

enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued on: April 4, 2006.

Warren E. Hoemann,

Deputy Administrator.

[FR Doc. E6-5209 Filed 4-7-06; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

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

District of Columbia Requirements for Highway Routing of Certain Hazardous Materials

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

ACTION: Notice of administrative determination of preemption.

Applicant: American Trucking Associations, Inc.

Local Laws Affected: Terrorism Prevention in Hazardous Materials Transportation Act of 2005; Terrorism Prevention in Hazardous Materials Transportation Congressional Review Emergency Act of 2006.

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 et seq., and FMCSA regulations at 49 CFR part 397.

SUMMARY: Federal hazardous material transportation law preempts the highway routing requirements in the Terrorism Prevention in Hazardous Materials Transportation Act of 2005 [D.C. Act 16-266, Jan. 26, 2006] and the Terrorism Prevention in Hazardous Materials Transportation Congressional Review Emergency Act of 2006 [D.C. Act 16-325, Mar. 23, 2006].

FOR FURTHER INFORMATION CONTACT: Mr. Brian Yonish, Office of Chief Counsel (Tel. No. 202-366-0834); Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

This proceeding is based on the March 14, 2005, application

(“Application”) of the American Trucking Associations, Inc. (“ATA”) for an administrative determination that Federal hazardous material transportation law, 49 U.S.C. 5101 et seq., and FMCSA regulations at 49 CFR part 397 preempt highway routing requirements under the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 [D.C. Act 16-43, Feb. 15, 2005] (“Emergency DC Act”). Since the time that ATA filed its Application, the Emergency DC Act has expired. However, the Council of the District of Columbia (“D.C. Council”) has since introduced and enacted a series of acts with substantively identical language. The Terrorism Prevention in Hazardous Materials Transportation Congressional Review Emergency Act of 2006 [D.C. Act 16-325, Mar. 23, 2006] will expire June 21, 2006. The Terrorism Prevention in Hazardous Materials Transportation Act of 2005 [D.C. Act 16-266, Jan. 26, 2006] was transmitted to the United States Congress on February 6, 2006, for review.¹ Because the relevant portions of the successive acts are substantively identical, these acts will hereinafter collectively be referred to as the “DC Act.”

The DC Act applies to the transportation of certain hazardous materials within 2.2 miles of the United States Capitol Building. The DC Act refers to this zone as the “Capitol Exclusion Zone.”

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

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

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

(b) Flammable gasses of Class 2, Division 2.1, as designated in 49 CFR

173.2, in a quantity greater than 10,000 liters;

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

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

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

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

In its Application, ATA states the DC Act was enacted without regard to the procedures set forth in the Federal hazardous materials routing regulations found in 49 CFR part 397, subpart C. Specifically, ATA asserts the District of Columbia failed to provide the requisite notice and comment period as required by 49 CFR 397.71(b)(2) and failed to hold a public hearing. ATA further states the District of Columbia failed to consult with officials of neighboring jurisdictions as required by 49 CFR 397.71(b)(3). Additionally, ATA asserts the District of Columbia did not engage in the risk analysis required by 49 CFR 397.71(b)(4). Lastly, ATA states the D.C. Council's testimony and findings include no discussion or analysis of population density or special populations in the area outside the Capitol Exclusion Zone, characteristics of the alternative highways to be used, an analysis of the number of shipments that would be impacted by the DC Act, an analysis of the impact upon emergency response capabilities, consideration of comments and concerns of affected persons, impact

¹ Except for emergency acts and certain enumerated types of legislation, all acts passed by the D.C. Council must be transmitted to the U.S. Congress for a specified review period. The review period for acts that do not relate to the criminal code is 30 days in which Congress is in session. After this review period, the act takes effect unless Congress enacts a joint resolution disapproving the act. D.C. Code § 1-206.02.

upon commerce, delays in transportation, or traffic conditions, including motor vehicle accident experience. ATA points out FMCSA's routing regulations relating to non-radioactive hazardous materials require analysis of these factors prior to enacting a routing restriction. See 49 CFR 397.71(b)(9).

Notice of ATA's filing of its Application was published in the **Federal Register** on April 20, 2005, and interested parties were invited to submit comments. 70 FR 20630. Comments were submitted by Yellow Roadway Corporation ("Yellow Roadway"), the National Propane Gas Association ("NPGA"), and the National Tank Truck Carriers, Inc. ("NTTC"). The District of Columbia submitted a reply. ATA then filed rebuttal comments.

On December 21, 2005, FMCSA published a **Federal Register** notice announcing a delay in issuing a determination on ATA's Application in order to allow time for fact-finding and an appropriate consideration of the issues. 70 FR 75858.

II. Federal Preemption

Title 49 U.S.C. 5125 includes several preemption provisions. Relevant to this proceeding is section 5125(c)(1), which allows a State or Indian tribe to establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with 49 U.S.C. 5112(b). The District of Columbia is considered a "State" for purposes of hazardous materials transportation law. 49 U.S.C. 5102(11).

Section 5112(b) requires the Secretary of Transportation (the Secretary), in consultation with the States, to prescribe by regulation standards for the States and Indian tribes to follow when designating specific highway routes for transportation of hazardous materials. The Secretary has delegated to FMCSA authority and responsibility for highway routing of hazardous materials. See 49 CFR 1.73(d)(2).

The standards required by 49 U.S.C. 5112(b) for establishing highway routing requirements for non-radioactive hazardous materials are set forth in 49 CFR part 397, subpart C, and apply to any designations established or modified on or after November 14, 1994. 49 CFR 397.69(a). A State or Indian tribe must follow FMCSA standards when establishing highway routing requirements for hazardous materials.

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

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

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

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

The Committee on Commerce, Science, and Transportation, when reporting in 1990 on the bill to amend the Hazardous Materials Transportation Act (HMTA) [Pub. L. 93-633 section 112(a), 88 Stat. 2161 (1975)], stated "The original intent of HMTA was to authorize [DOT] with the regulatory and enforcement authority to protect the public against the risks imposed by all forms of hazardous materials transportation, and to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations." S. Rep. No. 101-449 (1990), reprinted in 1990 U.S.C.C.A.N. 4595, 4596. A Federal Court of Appeals has indicated uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments expanding the original preemption provisions.²

III. Preemption Determinations

Title 49 U.S.C. 5125(d) provides for issuance of binding preemption determinations by the Secretary. The Secretary has delegated to FMCSA authority to make determinations of

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

preemption concerning highway routing of hazardous materials. See 49 CFR 1.73(d)(2). Any directly affected person may apply for a determination whether a requirement of a State, political subdivision or Indian tribe is preempted. 49 CFR 397.205(a).

FMCSA's preemption determinations are governed by procedures under 49 CFR part 397, subpart E, and 49 U.S.C. 5125. After the preemption determination is issued, aggrieved persons have 20 days to file a petition for reconsideration. See 49 CFR 397.211(c) and 397.223. Any party to the proceeding may seek judicial review in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the circuit in which the person resides or has its principal place of business. 49 U.S.C. 5127(a).

In making preemption determinations under 49 U.S.C. 5125(d), FMCSA is guided by the principles and policies set forth in Executive Order 13132, titled "Federalism." 64 FR 43255 (Aug. 4, 1999). Section 4(a) of Executive Order 13132 directs agencies to construe a Federal statute to preempt State law only when the statute contains an express preemption provision, there is other clear evidence that Congress intended preemption of State law, or the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute. Section 5125 includes express preemption provisions, which FMCSA has implemented through its regulations.

IV. Discussion

A. Summary of DC Act

The DC Act makes it illegal, except in cases of emergency, to transport in the Capitol Exclusion Zone without a permit certain quantities of hazardous materials specified in Section 4 of the DC Act. The specific quantities of the banned materials are listed in Section I of this preemption determination. Section 4 of the DC Act also makes it illegal in the Capitol Exclusion Zone, without a permit, to operate a vehicle which is capable of containing, and has exterior placarding or other markings indicating it contains, the specified quantities of the listed materials.

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

Section 5 of the DC Act enables the District of Columbia Department of Transportation to issue a permit

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

B. Summary of Regulatory Requirements

Because the District of Columbia established routing restrictions in the DC Act, the District of Columbia must comply with FMCSA's standards in 49 CFR part 397, subpart C. 49 CFR 397.69(a). These standards, issued pursuant to 49 U.S.C. 5112(b), specify that there must be:

- A finding by the State that the highway routing designation "enhances public safety in the areas subject to its jurisdiction and in other areas which are directly affected by such highway routing designation." 49 CFR 397.71(b)(1).
- Notice to the public of the proposed routing designation, a 30-day period for the public to submit comments, and consideration of whether to hold a public hearing (with advance notice to the public). 49 CFR 397.71(b)(2).
- Notice to and consultation with "officials of affected political subdivisions, States and Indian tribes, and any other affected parties," and completion of the routing designation process within 18 months of the notice to the public or notice to other affected jurisdictions. 49 CFR 397.71(b)(3), (6).
- Assurance of "through highway routing * * * between adjacent areas." 49 CFR 397.71(b)(4).
- No unreasonable burden on commerce. 49 CFR 397.71(b)(5).
- Agreement with the proposed routing by all affected States within 60 days of notice, or alternatively, approval by the Administrator pursuant to dispute resolution procedures under 49 CFR 397.75. 49 CFR 397.71(b)(5).
- Reasonable access for vehicles to reach terminals, pickup and delivery points, loading and unloading locations, and facilities for food, fuel, repairs, rest, and safe havens. 49 CFR 397.71(b)(7).
- Consideration of specific factors, including population density, emergency response capabilities,

continuity of routes, alternative routes, effects on commerce, potential delays in transportation, and congestion and accident history. 49 CFR 397.71(b)(9).

In addition, the State must (1) ensure that its political subdivisions comply with FMCSA's standards and procedures (49 CFR 397.71(b)(8)); (2) make information on highway routing designations available to the public "in the form of maps, lists, road signs or some combination thereof" (49 CFR 397.73(a)); and (3) report highway routing designations to FMCSA within 60 days after establishment (49 CFR 397.73(b)).

C. Application of Regulatory Requirements to the DC Act

ATA states in its Application that the District of Columbia did not comply with the public notice and comment period required by 49 CFR 397.71(b)(2). ATA further alleges the District of Columbia did not consult with affected neighboring jurisdictions as required by 49 CFR 397.71(b)(3) and did not receive the agreement of the State of Maryland or the Commonwealth of Virginia as required by 49 CFR 397.71(b)(5). Additionally, ATA states the District of Columbia did not engage in the risk analysis required by 49 CFR 397.71(b)(4).

ATA further maintains that the D.C. Council's findings and the testimony of the D.C. Council members during the session in which the DC Act was enacted contain no discussion or analysis of the factors required by 49 CFR 397.71(b)(9), such as population density, characteristics of alternative highways to be used, analysis of the number of shipments impacted by the DC Act, consideration of comments and concerns of affected persons, impact upon commerce, delays in transportation, and traffic conditions, including motor vehicle accident experience.

In its comments, Yellow Roadway expresses concern that if the DC Act goes unchallenged, other cities and local governments might implement similar measures that would adversely impact the safe and efficient transportation of hazardous material. Yellow Roadway points out the additional miles associated with rerouting increases exposure, driving time and would not ensure an increase in safety or security in the routes chosen. Moreover, Yellow Roadway states a requirement to adhere to different rules and routing requirements in different communities would be confusing, extremely costly, and administratively burdensome and would adversely impact the safe and

secure transportation of hazardous materials.

NTTC asserts the DC Act attempts to shift risk from the District of Columbia to other jurisdictions. NTTC further states that Federal law allows the District of Columbia to seek a legal means of addressing a routing scheme.

NPGA notes that the Federal regulations were developed to address situations where localities shift hazardous materials traffic from one jurisdiction to another. NPGA further states there must be an opportunity for full participation by the motor carriers and the neighboring affected communities when a locality seeks to establish a routing restriction. NPGA also filed a separate application for preemption with the Pipeline and Hazardous Materials Safety Administration (PHMSA) in which it asked PHMSA to find that Federal hazardous materials law preempts the DC Act in its entirety. Because the issues raised by NPGA in its application concern the DC Act and because the issues overlap with the issues raised by ATA in its Application, NPGA's application is being considered in the context of the ATA Application and is in essence treated as a comment filed in the instant proceeding. NPGA states in its application that the DC Act contravenes the concept of national hazardous materials regulatory uniformity. NPGA expresses concerns that the actions of individual jurisdictions, with thoughts of only their own constituents and not a broader regional or national view, will fragment the unified system into balkanized pockets of differing rules and restrictions.

In its comments replying to ATA's Application, the District of Columbia states that it promulgated emergency rules implementing the DC Act, and those rules expressly exempt application of the DC Act to non-railroad carriers until certain conditions are met. In light of the exemption contained in the regulations, the District of Columbia argues the issues raised by ATA's Application are not yet ripe. Specifically, the District of Columbia states that the emergency rules implementing the DC Act exclude carriers who own motor vehicles from the routing requirements until thirty days after (a) a court or agency rules the DC Act is not preempted by Federal hazardous materials law; (b) the Director of the District of Columbia Department of Transportation certifies that the list of criteria set forth in 49 CFR 397.71 have been met; or (c) FMCSA issues a waiver of preemption pursuant to 49 CFR 397.213 and 49 CFR 397.219.

Consequently, the District of Columbia requests FMCSA to deny ATA's Application. In the alternative, the District of Columbia asks FMCSA to stay a decision on ATA's Application until the U.S. District Court for the District of Columbia issues an opinion in *CSX Transportation, Inc. v. Williams* ("CSX")³ relating to preemption, or until one of the three conditions listed in the District of Columbia's rules is satisfied.

The District of Columbia's response to NPGA's application is similar to its response to ATA's Application. Specifically, the District of Columbia states that because the emergency rules implementing the DC Act expressly exempt application of the DC Act to non-railroad carriers until certain conditions are met, the issues raised in NPGA's application are not yet ripe. The District of Columbia states that its rules provide that the routing requirements will not apply to motor carriers until thirty days after one of three conditions have been met, as summarized above in the District of Columbia's response to ATA's Application. The District of Columbia requests FMCSA to deny NPGA's application, or in the alternative, to stay a decision on the application until the United States District Court for the District of Columbia resolves the claims regarding preemption in the CSX proceeding, or until one of the three conditions is satisfied.

ATA filed rebuttal comments responding to the District of Columbia's comments. ATA states that the District of Columbia did not demonstrate in its rebuttal comments that it complied with Federal hazardous materials routing requirements, but instead the District of Columbia opposed ATA's Application on the grounds that the District of Columbia has temporarily delayed the implementation of its routing restrictions with respect to motor carriers. ATA notes that its Application for a preemption determination challenges the DC Act, and not the implementing regulations. ATA states that the routing restriction set forth in the DC Act is self-implementing and that the subsequently issued regulations do not cure the procedural defects in enacting the DC Act.

In its reply, the District of Columbia does not dispute the assertions made by ATA. Significantly, the District of Columbia does not assert that it followed the Federal hazardous

materials requirements as set forth in 49 U.S.C. 5112 and 49 CFR part 397. See *Morrisville, PA Requirements for Transportation of "Dangerous Waste,"* 66 FR 37260, 37264 (July 17, 2001) (finding that Borough of Morrisville did not comply with FMCSA's standards in 49 CFR part 397 after Borough failed to dispute commenters' assertions that the Borough adopted a routing limitation without notice and opportunity to comment). Instead, the District of Columbia argues the issue of preemption is not yet ripe because the regulations implementing the DC Act exempt application of the DC Act to non-railroad carriers until certain conditions are met. The District of Columbia failed to submit any evidence demonstrating compliance with the Federal regulatory requirements in establishing the routing designation in the DC Act.

To additionally develop the factual record in this proceeding, on November 22, 2005, FMCSA sent letters to the Maryland State Highway Administration and the Virginia Department of Transportation asking whether the District of Columbia provided them written notice of the District of Columbia's proposal to prohibit the transportation of certain hazardous materials in the Capitol Exclusion Zone, as is required by 49 CFR 397.71(b)(3). Specifically, at least 60 days prior to establishing a routing designation, the District of Columbia was required by regulation to "provide notice, in writing, of the proposed routing designation to officials responsible for highway routing in all other affected States or Indian tribes." 49 CFR 397.71(b)(3)(i). Moreover, any such routing designation shall be established, maintained, or enforced only if the routing designation is "agreed to by the affected State or Indian tribe within 60 days of receipt of the notice" or the routing designation is approved by the FMCSA Administrator pursuant to dispute resolution procedures. 49 CFR 397.71(b)(5)(ii).

On December 7, 2005, the Maryland State Highway Administration responded to FMCSA's letter, explaining that it was unable to locate any documentation indicating that the District of Columbia sent any such notice to the State of Maryland and likewise was unable to locate documentation indicating that the State of Maryland sent any reply to the District of Columbia regarding the routing designations contained in the DC Act. On January 12, 2006, the Virginia Department of Transportation responded that it similarly was unaware of any notification from the District of

Columbia regarding the routing restrictions at issue in this proceeding. Consequently, FMCSA finds that the District of Columbia did not comply with the requirement in 49 CFR 397.71(b)(3) to provide notice to and consult with officials of affected States. Further, there is no evidence in the record indicating the District of Columbia complied with any of the requirements contained in 49 CFR part 397, subpart C, and the District of Columbia has offered none.

The District of Columbia failed to comply with the statutory requirements in 49 U.S.C. 5112 and FMCSA's standards in 49 CFR part 397 when it enacted the DC Act. The District of Columbia argues the issue of preemption is not yet ripe because the regulations implementing the DC Act do not apply to motor carriers until certain conditions are met.

As discussed below, the issues presented by ATA in its Application are ripe. As an initial matter, however, it should be noted that the ripeness doctrine derives from Article III of the U.S. Constitution, which places limitations on federal judicial powers that are inapplicable to administrative agencies.⁴ Courts have held that an administrative agency is not subject to Article III and related prudential limitations, and accordingly may issue declaratory orders "in mere anticipation of a controversy or simply to resolve an uncertainty."⁵ Thus, while an administrative agency may, where appropriate, exercise its discretion and decline to address a matter before it on ripeness grounds, it is not compelled to do so under the Constitution.

The District of Columbia argues the issues raised by ATA's Application are not yet ripe because the regulations implementing the DC Act do not apply to motor carriers until certain conditions are met. However, the District of Columbia's promulgation of regulations excluding motor vehicle traffic from the routing restrictions until specified criteria are met does not salvage the District of Columbia's failure to comply with Federal standards when it established in the DC Act a highway routing designation over which certain hazardous materials may not be transported. 49 CFR 397.71. As noted by ATA in its rebuttal comments, its Application challenges the DC Act itself and not the implementing regulations.

⁴ *Metropolitan Council of N.A.A.C.P. Branches v. F.C.C.*, 46 F.3d 1154, 1161 (D.C. Cir. 1995) (citing *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409, 1414 (9th Cir.1992)).

⁵ *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999) (citing *Metropolitan Council of NAACP Branches*, 46 F.3d at 1161).

³ *CSX Transportation, Inc. v. Williams*, No. 05cv00338 (D.D.C. filed Feb. 16, 2005) (involving a complaint filed by a railroad company seeking a declaration that the DC Act is invalid).

ATA correctly points out in its rebuttal comments that the District of Columbia's subsequently issued regulations do not cure the procedural defects in enacting the DC Act.

Federal hazardous material law on preemption is triggered when a highway routing designation over which hazardous material may or may not be transported is established, maintained, or enforced. 49 U.S.C. 5125(c). Similarly, FMCSA's regulations require compliance with the highway routing standards in 49 CFR 397.71 when a state establishes or modifies a highway routing designation and maintains or enforces such designation. 49 CFR 397.69. The District of Columbia has established⁶ a highway routing designation through the enactment of the DC Act and has maintained⁷ that highway routing designation by keeping the DC Act current. As such, the District of Columbia was required to comply with the statutory requirements in 49 U.S.C. 5112 and FMCSA's standards in 49 CFR part 397 with regard to each enactment. A highway routing designation made by the District of Columbia that does not comply with the requirements of part 397 is preempted. 49 CFR 397.69(b). The District of Columbia has attempted to unilaterally exempt itself from this obligation by adopting rules that would avoid FMCSA's regulatory requirements until the rule is literally applied to carriers. That is too late and not the intent of FMCSA's regulations. Consequently, FMCSA rejects the District of Columbia's ripeness argument.

Accordingly, the entire DC Act as it applies to motor carriers is preempted by 49 U.S.C. 5125(c)(1) because the District of Columbia failed to comply with FMCSA's standards for establishing highway routing designations issued pursuant to 49 U.S.C. 5112(b) and 49 CFR part 397, subpart C.

V. Ruling

Federal hazardous material transportation law preempts all provisions of the DC Act as it applies to motor carriers.

VI. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 397.223(a), any person aggrieved by this decision may file a petition for

reconsideration within 20 days of publication of this decision in the **Federal Register**. Any party to this proceeding may seek judicial review in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the circuit in which the person resides or has its principal place of business. 49 U.S.C. 5127(a).

This decision will become the final decision of FMCSA 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this determination is filed within 20 days of publication in the **Federal Register**, the action by FMCSA on the petition for reconsideration will be the final decision. 49 CFR 397.223(d).

Issued in Washington, DC, on April 3, 2006.

Warren E. Hoemann,
Deputy Administrator.

[FR Doc. E6-5137 Filed 4-7-06; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2006-24005]

Hours of Service of Drivers: Institute of Makers of Explosives (IME); Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application for exemption from a requirement in its hours-of-service (HOS) rules from the Institute of Makers of Explosives (IME). IME requests that a member of a driving team who is transporting hazardous materials requiring constant attendance in accordance with the Federal Motor Carrier Safety Regulations and who is using the sleeper berth be allowed to exit the sleeper berth for brief specified periods without being considered "on duty." FMCSA requests public comment on IME's application for exemption.

DATES: Comments must be received on or before May 10, 2006.

ADDRESSES: You may submit comments [identified by DOT DMS Docket No. FMCSA-2006-24005] using any of the following methods:

- **Web Site:** <http://dmses.dot.gov/> submit. Follow the instructions for

submitting comments on the DOT electronic docket site.

- **Fax:** 1-202-493-2251.
- **Mail:** Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

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

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the Agency name and docket number for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want to be notified that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). This statement is also available at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Division Chief, Driver and Carrier Operations Division (MC-PSD), Office of Bus and Truck Standards and Operations, phone (202) 366-4009, e-mail MCPSD@fmcsa.dot.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L. 105-178, June 9, 1998, 112 Stat. 107) amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from the motor carrier safety

⁶Merriam Webster's dictionary defines "establish" as "to institute (as a law) permanently by enactment or agreement." Merriam Webster's Collegiate Dictionary 397 (10th ed. 1997).

⁷"Maintain" is defined as "to keep in an existing state." Merriam Webster's Collegiate Dictionary 702 (10th ed. 1997).