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**Department of
Transportation**

Federal Highway Administration

**49 CFR Part 397
Transportation of Hazardous Materials;
Highway Routing; Final Rule**

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 397

[FHWA Docket No. MC-92-6]

RIN 2125-AC80

Transportation of Hazardous Materials; Highway Routing

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is adopting regulations to implement subsections 105 (b) and (c) of the Hazardous Materials Transportation Act of 1975 (HMTA) as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA). The regulations include Federal standards and procedures which the States and Indian tribes must follow if they establish, maintain, or enforce routing designations that (1) specify highway routes over which placarded non-radioactive hazardous materials (NRHM) may and may not be transported within their jurisdictions, and/or (2) impose limitations or requirements with respect to highway routing of such hazardous materials. Included are amendments to the procedures in 49 CFR part 397, subpart E, relating to Federal preemption and waivers of preemption, and new procedures for the resolution of disputes involving State or Indian tribe NRHM routing designations. States and Indian tribes are also required to furnish updated NRHM route information for publication by the FHWA. The existing motor carrier regulations with NRHM routing requirements have been incorporated into this regulation, along with the new requirements which require motor carriers to comply with the NRHM routing designations of States and Indian tribes. The intent of these requirements is to ensure that NRHM are moved safely and that commerce is not burdened by restrictive, uncoordinated, or conflicting requirements of various jurisdictions.

EFFECTIVE DATE: November 14, 1994.

FOR FURTHER INFORMATION CONTACT: Ms. Pamela K. Deadrick, Hazardous Materials Routing and Special Studies Branch (HHS-13), Office of Highway Safety, (202) 366-8788, or Mr. Raymond W. Cuprill, Office of Chief Counsel (HCC-20), (202) 366-0834, Federal Highway Administration, 400 Seventh Street SW., Washington, D.C. 20590-0001. Office hours are from 7:45 a.m. to

4:15 p.m., a.t., Monday through Friday, except for legal Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On November 16, 1990, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101-615, 104 Stat. 3244) was enacted and amended the Hazardous Materials Transportation Act of 1975 (HMTA) (Pub. L. 93-633, 88 Stat. 2156). The FHWA was delegated the responsibility by the Secretary, as published in the Federal Register (56 FR 31343, July 10, 1991; 49 CFR 1.48), to implement subsections 105 (b) and (c) of the HMTA (now codified at 49 U.S.C. §§ 5112 and 5125 (1994), Pub. L. 103-272, 108 Stat. 745). This included the rulemaking and program responsibility for hazardous materials highway routing, with the exception of currently pending applications for inconsistency rulings and non-preemption determinations which remain a responsibility of the Research and Special Programs Administration (RSPA).

Section 5112(b) of title 49, United States Code, requires the Secretary to establish by regulation standards for States and Indian tribes to use in establishing, maintaining, and enforcing these routing designations. These Federal standards shall provide for enhancement of safety; public participation; transportation of hazardous materials between adjacent areas; consultation with other States, Indian tribal and local governments; through highway routing; reasonable time to reach agreement between affected States or Indian tribes; avoidance of unreasonable burden on commerce; timely establishment of State and Indian tribe routing; reasonable routes to terminals and other facilities; State responsibility for local compliance; and a number of "factors" for States and Indian tribes to consider. Section 5112(b)(2) prohibits the Secretary from assigning specific weights to the "factors to consider" in the Federal standards, but Sections 5125(c) and 5112(d) do provide for Federal preemption and dispute resolution of State and Indian tribe routing designations to allow for consistent application of the Federal standards among adjacent jurisdictions.

Section 5112(c) also requires the Secretary, in coordination with the States, to periodically update and publish a list of currently effective hazardous materials highway route designations.

The FHWA recognizes that 49 CFR 177.810 exempts State and local regulations and ordinances regarding the kind, character, or quantity of any hazardous material, except radioactive materials, transported through urban tunnels used for mass transportation from parts 170 to 189 of the hazardous materials regulations. However, this section does not exempt State, Indian tribes and local governments from having to comply with the routing regulations applicable to the transportation of Class 7 (radioactive) materials (49 CFR 397, subpart D) or the routing regulations established herein. Therefore, tunnel routing designations are now subject to the same Federal standards and procedures as are other highway routing designations.

To assist the States and local governments in the development of routes, the DOT published "Guidelines for Selecting Preferred Highway Routes for Highway Route Controlled Quantity Shipments of Radioactive Materials" (latest edition DOT/RSPA/OHMT-89/01 dated August 1992) and "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" (latest edition DOT/RSPA/OHMT-89-02 dated July 1989). The latter publication is being updated to provide guidance on the Federal standards in this regulation. Both guides are useful in developing highway routing requirements for hazardous materials. These documents are available to the public through the National Technical Information Service, Springfield, Virginia 21661.

The FHWA published a notice of proposed rulemaking and a notice of public hearings entitled "Transportation of Hazardous Materials; Highway Routing" in the Federal Register on August 31, 1992 (57 FR 39522). The FHWA requested comments from any interested parties to be submitted to Docket MC-92-6 by October 30, 1992. In addition, the FHWA held four public hearings to solicit comments from interested parties in October at Washington, D.C.; Dallas, Texas; San Francisco, California; and Rosemont, Illinois.

Discussion of Comments

A total of fifty-six commenters responded to this proposed regulation by written submission to the docket and/or presentation at the public hearings. The commenters represented a total of fifty-two organizations, including twenty-seven commercial/trade affiliated organizations representing shippers and carriers, fourteen State government organizations, five local governments,

three Federal agencies, one Indian tribe, one citizens' group, and one consulting firm

Nineteen commenters supported and eight opposed the overall format and/or intent of the proposed regulations. The remaining commenters did not express overall opposition or support for the regulation but did comment on specific parts of the regulation. Fifty-four commenters discussed details of the proposed rule, and many recommended changes to various aspects of the rule. The following topics were of main concern.

Definitions

Definitions were discussed by fifteen commenters who recommended clarification of some definitions and additional definitions for some terms used in the regulation. These comments were submitted from eight members of the shipper-carrier industry, four States, one local government, one Federal agency and a citizens' group.

Nine commenters recommended clarification of the definition of "routing designations." The main concern was that routing designations broadly defined could include licenses, permits, bonds, and other restrictions or requirements which might not be route-specific. In response to these concerns, the FHWA has clarified routing designations to include route-specific features, such as designations of routes, restrictions on routes, curfews/time-of-travel restrictions on routes, lane restrictions, routing bans, port-of-entry requirements, and weight restrictions on routes which are specifically related to NRHM. Common State, Indian tribal, or local regulatory requirements are not "routing designations" when they are not route specific. These can include fee, bonding/insurance, notice, escort, permit, registration, inspection, and communication requirements which are generally applied to entire jurisdictions rather than specific highway routes. Such jurisdictional restrictions are not covered under this regulation. Their possible preemption is determined by the RSPA, not the FHWA. Other restrictions on motor vehicles that are not specific to the transportation of hazardous materials, such as height, weight, or width restrictions for roads and bridges, or prohibitions on the use of downtown streets by trucks over certain sizes, are not affected by this regulation.

Motor Carrier Responsibilities for Routing

Five commenters recommended clarifying the applicability of the rule to placarded and marked vehicles. These

commenters were concerned that the regulation would be applicable to placarded NRHM transport while other motor carrier regulations are applicable to both placarded and marked NRHM transport. The FHWA has amended § 397.67(b), which deals with the motor carriers responsibilities, to include motor vehicles that are marked or placarded.

One State recommended that reasonable deviation cover highway and law enforcement situations that require a driver to take an alternative route. The FHWA agreed with this recommendation and amended § 397.67(b)(3) to provide for highway agency detours, such as in work zones, and law enforcement situations.

The FHWA also amended the terms "Class A or Class B explosives" to "Explosives, in Class 1, Division 1.1, 1.2, 1.3" so as to be consistent with the current terminology in the Hazardous Materials Regulations (49 CFR 171-180).

Quantities of NRHM

Four commenters recommended limiting the placarded quantity and type of NRHM for which the regulation applied, such as to bulk rather than to vehicles transporting small individual cylinders of hazardous materials. The FHWA did not adopt this recommendation because 49 U.S.C. § 5112(a)(1) requires that the highway routing regulations apply to a vehicle if such vehicle is transporting in commerce a hazardous material for which placarding of the vehicle is required. This section authorized the Secretary of Transportation to extend application of the regulations to other hazardous materials, but did not authorize limiting their application to only "in bulk" hazardous materials.

Factors

Twenty-four commenters discussed the factors which States and Indian tribes must consider in developing NRHM routing designations. These commenters included twelve shippers and carriers, four States, three local governments, three Federal agencies, one citizens' group and one consulting firm. Eleven commenters recommended clarification of the factors and development of specific measures or benchmarks by which the factors could be evaluated. These commenters were concerned that the factors can be applied differently by various jurisdictions, resulting in different routing designations. Sixteen commenters indicated that specific risk criteria should be considered more important than the other factors, while seven commenters recommended the

Federal government establish minimum criteria for each of the factors. The FHWA declined to adopt these recommendations because the HMTUSA specifically provided the States and Indian tribes with the flexibility to determine how each standard should be applied.

Five commenters mentioned the importance of providing updated Federal guidelines for analyzing the factors; five commenters recommended additional factors, including accident histories, the use of tunnels, and hours of service for drivers; and several commenters recommended clarification of the terms "unreasonably burden commerce," "climatic conditions," and "congestion factors." In response to these comments, the FHWA revised several of the factors. The factor on "terrain considerations" was amended to include both accident severity and clean up of spills; "alternative routes" was amended to specifically consider safety; "climatic conditions" was amended to provide examples, such as snow, high winds, ice, and fog; and "consideration of accident history" was added to the congestion factor. Additionally, the FHWA is in the process of updating the guidelines for analyzing routing designations and intends to address each of the factors in the updated publication.

Grandfather Provision

The notice of proposed rulemaking contained a section incorporating the grandfather clauses included in the HMTA as amended by the HMTUSA. One clause provides that routing designations established before November 16, 1990, are not required to comply with the factors discussed in § 397.71 of the regulation. Another clause provides that the routing designations established before the date of issuance of these regulations do not have to be in accordance with the routing standards dealing with public participation, consultation with other jurisdictions, and timeliness.

The FHWA received numerous comments from the public expressing their concern that incorporation of these grandfather clauses in the regulation resulted in unnecessary confusion. The FHWA agrees. A strict reading of the grandfather clauses would make the factors established in this regulation retroactively applicable to routing designations established after enactment of the HMTUSA on November 16, 1990. It would be impracticable and unduly burdensome on the States and Indian tribes to interpret the statute in such a manner. The FHWA would be applying to these routing designations factors that

id not exist in Federal regulations at that time. As a result, the FHWA has decided to apply the factors established in this final rule prospectively from 30 days after the date of publication in the Federal Register.

This action should not be interpreted to mean that the routing designations established prior to the publication of the final rule are not subject to Federal preemption. These routing designations are still subject to Federal preemption under 49 U.S.C. § 5125(a), if—

(1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible;

(2) The requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

Jurisdictional Coordination

Twenty-two commenters addressed the issue of jurisdictional coordination between Federal, State, Indian tribal, and local governments in the routing designation process. These commenters included ten members of the shipper-carrier industry, eight States, two local governments, one Federal agency, and one consulting firm. Fourteen commenters expressed concern about the role of the Federal government versus State and local governments. Many of the commenters did not recommend changes to the regulation, but expressed their concerns about the administration of this regulation.

Eleven commenters discussed the potential for conflicts between States, between local jurisdictions, and between States and local jurisdictions. Eight commenters were concerned that the required communications between States, Indian tribes, and local jurisdictions would not be adequately coordinated. The FHWA revised § 397.71(b)(3)(i), dealing with consultation with others, to provide for better interagency coordination.

Comments from shippers and carriers recommended increasing the State, Indian tribal, or local governments' burden in establishing and administering a routing designation. For example, their recommendations included requiring States to produce a risk analysis for each class of NRHM for a specific route designation and for each route designation that transfers risk from one jurisdiction to another. They also recommended that States develop consistent standards to be used by all local jurisdictions. State and local governments, on the other hand, expressed concerns about the proposed

requirements that would be imposed on them in establishing and maintaining routing designations. These comments focused on the administrative burdens associated with the proposed requirements, such as those involving records maintenance, public hearings, and those that would require a finding that any routing designation would enhance public safety.

The FHWA believes that the increased requirements proposed by the shipper and carrier industries would unduly burden State and local governments without producing a corresponding safety benefit. Similarly, the FHWA believes that the requirements proposed in the NPRM are the minimum necessary to ensure that States or Indian tribes adopting routing designations fully and fairly consider all of the factors required under the law. Accordingly, the FHWA is promulgating this final rule without a change in the proposed coordination requirements for establishing and administering route designations.

Two commenters recommended that States or local governments be allowed to have varying standards which could differ based on the type and quantity of material involved. The FHWA believes that no changes are necessary since States are already provided the latitude to determine how the standards in this regulation or any additional standards a State or Indian tribe select are to be applied.

Dispute Resolution, Preemption, and Waivers of Preemption

Preemption, waivers of preemption, and dispute resolution procedures were discussed by fourteen commenters. These commenters included nine members of the shipper-carrier industry, three States, one Federal agency, and one citizens' group. Four commenters addressed eligibility or standing to petition under the dispute resolution process, with three commenters recommending the local jurisdiction be eligible to participate in the dispute resolution process. The FHWA decided not to adopt these recommendations because the HMTUSA authorizes the FHWA only to resolve disputes between States and between States and Indian tribes. The FHWA believes that States will consider the views and concerns of local jurisdictions in formulating their positions on preemption and preemption waiver determinations. Additionally, the dispute resolution procedures provide affected local jurisdictions with notice and the opportunity to participate, through their State, in the process.

Eight commenters addressed waiver of preemptions. Two suggested that local governments could use this process to circumvent State administration of routing designations. Another recommended the FHWA prevent local governments from seeking a waiver of preemption when the State has disapproved the designation, and one remarked that the waiver of preemption process provides protection for jurisdictions where unique circumstances justify extraordinary routing measures. The FHWA has decided not to adopt these recommendations because it believes that the finding required by 49 CFR 397.219 (that the waived routing designation provides an equal or higher level of highway safety to the public without unreasonably burdening commerce) is sufficient to ensure that the waiver process is not used arbitrarily. Additionally, States are able to express their views as part of the process.

Four commenters discussed the status of a routing designation pending a preemption determination, with three recommending the use of an administrative stay until the determination is issued. Another recommended the interim status of a routing designation be decided by the FHWA. Two commenters recommended an administrative appeals process. The FHWA believes no changes are necessary because the procedures in 49 CFR part 397, subpart E, maintain the status of a highway routing pending a preemption determination and provide for administrative reconsideration and judicial review.

The FHWA, in considering all the comments and the current provisions in subpart E of 49 CFR part 397, determined that the proposed provisions should be incorporated into the existing procedures in subpart E rather than being included as redundant procedures unique to this final rule. Consequently, § 397.79 Preemption determination procedure; § 397.81 Waivers of preemption; § 397.85 Timeliness; and § 397.87 Judicial review of preemption or waiver of preemption decision have been removed and this final rule has been amended to refer to the applicable sections of subpart E, and subpart E is amended to refer to the provisions of this final rule.

Public Notification

Public notification procedures were discussed by twenty-nine commenters. This included seventeen members of the shipper-carrier industry, five States, three Federal agencies, two local governments, one citizens' group and

one consulting firm. Thirteen commenters discussed public participation. Highway users tended to recommend more public notification through publications, such as newspapers or the Federal Register, while two government agencies recommended reducing the publication requirements because of costs. Additionally, five commenters discussed public hearing requirements and recommended providing an opportunity for a public hearing rather than requiring a public hearing. The FHWA has revised the regulation to grant States and Indian tribes discretion to hold public hearings on proposed NRMH routing designations after providing the public with notice and an opportunity to comment. The FHWA also believes publication of the notice for both the comment period and the public hearing, if one is held, to be most appropriately administered at the State and Indian tribe level, through publications, such as the official register of the State regulations, rather than through publication in the Federal Register.

Reporting of Routing Designations

Ten commenters discussed the requirement for State and Indian tribes to report routing designations to the FHWA. The majority recommended the FHWA frequently publish new and existing route designations in the Federal Register. Several also recommended that States and Indian tribes, as a prerequisite, be required to report their intention to establish a route designation to the FHWA for publication in the Federal Register. Upon further review, the FHWA determined it would be more practical and appropriate to provide some form of current information on established routing designations; consequently, the FHWA is considering alternative methods, such as establishing an electronic bulletin board, to update and provide this information to the public in a timely manner along with publishing annual lists of routing designations in the Federal Register.

Signs, Maps and Lists of Routing Designations

Ten commenters were concerned about the use and availability of road signs and maps. Highway users were generally in favor of requiring the use of road signs. They recommended that routing designations be enforceable only to the extent they are signed. Several States, notably California and Colorado, have successfully operated rather extensive and efficient routing systems through the use of lists and maps rather

than signs. The requirement to sign all routing designations could also be a considerable administrative and economic burden for States which have or develop extensive routing designations. Therefore, the FHWA declines to adopt this suggestion.

Reasonable Routes to Terminals and Other Facilities

Reasonable access to terminals and other facilities was discussed by fifteen commenters, including twelve shippers and carriers, one State, one Federal entity, and one local agency.

Nine commenters representing shippers and carriers of fuels and farm supplies recommended more flexibility be provided for their products in designating route restrictions because many of their deliveries are local and unplanned. Seven of these commenters, mostly representing short-haul, irregular route carriers, recommended they be exempted from the proposed limits on reasonable access deviations, because they could impose a financial burden on them. The FHWA declined to adopt these recommendations because the HMTUSA was specific on providing the States and Indian tribes with the flexibility to accommodate local and special interests which may be unique to an area's geographic or commercial situation.

Three government agencies recommended a larger maximum deviation distance, whereas three carriers recommended a shorter maximum deviation. In response to these comments, the FHWA amended § 397.71(b)(7) by replacing the proposed requirement that such routes or deviations not exceed twice the distance of the most direct route with a requirement that States or Indian tribes which establish or provide for reasonable access to and from designated routes use the shortest practicable route based upon consideration of 13 factors listed in paragraph (b)(9) of that section.

Several commenters recommended clarification of the applicability of reasonable access and through routing provisions to local deliveries. The FHWA revised the reasonable access provisions to also apply to pickup and deliveries.

Through Routing

Through routing issues were discussed by twenty-seven commenters, including nineteen shippers and carriers, three Federal agencies, three States, one Indian tribe, and one citizens' action group. Fifteen commenters recommended a decrease in the maximum deviation distance and

two commenters favored an increase to as much as twice the distance of the most direct route. Four commenters recommended elimination of percentage-based permissible routing deviations and suggested that consideration of the factors would be adequate. Three commenters also indicated that it was inappropriate to use an arbitrary percentage to determine the length of permissible deviations when such a percentage has no correlation to safety. Four commenters recommended clarifying how the maximum deviation limitation would be applied to each designated routing encountered during a trip or to the sum of all deviations contained in an entire trip. Seven commenters recommended clarifying the difference between through routing and reasonable routes to terminals and other facilities, and when the separate regulations are applicable. Several of the commenters recommended that deviations from through routing should only be implemented when the deviation is safer than the through route or at least as safe and not an unreasonable burden on commerce. The FHWA has revised the section on through routing to consider public safety and economic burden (rather than use only percentages and mileage measurements). The revised section provides a relationship between route deviations and public safety and requires that new routing designations have substantially lower relative risk than the current routing. When the relative risk of the routing deviation is not substantially lower, the potential economic effect becomes a significant factor.

Discussion of Final Rule

Purpose and Scope

The FHWA is implementing the requirements of the HMTUSA in a new subpart C, Routing, in Part 397 of Title 49, Code of Federal Regulations. This regulation implements the requirements of the HMTUSA by establishing Federal standards and procedures which States and Indian tribes are required to follow if they establish, maintain, or enforce routing designations for the highway transportation of non-radioactive hazardous materials. The intent of these requirements is to ensure that NRMH are moved safely and that commerce is not burdened by restrictive, uncoordinated, or conflicting requirements of various jurisdictions. The standards and requirements of this regulation, however, allow for the flexibility intended in the HMTUSA. The FHWA will not designate routes

used for transporting NRHM. Any State or Indian tribe that chooses to establish, maintain, or enforce NRHM routing designations is required to comply with the Federal standards established in this regulation. The States and Indian tribes are also required to ensure that any NRHM routing designations by political subdivisions under their jurisdiction are established, maintained, and enforced in accordance with this regulation. Any NRHM routing designations that fail to comply with the standards can be preempted. Any State, political subdivision thereof, Indian tribe, business, organization, or individual affected by a NRHM routing designation can apply to the Federal Highway Administrator (Administrator) for a preemption determination pursuant to 49 CFR 397, subpart E, which contains procedures for Federal preemption determinations, waivers of preemptions, and petition for reconsideration. Procedures for dispute resolution are included in this final rule (49 CFR 397, subpart C).

The regulations require States and Indian tribes to report existing NRHM routing designations within their boundaries to the FHWA and, thereafter, to report any additions or changes to these routing designations 60 days after the effective date of designation.

Applicability

The provisions of this regulation are applicable to States, including any political subdivisions, and Indian tribes that establish, maintain, or enforce any highway routing designations over which placarded NRHM may or may not be transported. The regulation also contains several provisions which are applicable to motor carriers transporting NRHM.

This regulation requires States, including political subdivisions, and Indian tribes to comply with Federal standards in establishing NRHM highway routing designations and to follow certain procedures. This regulation also requires States and Indian tribes that establish, maintain, or enforce routing designations to report these routing designations to the FHWA.

Motor Carrier Responsibility for Routing

Motor carriers transporting NRHM as of the effective date of this regulation are required to comply with the NRHM routing designations of States or Indian tribes. Where States and Indian tribes have not established NRHM routing designations, motor carriers are required to operate in accordance with 49 CFR 397.67, previously set forth in 49 CFR 397.9(a), over routes that avoid heavily populated areas, places where crowds

are assembled, tunnels, narrow streets, or alleys. The routing plan requirements previously set forth in 49 CFR 397.9(b) for transporting Class 1 explosives, divisions 1.1, 1.2, 1.3, as defined in 49 CFR 173.50 and 173.53, have also been incorporated into the same section.

The Federal regulations for highway routing of Class 7 (radioactive) materials, 49 CFR 397, subpart D, remain unchanged by this regulation.

State and Indian Tribe Jurisdiction Over Routing

States and Indian tribes are required to comply with this regulation if they impose routing designations for NRHM. If a political subdivision of a State wishes to impose NRHM routing designations, the State is required to ensure that the political subdivision follows these regulations, including coordination with and approval by the routing agency designated by the Governor. The State is responsible for all NRHM routing designations that local jurisdictions establish, including resolving any disputes between local jurisdictions. The regulation requires the States and Indian tribes to designate routing agencies who will be responsible for ensuring that all NRHM routing designations are made in accordance, and substantively comply, with the procedural requirements of the Federal standards.

Procedures for States and Indian Tribes

1. Federal Standards

This regulation establishes standards which closely follow the specific requirements of 49 U.S.C. § 5112(b) and include procedures for States and Indian tribes to follow if they impose routing designations for NRHM transportation by motor carriers. The Federal standards provide for enhancement of safety; public participation; consultation with other State, local, and tribal governments; through routing; reasonable time to reach agreement between affected States or Indian tribes; not unduly burdening commerce; timely establishment of State and Indian tribe routing; reasonable routes to terminals; State responsibility for local compliance; and a number of "factors to consider." The list of "factors to consider" which States (political subdivisions) and Indian tribes are required to use in regulating routing is contained in § 397.71 of this final rule and includes the factors required by 49 U.S.C. § 5112(b)(1)(I) and additional factors addressing climatic conditions, congestion, and accident analysis. In accordance with 49 U.S.C. § 5112(b)(2), the FHWA will not assign any specific

weight to be given by the States or Indian tribes in considering the factors. Additionally, in analyzing these factors, the States or Indian tribes shall use the most current version of "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" or an equivalent routing analysis.

2. Public Information and Reporting Requirements

Section 5112(c) of title 49, United States Code, requires the Secretary, in coordination with the States, to periodically update and publish a list of current hazardous materials highway routing designations. Accordingly, the FHWA will compile and publish annually in the Federal Register a listing of all hazardous materials routing designations. The FHWA will also maintain a list of all current designations, including additions and changes, and provide this information, upon request, to interested parties. To comply with this requirement, the FHWA is, through this regulation, requiring States and Indian tribes to initially submit, to the FHWA, information on all the existing NRHM routing designations within their boundaries. After the initial submission, any new or changed NRHM routing designation shall be submitted to the FHWA 60 days after the routing designation takes effect.

The States (political subdivisions) and Indian tribes are required to use methods such as maps, listings, road signs, or some combination of these measures as may be needed to adequately inform the public of their NRHM routing designations.

3. Dispute Resolution

Disputes involving highway routing agreements between political jurisdictions within a State are to be resolved by the State's routing agency. Unresolved disputes involving through highway routing or routing designation agreements between States or Indian tribes may be submitted to the Administrator for resolution. Details of the dispute shall be furnished to the Administrator by the petitioner, together with a description of what was done to try to settle it, plus a recommendation of the actions that should be taken by the Administrator to resolve the dispute. The FHWA has revised § 397.75 of this regulation to clearly set forth the importance of public safety in any routing designation. The State or Indian tribe filing the petition for dispute resolution shall be responsible for providing a comparative risk analysis for the proposed routing designation and the current routing condition. Once

a dispute is submitted to the Administrator, no court action may be taken for one year or until after a decision by the Administrator, whichever occurs first.

4. Judicial Review of Dispute Decision

A party to a dispute who is adversely affected by a dispute resolution decision of the Administrator can obtain judicial review of the decision if such court action is filed within 90 days after the Administrator's decision becomes final.

5. Preemption Determinations and Waivers of Preemption

On September 24, 1992, the FHWA published an interim final rule (57 FR 44152) amending 49 CFR 397 by adding a subpart E which established procedures applicable to preemption determinations and waivers of preemption. This final rule amends subpart E to make these procedures applicable to NRHM routing designations which are now included in subpart C.

Any highway routing designation established, maintained or enforced by a State, a political subdivision thereof, or an Indian tribe is preempted if:

(1) Compliance with both the highway routing designation and any requirement of chapter 51 of title 49, United States Code, or of a regulation prescribed thereunder is not possible;

(2) The highway routing designation, as applied or enforced is an obstacle to accomplishing and carrying out chapter 51 of title 49, United States Code, or the regulations prescribed thereunder; or

(3) A State or Indian tribe establishes, maintains or enforces any routing designation that does not comply with the procedural and substantive requirements of the Federal standards set forth in this regulation.

Any person, including a State, political subdivision thereof, or Indian tribe, affected by a NRHM routing designation can apply to the Administrator for a determination of whether such routing designation is preempted.

A State, political subdivision, or Indian tribe may apply to the Administrator for a waiver of preemption. The Administrator is authorized to waive preemption of a NRHM routing designation, based on a determination that it provides equal or better protection to the public than these regulations would provide, and it does not unreasonably burden commerce.

Technical Amendments

Public Law 103-272 (108 Stat. 745), enacted on July 5, 1994, codified certain

U.S. transportation laws as title 49, United States Code. Like other transportation statutes, the Hazardous Materials Transportation Act was repealed and its contents restated in title 49. This final rule changes the citations contained in the NPRM to conform to the provisions of the new law.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This rulemaking document was reviewed under E.O. 12866, "Regulatory Planning and Review." The FHWA has determined that this regulation is a significant regulatory action within the meaning of that Order. This rulemaking is considered a significant regulation under Department of Transportation regulatory policies and procedures because of substantial congressional and public interest. This interest involves minimizing risks while allowing reasonable highway routing for the transportation of NRHM. The regulation does not require the establishment of NRHM routing designations or the use of Federal preemption determinations, waivers of preemption, and dispute resolution, but does provide standards and procedures which are required to be followed if these actions are taken. The FHWA believes that for those States or Indian tribal governments which choose to adopt routing designations, the benefits from implementing these regulations, such as NRHM routing designation continuity, public participation, uniform standards, and preemption and dispute resolution procedures, will be greater than the costs, such as providing the required documentation, coordination, and analysis which allow discretion in level of detail. The FHWA anticipates that the economic impact of this regulation will be minimal based upon a regulatory evaluation.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; 5 U.S.C. 601-612), the FHWA has evaluated the effects of this regulation on small entities such as Indian tribes, local governments, and small businesses. The HMTUSA requires the Secretary to adopt standards which States and Indian tribes must follow if they establish, maintain, or enforce NRHM routing designations (specific highway routes over which NRHM may or may not be transported within their jurisdictions, limitations or requirements for highway routing). The

regulation does not require the use of NRHM routing designations or Federal preemption determinations, waivers of preemption, and dispute resolution, but provides standards and procedures which are required to be followed if these actions are chosen to be used. The discretionary nature of the actions allows for cost saving options to be used in balancing the needs in commerce and the risks in the transportation of NRHM. To date, relatively few States and local jurisdictions have chosen to establish NRHM routing designations. The FHWA has concluded that the regulation does not substantially affect the ability of, or cost to, local jurisdictions establishing needed NRHM routing designations. The preemption and dispute resolution procedures provide all entities more effective and efficient means of resolving routing issues. Based on this evaluation, the FHWA certifies that this regulation does not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. The HMTUSA requires the Secretary to adopt standards which States and Indian tribes must follow if they establish, maintain, or enforce NRHM routing designations (specific highway routes over which NRHM may or may not be transported within their jurisdictions, limitations or requirements for highway routing). The regulation recognizes the State and Indian tribal role in the designation of highway routes for NRHM while de-emphasizing the role of local governments. The regulation provides for discretion by the States and Indian tribes as to whether they impose NRHM routing designations. Each State and Indian tribe is free to establish NRHM routing designations tailored to its own needs in accordance with the Federal standards, using the DOT "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials," or an equivalent routing analysis which adequately considers overall risk to the public. States and localities have a better understanding of the relative safety of the highways within their jurisdictions than does the Federal government.

The regulation limits the policymaking discretion of the States, their political subdivisions and Indian tribes. The regulation is necessary, however, to achieve the purposes and implement the requirements of the HMTUSA. Accordingly, it is certified

(iv) The State or Indian tribe shall keep a record of the names and addresses of the officials notified pursuant to this section and of any consultation or meeting conducted with these officials or their representatives. Such record shall describe any concern or disagreement expressed by the officials and any action undertaken to resolve such disagreement or address any concern.

(4) Through routing. In establishing any NRHM routing designation, the State or Indian tribe shall ensure through highway routing for the transportation of NRHM between adjacent areas. The term "through highway routing" as used in this paragraph means that the routing designation must ensure continuity of movement so as to not impede or unnecessarily delay the transportation of NRHM. The State or Indian tribe shall utilize the procedures established in paragraphs (b)(2) and (b)(3) of this section in meeting these requirements. In addition, the State or Indian tribe shall make a finding supported by a risk analysis conducted in accordance with paragraph (b)(1) of this section, that the routing designation enhances public safety. If the risk analysis shows—

(i) That the current routing presents at least 50 percent more risk to the public than the deviation under the proposed routing designation, then the proposed routing designation may go into effect.

(ii) That the current routing presents a greater risk but less than 50 percent more risk to the public than the deviation under the proposed routing restriction, then the proposed routing restriction made by a State or Indian tribe shall only go into effect if it does not force a deviation of more than 25 miles or result in an increase of more than 25 percent of that part of a trip affected by the deviation, whichever is shorter, from the most direct route through a jurisdiction as compared to the intended deviation.

(iii) That the current route has the same or less risk to the public than the deviation resulting from the proposed routing designation, then the routing designation shall not be allowed.

(5) Agreement of other States; burden on commerce. Any NRHM routing designation which affects another State or Indian tribe shall be established, maintained, or enforced only if:

(i) It does not unreasonably burden commerce, and

(ii) It is agreed to by the affected State or Indian tribe within 60 days of receipt of the notice sent pursuant to paragraph (b)(3)(i) of this section, or it is approved

by the Administrator pursuant to § 397.75.

(6) Timeliness. The establishment of a NRHM routing designation by any State or Indian tribe shall be completed within 18 months of the notice given in either paragraph (b)(2) or (b)(3) of this section, whichever occurs first.

(7) Reasonable routes to terminals and other facilities. In establishing or providing for reasonable access to and from designated routes, the State or Indian tribe shall use the shortest practicable route considering the factors listed in paragraph (b)(9) of this section. In establishing any NRHM routing designation, the State or Indian tribe shall provide reasonable access for motor vehicles transporting NRHM to reach

(i) Terminals.

(ii) Points of loading, unloading, pickup and delivery, and

(iii) Facilities for food, fuel, repairs, rest, and safe havens.

(8) Responsibility for local compliance. The States shall be responsible for ensuring that all of their political subdivisions comply with the provisions of this subpart. The States shall be responsible for resolving all disputes between such political subdivisions within their jurisdictions. If a State or any political subdivision thereof, or an Indian tribe chooses to establish, maintain, or enforce any NRHM routing designation, the Governor, or Indian tribe, shall designate a routing agency for the State or Indian tribe, respectively. The routing agency shall ensure that all NRHM routing designations within its jurisdiction comply with the Federal standards in this section. The State or Indian tribe shall comply with the public information and reporting requirements contained in § 397.73.

(9) Factors to consider. In establishing any NRHM routing designation, the State or Indian tribe shall consider the following factors.

(i) Population density. The population potentially exposed to a NRHM release shall be estimated from the density of the residents, employees, motorists, and other persons in the area, using United States census tract maps or other reasonable means for determining the population within a potential impact zone along a designated highway route. The impact zone is the potential range of effects in the event of a release. Special populations such as schools, hospitals, prisons, and senior citizen homes shall, among other things, be considered when determining the potential risk to the populations along a highway routing. Consideration shall be given to the amount of time during

which an area will experience a heavy population density.

(ii) Type of highway. The characteristics of each alternative NRHM highway routing designation shall be compared. Vehicle weight and size limits, underpass and bridge clearances, roadway geometrics, number of lanes, degree of access control, and median and shoulder structures are examples of characteristics which a State or Indian tribe shall consider.

(iii) Types and quantities of NRHM. An examination shall be made of the type and quantity of NRHM normally transported along highway routes which are included in a proposed NRHM routing designation, and consideration shall be given to the relative impact zone and risks of each type and quantity.

(iv) Emergency response capabilities. In consultation with the proper fire, law enforcement, and highway safety agencies, consideration shall be given to the emergency response capabilities which may be needed as a result of a NRHM routing designation. The analysis of the emergency response capabilities shall be based upon the proximity of the emergency response facilities and their capabilities to contain and suppress NRHM releases within the impact zones.

(v) Results of consultation with affected persons. Consideration shall be given to the comments and concerns of all affected persons and entities provided during public hearings and consultations conducted in accordance with this section.

(vi) Exposure and other risk factors. States and Indian tribes shall define the exposure and risk factors associated with any NRHM routing designations. The distance to sensitive areas shall be considered. Sensitive areas include, but are not limited to, homes and commercial buildings; special populations in hospitals, schools, handicapped facilities, prisons and stadiums; water sources such as streams and lakes; and natural areas such as parks, wetlands, and wildlife reserves.

(vii) Terrain considerations. Topography along and adjacent to the proposed NRHM routing designation that may affect the potential severity of an accident, the dispersion of the NRHM upon release and the control and clean up of NRHM if released shall be considered.

(viii) Continuity of routes. Adjacent jurisdictions shall be consulted to ensure routing continuity for NRHM across common borders. Deviations from the most direct route shall be minimized.

(ix) Alternative routes. Consideration shall be given to the alternative routes to, or resulting from, any NRHM route designation. Alternative routes shall be examined, reviewed, or evaluated to the extent necessary to demonstrate that the most probable alternative routing resulting from a routing designation is safer than the current routing.

(x) Effects on commerce. Any NRHM routing designation made in accordance with this subpart shall not create an unreasonable burden upon interstate or intrastate commerce.

(xi) Delays in transportation. No NRHM routing designations may create unnecessary delays in the transportation of NRHM

(xii) Climatic conditions. Weather conditions unique to a highway route such as snow, wind, ice, fog, or other climatic conditions that could affect the safety of a route, the dispersion of the NRHM upon release, or increase the difficulty of controlling it and cleaning it up shall be given appropriate consideration

(xiii) Congestion and accident history. Traffic conditions unique to a highway routing such as: traffic congestion; accident experience with motor vehicles, traffic considerations that could affect the potential for an accident, exposure of the public to any release, ability to perform emergency response operations, or the temporary closing of a highway for cleaning up any release shall be given appropriate consideration

§ 397.73 Public information and reporting requirements

(a) Public information. Information on NRHM routing designations must be made available by the States and Indian tribes to the public in the form of maps, lists, road signs or some combination thereof. If road signs are used, those signs and their placements must comply with the provisions of the Manual on Uniform Traffic Control Devices,² published by the FHWA, particularly the Hazardous Cargo signs identified as R14-2 and R14-3 shown in Section 2B-43 of that Manual.

(b) Reporting and publishing requirements. Each State or Indian tribe, through its routing agency, shall provide information identifying all NRHM routing designations which exist within their jurisdictions on November 14, 1994 to the FHWA, HHS-30, 400 7th St., SW., Washington, D.C. 20590-0001

²This publication may be purchased from the Superintendent of Documents U.S. Government Printing Office (GPO), Washington, D.C. 20402 and has Stock No. 050-001-81001-8. It is available for inspection and copying as prescribed in 49 CFR part 7, appendix D. See 23 CFR 655, subpart F

by March 13, 1995. The State or Indian tribe shall include descriptions of these routing designations, along with the dates they were established. This information may also be published in each State's official register of State regulations. Information on any subsequent changes or new NRHM routing designations shall be furnished within 60 days after establishment to the FHWA. This information will be available from the FHWA, consolidated by the FHWA, and published annually in whole or as updates in the Federal Register. Each State may also publish this information in its official register of State regulations.

(Approved by the Office of Management and Budget under control number 2125-0554)

§ 397.75 Dispute resolution.

(a) Petition. One or more States or Indian tribes may petition the Administrator to resolve a dispute relating to an agreement on a proposed NRHM routing designation. In resolving a dispute under these provisions, the Administrator will provide the greatest level of safety possible without unreasonably burdening commerce, and ensure compliance with the Federal standards established at § 397.71 of this subpart.

(b) Filing. Each petition for dispute resolution filed under this section must:

(1) Be submitted to the Administrator, Federal Highway Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590-0001. Attention: HCC-10 Docket Room, Hazardous Materials Routing Dispute Resolution Docket.

(2) Identify the State or Indian tribe filing the petition and any other State, political subdivision, or Indian tribe whose NRHM routing designation is the subject of the dispute.

(3) Contain a certification that the petitioner has complied with the notification requirements of paragraph (c) of this section, and include a list of the names and addresses of each State, political subdivision, or Indian tribe official who was notified of the filing of the petition.

(4) Clearly set forth the dispute for which resolution is sought, including a complete description of any disputed NRHM routing designation and an explanation of how the disputed routing designation affects the petitioner or how it impedes through highway routing. If the routing designation being disputed results in alternative routing, then a comparative risk analysis for the designated route and the resulting alternative routing shall be provided.

(5) Describe any actions taken by the State or Indian tribe to resolve the dispute.

(6) Explain the reasons why the petitioner believes that the Administrator should intervene in resolving the dispute.

(7) Describe any proposed actions that the Administrator should take to resolve the dispute and how these actions would provide the greatest level of highway safety without unreasonably burdening commerce and would ensure compliance with the Federal standards established in this subpart.

(c) Notice.

(1) Any State or Indian tribe that files a petition for dispute resolution under this subpart shall mail a copy of the petition to any affected State, political subdivision, or Indian tribe, accompanied by a statement that the State, political subdivision, or Indian tribe may submit comments regarding the petition to the Administrator within 45 days.

(2) By serving notice on any other State, political subdivision, or Indian tribe determined by the Administrator to be possibly affected by the issues in dispute or the resolution sought, or by publication in the Federal Register, the Administrator may afford those persons an opportunity to file written comments on the petition.

(3) Any affected State, political subdivision, or Indian tribe submitting written comments to the Administrator with respect to a petition filed under this section shall send a copy of the comments to the petitioner and certify to the Administrator as to having complied with this requirement. The Administrator may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond.

(d) Court actions. After a petition for dispute resolution is filed in accordance with this section, no court action may be brought with respect to the subject matter of such dispute until a final decision has been issued by the Administrator or until the last day of the one-year period beginning on the day the Administrator receives the petition, whichever occurs first.

(e) Hearings; alternative dispute resolution. Upon receipt of a petition filed pursuant to paragraph (a) of this section, the Administrator may schedule a hearing to attempt to resolve the dispute and, if a hearing is scheduled, will notify all parties to the dispute of the date, time, and place of the hearing. During the hearing the parties may offer any information pertinent to the resolution of the dispute. If an agreement is reached, it may be

stipulated by the parties, in writing, and, if the Administrator agrees, made part of the decision in paragraph (f) of this section. If no agreement is reached, the Administrator may take the matter under consideration and announce his or her decision in accordance with paragraph (f) of this section. Nothing in this section shall be construed as prohibiting the parties from settling the dispute or seeking other methods of alternative dispute resolution prior to the final decision by the Administrator

(f) Decision. The Administrator will issue a decision based on the petition, the written comments submitted by the parties, the record of the hearing, and any other information in the record. The decision will include a written statement setting forth the relevant facts and the legal basis for the decision.

(g) Record. The Administrator will serve a copy of the decision upon the petitioner and any other party who participated in the proceedings. A copy of each decision will be placed on file in the public docket. The Administrator may publish the decision or notice of the decision in the Federal Register

§ 397.77 Judicial review of dispute decision.

Any State or Indian tribe adversely affected by the Administrator's decision under § 397.75 of this subpart may seek review by the appropriate district court of the United States under such proceeding only by filing a petition with such court within 90 days after such decision becomes final.

4 In § 397.201, paragraph (a) is revised and paragraph (c) is amended by revising the definitions for "Act", "Administrator", "routing agency" and

"routing designation" and by adding new definitions for "hazardous material" and "Indian tribe" to read as follows:

§ 397.201 Purpose and scope of the procedures.

(a) This subpart prescribes procedures by which:

(1) Any person, including a State, political subdivision thereof, or Indian tribe, directly affected by any highway routing designation for hazardous materials may apply to the Administrator for a determination as to whether that highway routing designation is preempted under 49 U.S.C. § 5125, or § 397.69 or § 397.203 of this part; and

(2) A State, political subdivision thereof, or Indian tribe may apply to the Administrator for a waiver of preemption with respect to any highway routing designation that the State, political subdivision thereof, or Indian tribe acknowledges to be preempted by 49 U.S.C. § 5125, or § 397.69 or § 397.203 of this part, or that has been determined by a court of competent jurisdiction to be so preempted.

(c) For purposes of this subpart, Act means 49 U.S.C. § 5101 *et seq.*, formerly known as the Hazardous Materials Transportation Act

Administrator means the Federal Highway Administrator, who is the chief executive of the Federal Highway Administration, an agency of the United States Department of Transportation, or his/her designate.

Hazardous material means a substance or material, including a hazardous substance, which has been

determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, or property, when transported in commerce, and which has been so designated

Indian tribe has the same meaning as contained in § 4 of the Indian Self-Determination and Education Act, 25 U.S.C. 450b.

Routing agency means the State highway agency or other State agency designated by the Governor of a State, or an agency designated by an Indian tribe, to supervise, coordinate, and approve the highway routing designations for that State or Indian tribe. Any highway routing designation made by a political subdivision of a State shall be considered a designation made by that State.

Routing designation includes any regulation, limitation, restriction, curfew, time of travel restriction, lane restriction, routing ban, port-of-entry designation, or route weight restriction applicable to the highway transportation of hazardous materials over a specific highway route or portion of a route.

5 In § 397.203, paragraph (a)(?) is revised to read as follows.

§ 397.203 Standards for determining preemption.

(3) The highway routing designation is preempted pursuant to § 397.69(h) of this part