transporting hazardous material,” as required by 49 U.S.C. 5125(f)(1). PD 37(R), 82 FR at 31395-31396

PHMSA, in Part I of PD-37(R), discussed the standards for making determinations of preemption under the Federal hazardous material transportation law. *Id.* at 31392-3. As we explained, unless there is specific authority in another Federal law or DOT grants a waiver, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if:

--It is not possible to comply with both the State, local, or tribal requirement and a requirement in the Federal hazardous material transportation law or regulations;

--The State, local, or tribal requirement, as applied or enforced, is an “obstacle” to accomplishing and carrying out the Federal hazardous material transportation law or regulations; or

--The State, local, or tribal requirement concerns any of five specific subjects and is not “substantively the same as” a provision in the Federal hazardous material transportation law or regulations. *Id.* (citing 49 U.S.C. 5125(a)-(b)).

In addition, 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 and planning, developing, and maintaining a capability for emergency response.” *Id.* at 31393 (citing 49 U.S.C. 5215(f)(1)).

These preemption provisions stem from congressional findings that State, local, or tribal requirements that vary from Federal hazardous material transportation law and regulations can create “the potential for unreasonable hazards in other jurisdictions and confound[] shippers and carriers which attempt to comply with multiple and conflicting... regulatory requirements,” and that safety is advanced by “consistency in laws and regulations governing the transportation of hazardous materials[.]” Pub. L. 101-615 sections 2(3) and 2(4), 104 Stat. 3244 (Nov. 16, 1990). In PD-37(R), PHMSA also explained that its

[p]reemption 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).

PD-37(R), 82 FR at 31393.

B. Petition for Reconsideration.

FDNY contacted PHMSA, within the 20-day time period provided in 49 CFR 107.211(a), and requested a 60-day extension of time in which to file a petition for reconsideration. We granted FDNY’s request, and set a new filing deadline. FDNY timely filed its petition for reconsideration on September 25, 2017. FDNY sent a copy of

its petition to each person who had previously submitted comments in the proceeding. Thereafter, we received a request from ATA for a 22-day extension of time to file its comments to FDNY's petition. We granted ATA's request, and instructed ATA to file its comments on or before November 6, 2017. ATA timely submitted its comments.

FDNY, in its petition, challenges PHMSA's findings that its inspection and permit requirements, and the associated permit fee, are preempted. FDNY presents four arguments for why it believes the agency should reconsider and reverse its decision:

- The permit and inspection program is valid because it addresses an issue of foremost local concern, i.e., the public safety of FDNY residents;
- The inspection requirement is not an obstacle because it does not cause unnecessary delay;
- The fee is fair and used for appropriate purposes; and
- PHMSA's decision in this proceeding is inconsistent with the ruling by the agency's predecessor in a prior waiver of preemption proceeding.

II. Discussion

A. Inspection and Permit Requirement.

In PD-37(R), PHMSA explained that although State or local governments may generally conduct inspections of motor carriers to assure compliance with Federal requirements for the transportation of hazardous materials, such inspections must not conflict with the Federal requirement that:

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.

PD-37(R), 82 FR at 31394 (citing 49 CFR 177.800(d)). PHMSA explained that its prior decisions have established several key principles in this area.

First, while “travel and wait times associated with an inspection are not generally considered unnecessary delays . . .[,] a delay of hours or days . . . 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.” *Id.*

Second, “a State’s annual inspection requirement applied to vehicles that operate solely within the State is presumptively valid,” as 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.” *Id.*

Third, “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.” *Id.*

Fourth, “a State or local government may apply an annual inspection requirement to trucks based outside its jurisdictional boundaries only if [it] can actually conduct the equivalent of a ‘spot’ inspection upon the truck’s arrival within the local jurisdiction,” and “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.” *Id.* (alterations omitted).

In setting forth these principles, PHMSA discussed three prior determinations: (1) a determination that a town’s permit requirement was preempted with respect to vehicles based outside the town, PD-28(R), Town of Smithtown, New York Ordinance of Transportation of Liquefied Petroleum Gas, 67 FR 15276 (Mar. 29, 2002); (2) a determination that a county’s permit requirement was preempted with respect to vehicles based outside the county, but not with respect to vehicles based within the county, PD-13(R), Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases, 63 FR 45283 (Aug. 25, 1998), on reconsideration, 65 FR 60238 (Oct. 10, 2000); and (3) a determination that a State’s inspection requirement was preempted, PD-4(R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48933 (Sept. 20, 1993), on reconsideration, 60 FR 8800 (Feb. 15, 1995).

Consistent with these principles, PHMSA determined that FDNY’s permit and inspection requirements are not preempted with respect to vehicles based within New York City, but are preempted with respect to vehicles based outside New York City. PD-37(R), 82 FR at 31394-95. With respect to the latter category, PHMSA noted (among other things) that the single facility at which the FDNY performs inspections is only open weekdays until 3:00 p.m., and that “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 ([which] requires a permit) and discovers that the [facility] is closed.” *Id.* at 31394. PHMSA noted, moreover, that

there was no evidence that FDNY can perform “spot” inspections at the roadside, and that “fleet inspections at a motor carrier’s own facility appear to be impractical where the facility is located outside the City’s jurisdiction.” *Id.* Thus, PHMSA concluded 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.” *Id.* at 31395.

1. Program Validity Based on Unique Local Conditions.

FDNY argues that the decision disregards the “presumption against preemption” that it says must be applied to its program based on its unique and important purpose of protecting public safety. FDNY relies on prior Supreme Court decisions, DOT and federal case law, and executive branch orders and guidance on preemption, to justify its program. According to FDNY, the “presumption against preemption” is a rule developed by the courts to limit federal preemption of local requirements, and in particular, environmental health and safety regulations that are generally recognized as an area of traditional local control. Moreover, FDNY argues that since its program is limited in scope, i.e., permit not required for through traffic,¹ it is subject to a “strong presumption of validity.” In its argument, FDNY appears to rely heavily on the City’s unique local conditions. According to FDNY, the City’s unique local conditions such as “its high density; its narrow, congested streets; and its unique security concerns” justify special local safety rules, and should not be preempted. Thus, FDNY contends that PHMSA failed to properly acknowledge and apply the presumption against preemption of local

¹ Vehicles in continuous transit through the City without pickup or delivery are not required to have a permit, but are still subject to routing, time, escort, and other requirements. See FDNY Rule 2707-02.

safety regulations; failed to accord proper weight to the fact that its program is narrowly limited in scope to only vehicles making local deliveries or pickups; and failed to properly consider the unique circumstances of the City with respect to hazardous materials transportation.

We find FDNY's arguments unpersuasive for the following reasons. First, FDNY ignores the fact that Congress has expressly provided that state and local laws are preempted if they create an obstacle to carrying out a provision of the HMRs. When a "statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quotations omitted). And even if a presumption against preemption did apply here, it would easily be rebutted by the express command of Congress.

Second, although FDNY relies heavily on *Massachusetts v. DOT*, 93 F.3d 890 (D.C. Cir. 1996), that case demonstrates the appropriateness of PHMSA's analysis here. There, the D.C. Circuit rejected a determination by PHMSA's predecessor that 49 U.S.C. 5125(a)(2) – the same provision at issue here – preempted a state law that created an obstacle to accomplishing the HMTA's "general goal of uniform waste regulation." *Id.* at 894. The Court did so based on its conclusion that the "clear intent" of Section 5125(a)(2) is to preempt "state rules that . . . pose an obstacle to fulfilling explicit provisions, not general policies, of HMTA." *Id.* at 895. Although the Court noted a "presumption against extending a preemption statute to matters not clearly addressed in the statute in areas of traditional state control," *Id.* at 896, such a presumption is

irrelevant when a matter *is* “clearly addressed in the statute” – i.e., if a state rule “pose[s] an obstacle to fulfilling explicit provisions” of the HMTA or its implementing regulations. And that is exactly what PHMSA has determined here: the FDNY requirements pose an obstacle to fulfilling an “explicit provision” of the HMTA regulations, the prohibition on “unnecessary delay” contained in 49 CFR 177.800(d).

Third, contrary to FDNY’s contentions, PHMSA’s determination was in no way inconsistent with Executive Order (E.O.) No. 13132, entitled “Federalism” (64 FR 43255 (Aug. 10, 1999)), or the President’s May 20, 2009 memorandum on “Preemption” (74 FR 24693 (May 22, 2009)). As an initial matter, each of those documents states that it does not “create any right or benefit, substantive or procedural, enforceable” against the government. In any event, we specifically stated in our decision that our analysis was guided by the principles and policies set forth in these documents. PD-37(R) at 31393. We explained that the President’s 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 sufficient legal basis for preemption.” *Id.* Furthermore, we acknowledged that E.O. 13132 authorizes preemption of State law only when a statute contains an express preemption provision. More importantly, we noted that the HMTA contains express preemption provisions, which we have implemented through regulations. As such, PHMSA’s legal authority to make preemption determinations is expressly authorized through statute by Congress, and PHMSA’s preemption determination is therefore consistent with both EO 13132 and the 2009 memorandum.

Next, like its position in IR-22, it appears FDNY misunderstands the scope of the analysis required in making preemption determinations. As we pointed out in the IR-22 decision on appeal, consideration of local safety concerns is properly conducted during a waiver of preemption proceeding, not a preemption determination proceeding. 54 FR at 26704. The correct analysis in a preemption determination proceeding is whether a state or local requirement stands as an obstacle to compliance with the federal regulations, not whether local safety concerns justify a waiver of preemption. *Id.* Virtually all state and local hazardous materials requirements are prompted by safety concerns, but the focus of preemption analysis is whether state or local requirements are inconsistent with nationally-applicable requirements, not whether local safety concerns should be weighed against national concerns. 54 FR at 26704. Therefore, FDNY's safety concerns would be appropriate in a waiver of preemption proceeding but not relevant in this proceeding.²

Last, regarding the jurisdiction's local conditions, as we discussed in PD-37(R), we previously addressed a preemption challenge to FDNY's permit program 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), where we determined that FDNY's permitting system was preempted, which was affirmed on appeal. In IR-22, FDNY essentially asserted the same

² The authorities relied on by FDNY are not to the contrary. In *City of New York v. Ritter Transp., Inc.*, 515 F. Supp. 663 (S.D.N.Y. 1981) and *Nat'l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982), the courts addressed New York's routing requirements for hazardous materials, which necessarily are based on local conditions and which are expressly permitted by the HMTA, *see* 49 U.S.C. 5112. Those cases do not suggest that New York can rely on local concerns to impose a permit and inspection requirement that poses an obstacle to federal law. And while the agency did note that a Boston regulation allowing the Fire Commissioner to impose certain permit requirements "may legitimately assist the Fire Commissioner in dealing with unusual local conditions and emergencies," it found that it could not determine that regulation's consistency with the HMTA without information about the specific permit requirements imposed. IR-3, City of Boston Rules Governing Transportation of Certain Hazardous Materials By Highway Within the City, 46 FR 18918 (Mar. 26, 1981). Similarly here, while New York may certainly rely on local conditions in issuing regulations, those regulations are preempted if they create an obstacle to compliance with federal law.

public safety argument, i.e., that its regulations are “reasonable safety measures justified by its unique combination of conditions that create exceptional hazards to the transportation of hazmat and high risks of catastrophic consequences in the event of an accident.” 52 FR at 46577. In that proceeding, we rejected this argument, because we determined that it does not provide an adequate basis on which to find FDNY’s requirements were consistent with the HMTA and HMR. The reasons we gave for rejecting this “unique local concerns” argument in IR-22 are just as relevant to FDNY’s argument today. For instance, in IR-22 we said, “virtually every urban and suburban jurisdiction in the United States has a population density which is a matter of concern in planning for, and regulating hazmat transportation.” Moreover, “consideration of any unique population density of New York City must be accompanied by consideration of the City’s unique location as a crossroad for a large percentage of hazardous materials transportation between both New England and Long Island and the rest of the Nation; delays and diversions of such transportation are of great concern.” 52 FR at 46583.

Finally, it is important to recognize there are other administrative options available to FDNY to address its concerns. For example, if it believes the HMR are inadequate, it may file a petition for rulemaking with the agency, or otherwise participate in other PHMSA rulemakings related to these issues. Or if the FDNY believes its alleged unique circumstances require a different regulatory approach, it may request a waiver of preemption. 52 FR at 46583; 49 CFR 107.215.

B. Unnecessary Delay.

FDNY asserts that PHMSA ignored federal case law and misapplied its own precedent in making its determination that FDNY’s inspection and permit requirements

create an obstacle to accomplishing and carrying out the HMR's prohibition against unnecessary delays in the transportation of hazardous materials with respect to trucks based outside the inspecting jurisdiction. FDNY contends that federal judicial precedent recognizes that some delay is both necessary and acceptable.

1. FDNY's Allegations that PHMSA's Decision Contradicts Federal Case Law.

FDNY argues that our decision contradicts federal case law. FDNY relies on cases from the First Circuit to emphasize the apparent inconsistency of our decision with federal judicial precedent, which recognizes that some delay is both necessary and acceptable. *See N.H. Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir. 1984) (state license fees required for hazardous materials and waste transporters not preempted by the HMTA and did not violate the commerce clause); *see also N.H. Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995) (town's zoning ordinance was not preempted by the HMTA or other statutes, and did not violate the commerce clause). We do not find these cases persuasive for the following reasons.

The *Flynn* court conceded that PHMSA's preemption determinations have better developed administrative records and are thus more informed by the agency's expertise, and it left open the possibility that "a different record, created before DOT" may have led to "different conclusions." *Id.* at 50, 52 (Notwithstanding the Court's recognition of the agency's expertise in this area, it ultimately chose to proceed because it favored judicial efficiency over prolonged delay in the proceeding that would likely result from consultation with DOT. *Id.* at 51.). Thus, even if FDNY's regulations were identical to the regulations at issue in *Flynn* (which they are not), PHMSA might very well reach a

different result than the First Circuit. Indeed, the principal basis for the Court’s decision—that a license requirement for hazardous materials transporters creates no more delay than a requirement that drivers be licensed—is not persuasive: drivers are not licensed in each state into which they travel, and a driver entering a state will therefore experience no delay related to obtaining a driver’s license. *See, e.g.*, 49 U.S.C. 31302 (“An individual operating a commercial motor vehicle may have only one driver’s license at any time.”).

Additionally, the *Flynn* court framed the legal question from the perspective of the shipper, i.e., looking at the possibility of delay that arises when a shipper must choose a licensed truck when transporting hazardous materials at night or on weekends. 751 F.2d at 51. However, as we stated in PD-37(R), as well as prior agency precedent developed since the *Flynn* decision, an inquiry into whether non-federal permit and inspection requirements interfere with the HMR prohibition against unnecessary delay must necessarily focus on the delay that may result when a loaded vehicle arrives unannounced in the inspecting jurisdiction.

The *Flynn* court also misinterpreted two Inconsistency Rulings issued by the Research and Special Programs Administration (RSPA)³, which the Court cited for the proposition that “a ‘bare’ permit requirement or license requirement is consistent with HMTA.” 751 F.2d at 51-52. In the first ruling, RSPA explained that while a “bare” permit requirement “is not inconsistent with Federal requirements,” “a permit itself is

³ 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, § 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 this decision, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

inextricably tied to what is required in order to get it,” and therefore determined that the state permit requirement at issue *did* create unnecessary delay. IR-2, State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended To Be Used by a Public Utility, 44 FR 75566, 75570-71 (December 20, 1979). In the second ruling, RSPA merely determined that it could not determine whether a permit requirement created delay. IR-3, City of Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City, 46 FR 18918, 18923 (March 26, 1981).

In any event, PHMSA disagrees with FDNY’s claim that its program is even less likely to cause delays than the program upheld by the *Flynn* court. The state permits at issue in *Flynn* were apparently available at multiple “border stations,” *see* 751 F.2d at 51, meaning that many drivers could likely obtain permits without diverting from their intended routes. This type of arrangement may be considered a functionally equivalent option to a spot or roadside inspection. FDNY’s program, in contrast, requires drivers without permits to travel to a single inspection facility, diverting from their intended routes by potentially significant amounts.

FDNY also relies on *Nat’l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982) and *City of New York v. Ritter Transp., Inc.*, 515 F. Supp. 663 (S.D.N.Y. 1981) to support its argument that due to the City’s unique safety considerations, enforcement of certain city regulations promote safety and as such, any associated transportation delays are not unnecessary. However, as we noted earlier, these cases involve routing requirements, which are specifically allowed by the HMTA, and do

not suggest that the City can rely on local concerns to impose a permit and inspection requirement that poses an obstacle to federal law. *Supra* at 12 n.2.

2. FDNY's Allegations that PHMSA's Decision is Inconsistent with Agency Precedent.

FDNY claims that our decision is inconsistent with agency precedent as it relates to what is considered an unnecessary delay. According to FDNY, it estimates that on average, its program only adds about 2 hours of additional travel and inspection time for unscheduled inspections at its Hazardous Cargo Unit (HCU). As such, FDNY asserts that a 2-hour delay falls within the range that DOT previously determined to be reasonable and presumptively valid.

Also, FDNY alleges that PHMSA downplayed the program's flexibility regarding on-site fleet inspections and drop-in inspections during the HCU's business hours, which FDNY says it is extending to 7 days a week, starting November 1, 2017.⁴ Finally, FDNY contends that spot or roadside inspections are not feasible, would raise significant safety concerns, and are not required because its program is the functional equivalent of a roadside inspection. Here, the main premise of FDNY's argument is the proposition that any additional travel and inspection time associated with its program is a reasonable and necessary delay.

Although FDNY is correct that in prior proceedings we have considered the length of time involved with a delay, we disagree with its interpretation of the agency's findings in these proceedings regarding unnecessary delay. In PD-37(R), we discussed our prior precedent, and acknowledged that vehicle and container inspections are an

⁴ In its petition, the FDNY stated that in the future, under a "pilot program," the HCU will be open for drop-in inspections on weekends.

integral part of a program to assure the safe transportation of hazardous materials in compliance with the HMR. Furthermore, we outlined the agency's position regarding these types of inspections by highlighting relevant agency precedent developed through prior Inconsistency Rulings and Preemption Determinations. But we also said that a local inspection of a vehicle or container used to transport hazardous material must not conflict with the HMR's prohibition against unnecessary delays. In the analysis of the issue in PD-37(R), we then identified several principles related to unnecessary delay based on agency precedent, including travel and wait times; intrastate and interstate considerations; and program flexibility. PD-37(R) at 31393-4. We applied these principles to our analysis of FDNY's program.

A state or local periodic inspection requirement has an inherent potential to cause unnecessary delays in the transportation of hazardous materials when that requirement is applied to vehicles based outside of the inspecting jurisdiction. PD-28(R) at 15279; *see also* PD-4(R); PD-13(R). The inherent potential for unnecessary delay is not eliminated by a flexible scheduling policy. *Id.* It is the impracticability of scheduling an inspection that creates unnecessary delay. It is the delay in deviating from an intended route to travel to an inspection facility, and/or waiting with a loaded vehicle for the arrival of an inspector from another location, that creates unnecessary delay, rather than the time waiting in line or the inspection time. *Id.* Contrary to FDNY's characterization, our precedent does not say that *any* delay of 1.5 to 2 hours is "reasonable and presumptively valid," it says that a delay of that length "*during which a State inspection is actually conducted* is "reasonable and presumptively valid." PD-13(R) at 60243. As such, we said in our decision here, and as we have consistently stated in prior proceedings, that

unnecessary delay would be eliminated if FDNY performed the equivalent of a spot or roadside inspection upon the unannounced arrival of a truck carrying hazardous materials. PD-37(R) at 31395; *supra*. If such an inspection took one or two hours, such delay could perhaps be characterized as “necessary.” But the same is not true for the delay caused by FDNY’s requirement that vehicles drive to the HCU in Brooklyn to be inspected, even if doing so would amount to a significant re-routing (for example, if a truck wished to cross the George Washington Bridge and make a delivery in Upper Manhattan).

Here, FDNY contends that spot or roadside inspections are not feasible and would raise significant safety concerns. But we have repeatedly held that States or localities may sometimes impose requirements, without creating unnecessary delay, if they offer the equivalent of spot or roadside inspections, and have never said that actual spot or roadside inspections are required. FDNY argues that its program offers the equivalent of a spot or roadside inspection because it offers flexible scheduling and because its HCU is now open 7 days a week and offers “on demand” inspections. Since we issued our decision in this proceeding, we have confirmed that the HCU is now open on the weekends. However, we note that it remains the sole inspection facility within the jurisdiction and it still closes at 3 pm each day.

According to FDNY, these operational changes amount to the functional equivalent of a spot or roadside inspection. We disagree. The underlying principle of a spot inspection is the elimination of delay caused by travelling to an inspection facility or waiting for an inspector to arrive. Previously we have indicated that options that may be considered “functional equivalents” may include conducting inspections at points of entry

into the inspecting jurisdiction; other roadside inspection locations; and terminals. PD-4(R) at 48941. These options all have the common effect of eliminating unnecessary delays by bringing the inspection site closer to a vehicle loaded with hazardous materials as it enters the inspecting jurisdiction. FDNY's primary solution to delays caused by its program amounts to nothing more than keeping its single inspection facility open for a few hours on the weekends. On balance, we do not believe these changes rise to the level of a functional equivalent of a spot or roadside inspection.

For the reasons stated above, we believe FDNY misunderstands the prohibition against unnecessary delays because its arguments here focus on trying to justify the length of time of a delay that may be caused by its inspection program, rather than implementing changes to its program that would eliminate unnecessary delays. Here, FDNY estimates that such a delay would only be about 2 hours, which it asserts is considered reasonable and necessary. However, as we explained above, under the unnecessary delay requirement, 49 CFR 177.800(d), the determinative factor is not the amount of time of delay caused by an inspection program, or whether the delay is of a reasonable length. But rather, whether the delay is unnecessary. Here, FDNY's single inspection facility with limited operating hours revealed an inflexible program that creates delays in the transportation of hazardous materials. Therefore, we are unpersuaded by FDNY's arguments and affirm our finding that, with respect to vehicles based outside the inspection jurisdiction, its program is an obstacle to accomplishing and carrying out the HMR's prohibition against unnecessary delays in the transportation of hazardous materials.

C. Permit Fee.

In PD-37(R), PHMSA addressed ATA's contention that FDNY's permit fee violates 49 U.S.C. 5125(f)(1), which provides in relevant part that a "political subdivision of a State . . . may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to hazardous material." PHMSA concluded that FDNY's fee was neither "fair" nor "used for a purpose related to hazardous material." PD 37(R), 82 FR at 31395-96. FDNY challenges both findings.

1. Fairness of the Fee.

In PD-37(R), PHMSA noted that it had previously determined that it should determine whether a fee is "fair" by using the test articulated by the Supreme Court in *Evansville-Vanderburgh Airport Auth. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). PD37(R), 82 FR at 31395. PHMSA stated that this test, as further clarified by the Court, provides that a fee is reasonable 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." *Id.* (citing *Northwest Airlines, Inc. v. Kent*, 510 U.S. 355, 367-68 (1994)). PHMSA discussed two prior instances in which it had found that flat fees were not "fair" when there was no evidence that they were based on a fair approximation of the use of the roads or other facilities within a state. *Id.* PHMSA concluded that FDNY's fee was not fair and discriminated against interstate commerce, because "there is no evidence showing that FDNY's flat fee is apportioned to a motor carrier based on some approximation of benefit conferred to the permit holders," and

“there is no evidence that a more finely graduated fee would pose genuine administrative burdens to the City.”

FDNY asserts that the program’s inspection fee, \$105 per inspection, is not excessive. Furthermore, FDNY states that the costs of conducting the inspections “exceeds or approximates” revenue from fee collection and that the FDNY spends more money than it collects from the program on hazardous materials transport emergencies, including training and equipment for emergency response. Therefore, FDNY contends that its inspection fee is a reasonable flat fee since each regulated vehicle costs the same amount to inspect, regardless of how many times it uses local roads, and for that reason, “a graduated fee that reflects road usage is not appropriate.”

In support of its arguments here, FDNY submitted expense sheets for FY 2015 – 2017. In addition, FDNY contends that PHMSA “ignores *Evansville*’s recognition that a jurisdiction ‘may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive.’” FDNY relies on the First Circuit Court of Appeals’ interpretation of this statement in *Evansville*, in *N.H. Motor Transport Ass’n v. Flynn*, 751 F.2d 43 (1st Cir. 1984) (state license fees required for hazardous materials and waste transporters did not violate the commerce clause). The *Flynn* Court, in validating the annual license fee, said that the “burden of proving ‘excessiveness’ falls upon the truckers, not the state[.]” and found persuasive “the unrefuted plausibility of significant state expense[.]” *Flynn* at 48.

The materials FDNY submitted with its petition, which provided additional detail about the emergency and other services provided and their associated costs would, under the logic of *Flynn*, appear to support FDNY’s assertion that its annual inspection and

permitting program typically costs more than the revenue from the fees collected. However, as ATA noted in its comments on the petition, and as we acknowledged in PD-22(R), FDNY fails to recognize that the Court subsequently limited its holding in *Evansville* to situations where a flat tax is the ““only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.”” PD-22(R) at 59403 (quoting *Am. Trucking Assoc., Inc. v. Scheiner*, 483 U.S. 296, 266, 107 S. Ct. 2829 (1987)). More importantly, in *Scheiner*, the Court recognized the discriminatory consequences for out-of-state vehicles that are associated with an unapportioned flat tax, such as FDNY’s fee, and rejected the proposition that every flat tax for the privilege of using a State’s highways must be upheld even if it has a clearly discriminatory effect on commerce. Accordingly, “imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.” *Id.* at 296; *see also*, *Am. Trucking Assoc., Inc. v. Secretary of State*, 595 A.2d 1014, 1017 (Me. 1991).

Furthermore, even if the fee collected does not cover the cost of the program and an apportioned program is not appropriate, as alleged here by FDNY, “in-state trucking concerns will be favored more than their interstate competitors.” *Id.* Consequently, the burden is on the states to establish that collection of more finely calibrated user charges is impracticable. *Id.* FDNY did not meet this burden. As noted above, apart from its showing that its annual inspection and permitting program typically costs more than the revenue from the fees collected, it failed to adequately address whether apportionment of its fee was impracticable.

2. Fee Used for Appropriate Purposes.

We now turn to FDNY's challenge to our finding that it is not using the fees it collects under its program in accordance with the statutory mandate. FDNY's argument here is that because the cost to administer the FDNY program generally exceeds the revenues collected from the fee, FDNY believes it has demonstrated that the fee satisfies the "used for" test. However, before we address the merits of FDNY's argument, it is important to note that under the HMTA, FDNY has an affirmative obligation to submit a biennial report to DOT on fees that it levies in connection with the transportation of hazardous materials. The report must include information about the basis on which the fee is levied; the purposes for which the revenues from the fees are used; the annual total amount of the revenues collected from the fee; and such other matters requested by DOT. See 49 U.S.C. 5125(f)(2). According to our records, FDNY has consistently failed to comply with this statutory mandate. Consequently, since FDNY is the only party with the information and data related to its use of the fees, it has the burden to sufficiently demonstrate it is using the fees appropriately.

Notwithstanding FDNY's failure to file the required report, upon review of the information available to us, we find that the supplemental information provided by FDNY in its petition regarding its use of the fee revenue appears to show that FDNY is spending the revenue on purposes permitted by the law. Therefore, we are reversing decision with respect to the "used for" test. Nevertheless, as discussed above, we are affirming our finding that the fee is not fair.

D. Prior Administrative Proceedings.

FDNY argues that in a prior ruling, the agency already indicated that FDNY's inspection and permit requirements were not preempted. That is patently erroneous. In PD-37 we extensively discussed these proceedings. Furthermore, we explained that these prior proceedings did not involve a direct challenge to FDNY's program, or attempt to answer any of the arguments that ATA presented in this proceeding. For example, whether the City's inspection and permitting program requirements, and related fees, should be preempted because the program causes unnecessary delay and unreasonable cost; whether its fees are fair; and whether FDNY is using the revenue generated from the fees for authorized purposes. For these reasons, we do not believe further discussion on our related prior administrative proceedings is necessary.

III. Ruling

For the reasons set forth above, FDNY's petition for reconsideration is granted in part, and denied in part, as follows:

PHMSA affirms its determination that the HMTA preempts FDNY's permit and inspection requirements, FC 2707.4 and 105.6, with respect to vehicles based outside the inspecting jurisdiction, and its determination that the HMTA does not preempt these requirements with respect to vehicles that are based within the inspecting jurisdiction. PHMSA's determination is based on its conclusion 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 material on vehicles based outside the inspecting jurisdiction.

Permit Fee – Based on new information supplied by FDNY, PHMSA reverses its determination that FDNY is not using the revenue it collects from its permit fee for

authorized purposes. However, PHMSA affirms its determination that the permit fee is not “fair,” as required by 49 U.S.C. 5125(f)(1), and therefore affirms its determination that the permit fee is preempted.

IV. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes the final agency action by PHMSA on ATA’s application for a determination of preemption as to the FDNY’s requirement that those wishing to transport hazardous materials by motor vehicle must, in certain circumstances, obtain a permit. This decision becomes final on the date of publication 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).

Issued in Washington, D.C., on May 12, 2020.

Paul J. Roberti,
Chief Counsel.

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