

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:** Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing regulations regarding the highway routing of hazardous materials to implement the requirements of section 105 (b) and (c) of the Hazardous Materials Transportation Act of 1975 (HMTA) (Pub. L. 93-633) as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101-615). The regulations would include Federal standards and procedures which the States and Indian tribes would be required to 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. Also included are procedures relating to Federal preemption, waivers of preemption and resolution of disputes involving State or Indian tribe NRHM routing designations. States and Indian tribes would be required to furnish updated NRHM route information for publication by the FHWA. The existing motor carrier regulations with NRHM routing requirements would be incorporated into the proposed NRHM regulation, along with the new requirements which would require the motor carriers to comply with the NRHM routing designations of States and Indian tribes. Four public hearings are planned to provide an opportunity for interested parties to comment on this proposed regulation. A notice of public hearings with the dates, locations, times and other details for these hearings is published elsewhere in today's issue of the *Federal Register* under the title "Transportation of Hazardous Materials; Highway Routing."

DATES: Comments must be received on or before October 30, 1992.**ADDRESSES:** Submit written, signed comments to FHWA Docket No. MC-92-6, room 4232, HCC-10, Office of Chief

Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Commenters may, in addition to submitting "hard copies" of their comments, also submit a floppy disk in standard or high density format containing files compatible with word processing programs such as WordPerfect, Wordstar, or Microsoft "Word" for IBM systems; or WordPerfect or Microsoft Word for Macintosh. The disks should be clearly labeled with the software format used (e.g., WordPerfect 5.0 [IBM] or Microsoft Word 4.0 [Mac]).

All comments received will be available for examination at the above address between 8:30 a.m. and 3 p.m., e.t., Monday through Friday, except for legal Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT:

Mr. Henry W. Sandhusen, Traffic Control Division (HHS-32), Office of Highway Safety, (202) 366-2218; Mr. Raymond Cuprill or Mr. Eric Kuwana, 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 7:30 a.m. to 4 p.m., e.t., Monday through Friday, except for legal Federal holidays.

SUPPLEMENTARY INFORMATION:**Background**

All sectors of the economy and all communities in the nation are dependent on the transportation of hazardous materials. It is estimated that four billion tons of regulated hazardous materials are transported annually and that approximately 500,000 movements of hazardous materials occur each day.

Despite an excellent safety record, the transportation of hazardous materials continues to be of concern to Congress, the public, and to Federal, State and local officials. Several States, including Colorado and California, as well as some regional and local governments have taken action to designate highway routes and/or impose route restrictions or limitations affecting the highway transportation of certain hazardous materials. While these localized routing designations are intended to improve safety, the proliferation of uncoordinated State and local routing designations could impede the free flow of commerce, have little or no demonstrable positive effect on public safety, and result in the exportation of risk from one jurisdiction to other jurisdictions. As a result of these

concerns, section 105(b) of the Hazardous Materials Transportation Act of 1975 (HMTA) (Pub. L. 93-633, 88 Stat. 2156), as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101-615, 104 Stat. 3244), requires the Secretary of Transportation (Secretary) to establish additional Federal regulations for the highway routing of hazardous materials. Also, section 105(c) of the HMTA, as amended by the HMTUSA, requires the Secretary to publish a list of hazardous materials highway route designations.

The Department of Transportation (DOT) currently has in effect two hazardous materials highway routing regulations (49 CFR 177.825, and 49 CFR 397.9) issued pursuant to the authority granted by the HMTA. Another routing related regulation is 49 CFR 177.810 which covers regulation of hazardous materials transported through urban tunnels used for mass transit. To assist State 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 January 1989) and "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" (latest edition DOT/RSPA/OHMT-89-2 dated July 1989). The guidelines were originally published in 1981 by the Research and Special Programs Administration (RSPA) and in 1980 by the FHWA, respectively. They have been used by a number of jurisdictions to develop hazardous materials transportation routes. The latest editions of the guidelines are available for review in the docket or may be requested from the FHWA Traffic Control Division contact person listed in this preamble under the heading "For Further Information Contact."

Currently, motor carriers must select routes for transporting placarded radioactive materials in accordance with 49 CFR 177.825, which requires them to consider information such as accident rates, transit time, population density, time of day, and day of week during which transportation will occur. Additionally, for "highway route controlled quantity" (HRCQ) shipments of radioactive materials (e.g., spent nuclear fuel), motor carriers must use "preferred routes" which include most Interstate highways and some State-designated highways.

The DOT concluded that the limited access Interstate Highway System, generally, would provide safe routing for

HRCQ shipments based on available risk assessments and the extensive comments received in response to its rulemaking in Docket HM-164. In developing 49 CFR 177.825, the DOT recognized the significant concerns and interests that State, regional, and local governments have in the highway routing of radioactive materials and the important role which their actions and knowledge of local conditions can have in reaching effective routing decisions. States are required to consult and coordinate with affected local jurisdictions and other affected States to ensure consideration of impacts and continuity of designated routes. The States are given considerable latitude to carry out their highway routing functions. DOT's nearly ten years of experience with the highway routing requirements for HRCQ shipments of radioactive materials generally have been successful. This, however, may be because the current number of such shipments is very small, and most of the shipments are of a long-haul, interstate nature.

For highway transportation of other hazardous materials, a generic routing rule (49 CFR 397.9) has been in effect for more than 20 years. This regulation requires that, unless there is no practicable alternative, motor vehicles must be operated over routes which do not go through or near heavily populated areas, places where crowds are assembled, or through tunnels, narrow streets, or alleys. The operating convenience of the carrier is not a basis for deciding whether it is practicable to operate a motor vehicle in accordance with this requirement. Although 49 CFR 397.9 attempts to embody a "common-sense" approach to the routing of hazardous materials, the section is difficult to enforce because it is so broad and general in nature.

Another regulation, 49 CFR 177.810, states that "Except as regards radioactive materials, nothing in 49 CFR parts 170-189 shall be construed as to nullify or supersede regulations established and published under authority of a State or municipal ordinance regarding the kind, character or quantity of any hazardous material permitted by such regulation to be transported through urban tunnels used for mass transportation." With regard to routing of hazardous materials, 49 CFR 177.810 does not permit exceptions to 49 CFR 177.825 which pertains to radioactive hazardous material (RAM) or to 49 CFR part 397 which pertains of all hazardous materials.

On April 7, 1988, under Docket HM-203 (53 FR 11618), the Research and

Special Programs Administration (RSPA) published an advance notice of proposed rulemaking (ANPRM) relating to the transportation safety aspects of the highway routing of placarded non-radioactive hazardous materials (NRHM). The RSPA notice was issued to consider the extent to which the DOT needed to exercise its rulemaking authority regarding NRHM, to ensure that State and local hazardous materials routing decisions were consistent, cost-effective and conducive to the public safety. It was designed to obtain information regarding the routing decisions being made by carriers, shippers and State and local governments, and the effects of their routing actions. It recognized the significant role of State and local governments in making highway routing decisions, and the fact that the Federal government lacks their specific knowledge concerning local highways, land use patterns, highway geometry, and the emergency response capabilities of their jurisdictions. RSPA held public hearings which generated approximately 400 pages of transcript material. In addition, 82 written comments were received in response to the ANPRM. The transcript and comments are available for review in the FHWA docket.

The ANPRM did not propose any specific action but presented three possible alternatives to the existing routing requirements to illustrate the range of possible Federal regulatory approaches that might be used. Briefly, these alternatives were: (A) Require hazardous materials carriers to comply with a set of routing standards and an analytic process similar to that required for HRCQ shipments of radioactive materials; (B) Require shippers and carriers of hazardous materials to conduct risk analyses of highway routes in accordance with federally prescribed procedures and to select only those routes which had the lower level of risk; and (C) Require each motor carrier of certain extremely hazardous materials to be licensed for each hazardous materials route. Implicit among these was the alternative of retaining the existing regulations for routing of hazardous materials (e.g., 49 CFR 397.9) and other regulations having routing implications.

Most of the comments received in response to the ANPRM were submitted by shippers (31), carriers (7), and their affiliated trade associations (17). Comments represented two fairly distinct viewpoints on the need for additional routing standards for hazardous materials.

Commenters in Favor of Enhanced Routing Standards

This group made the following major points: (1) There is a need for consistent Federal guidelines and criteria for the highway routing of hazardous materials; (2) the absence of such guidelines and criteria has led to the development of conflicting and uncoordinated routing requirements at the State and local level; and (3) of the alternatives presented in the ANPRM, an alternative providing similar regulatory requirements to those of 49 CFR 177.825 would best delineate the appropriate roles of the Federal, State and local governments. This would include establishment of a State routing agency, through which local governments would act in designating routes for NRHM. There were differences among the commenters favoring enhanced routing standards on a range of issues, including which hazardous materials ought to be subject to enhanced routing controls.

Commenters Opposed to Enhanced Routing Standards

This group of commenters was essentially of the view that the current routing rule for hazardous materials, 49 CFR 397.9, has worked reasonably well during the many years it has been in effect and should be changed only if it can be shown that such change would significantly improve public safety. Further, despite the generally successful experience with the routing standards for HRCQ shipments of radioactive materials, these commenters were of the view that it would be a mistake to assume that equal success could be achieved by establishing a similar routing regulatory system for the more than 30,000 hazardous materials in transportation. These commenters noted the sharp contrast between the annual totals of less than 300 shipments of radioactive materials subject to the routing requirements of 49 CFR 177.825 and the more than 183 million shipments of hazardous materials. They contended that while the shipment of HRCQ materials is usually of a long-haul, interstate nature, the majority of hazardous materials shipments are intrastate, regional, and local; therefore, anything more elaborate than a very general routing rule, such as embodied in 49 CFR 397.9, could result in an extremely intricate and burdensome system of routing standards. They argued that such a system also would be essentially unenforceable and would not enhance public safety. The complexity of hazardous materials transportation patterns and related delivery schedules,

and the vast number of origins and destinations, they claimed, defy anything other than a very general routing rule.

Comments From State Governments and Political Subdivisions

Comments about the RSPA ANPRM were received from only ten States, and eleven regional and local political subdivisions, despite the fact that the ANPRM stressed the important role that State and local governments have in making effective routing decisions. Of the ten State agencies that did respond to the advance notice, several favored the adoption of a Federal regulatory framework similar to that used for the routing of radioactive materials, i.e., alternative A described above. These commenters, however, asserted that routing standards to be established under this framework should focus exclusively on materials poisonous by inhalation or on other extremely hazardous materials. The majority of commenters from State and local government agencies contended that the routing standards as exemplified by 49 CFR 397.9 are adequate and that much more rigorous and convincing evidence is required before any changes should be made to these standards. One State declared that the "proposed options for additional routing regulations impose unnecessary burdens on government and commerce without a demonstrable increase in safety." Another stated that, as far as the establishment of routing criteria, anhydrous ammonia alone "would pose a virtually impossible routing problem in an agricultural state." One county suggested that any changes in the current routing standards, as represented by the options discussed in the ANPRM, "could easily become an administrative nightmare accompanied by an avalanche of paperwork," and that "gasoline, while obviously quite hazardous, is present in such a ubiquitous manner that it is difficult to conceive the practicality or possibility of regulating all necessary routes." Another State response was to "emphasize that any Federal activities or proposal should be published in the form of guidelines or recommendations so each State can provide for its population based on (its) unique characteristics."

None of these commenters addressed the dilemma posed by having more than 30,000 governmental jurisdictions who may attempt to impose their own routing rules and restrictions on the transportation of hazardous materials.

The State of Colorado's Statewide Hazardous Materials Routing System

The most extensive comments on the issues associated with routing hazardous materials were provided by the State of Colorado. Because Colorado has had in-depth experience in implementing a statewide routing network for hazardous materials, its comments and the nature of the statewide routing system it has adopted are discussed at length.

In July 1987, the State General Assembly passed the Hazardous Materials Transportation Act of 1987. This Act authorized, among other things, the designation of routes for the transportation of hazardous materials other than shipments of HRCQ radioactive materials. The Colorado State Patrol was delegated the responsibility for developing and implementing a statewide hazardous materials highway routing system.

In consultation with local governments and the State Highway Department, the Colorado State patrol instituted the process of designating a statewide hazardous materials highway network. As part of this process, it analyzed the risks associated with its 9,198-mile State highway system, in terms of traffic volume, accident rates, population, and other factors and employed the Interstate Highway System in Colorado as the core component of the network.

In conducting its statewide analysis of routing alternatives, Colorado closely followed the aforementioned DOT "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" to develop hazardous materials transportation routes.

In developing its hazardous materials highway system, Colorado conducted a study to determine the characteristics of hazardous materials transportation patterns within the State. It was found that about 9 percent of all truck trips within the State involved hazardous materials, and that only 3 percent of all hazardous materials trips were passing through the State. In other words, the transportation of hazardous materials occurs mainly to serve Colorado residents and businesses.

The study also revealed that the three most commonly transported classes of hazardous materials in Colorado, comprising 92 percent of all hazardous materials trips, are flammable liquids (such as gasoline, crude oil, paint and methanol), flammable gases (such as liquefied petroleum gas and acetylene) and combustible liquids (such as diesel fuel and fuel oil). With the information

from this study, the Colorado State Patrol developed a statewide hazardous materials transportation network. This network applies to all vehicles transporting hazardous materials that are subject to placarding requirements under 49 CFR 172.504, except shipments of HRCQ radioactive materials as defined in 49 CFR 173.403. Vehicles carrying gasoline, diesel fuel, or liquefied petroleum gas are not affected unless a city or county specifically petitions that such vehicles be included; and vehicles carrying hazardous materials necessary for agricultural production to or from a farm or ranch are exempt. Also exempt from restrictions is that portion of a trip that is for pickup or delivery of hazardous materials after the vehicle has approached the pickup or delivery point as closely as is reasonable and feasible on a designated route.

Colorado's experience demonstrates how a State can determine and tailor the scope and characteristics of a routing system to its own particular needs. Also, it is generally only at the State level that there exists the necessary combination of data expertise on such matters as State highway conditions, accident rates, knowledge of local road conditions and characteristics, environmental issues, demographic factors, and appropriate sensitivity to local, regional and interstate concerns.

Colorado's experience also indicates that a large proportion of trips involving the transport of hazardous materials by truck are of a local and regional, or more generally, of an intrastate nature, and that these shipments are closely linked to the commercial activities of the State and its economic health and welfare. The highly local and regional of hazardous materials transportation in Colorado is not peculiar to it alone; it is characteristic of the transportation patterns of many other States. In fact, the average shipment distance for all hazardous materials transported by truck in the United States is about 200 miles. The average shipment distance is much less for gasoline and other refined petroleum products which, as noted previously, account for more than half of all hazardous materials transported in the United States. The short shipment distances, when coupled with numerous delivery points which change from day to day and month to month, make it extremely difficult to designate a fixed routing system for these materials.

The Colorado experience also shows that while there is a definite role for local and regional governments in designating routes for hazardous materials, this role cannot be exercised

in an isolated, unilateral, independent fashion. Thus, despite the local and regional nature of hazardous materials transportation patterns in Colorado, the State of Colorado does not allow local or county governments to regulate the routing of these materials. Unless local or county routing actions are coordinated at a higher level and informed by a broader perspective, significant economic and safety dislocations could result. Therefore, it is at the State level where the safety concerns and hazardous materials transportation patterns associated with local and regional governments can best be properly coordinated and integrated into a cohesive, unified hazardous materials transportation network.

Hazardous Materials Transportation Uniform Safety Act of 1990

On November 16, 1990, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101-615, 104 Stat. 3244) was enacted. The FHWA was delegated the responsibility by the Secretary, as published in the *Federal Register* (56 FR 31343, July 10, 1991), to implement sections 105(b) and (c) of the Hazardous Materials Transportation Act of 1975 (HMTA), as amended by Section 4 of the HMTUSA. This included transferring the rulemaking and program responsibility for hazardous materials highway routing from RSPA to the FHWA, with the exception of the currently pending applications for inconsistency rulings and non-preemption determinations, which will remain a RSPA responsibility. Comments and other materials submitted to the RSPA docket (HM-203) have been transferred and are available in the FHWA docket established by this NPRM.

Section 4 of the HMTUSA partially amends section 105(b) of the HMTA (49 U.S.C. 1804(b)), and provides that " * * * each State and Indian tribe may establish, maintain and enforce: (A) Specific highway routes over which hazardous materials may and may not be transported by motor vehicle in the area which is subject to the jurisdiction of such State or Indian tribe, and (B) limitations and requirements with respect to highway routing." These "routing designations", as defined in the proposed regulation, would include regulation by or of such features as times, lanes, routes, types of loads or vehicles, inspections, permits and fees which would specifically apply to or affect the highway routing of hazardous materials.

Section 4 of the HMTUSA requires the Secretary to establish, by regulation, Federal standards which would be

required to be followed by the States and Indian tribes if they establish, maintain or enforce routing designations. The Federal standards must 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; 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 to consider." Section 4 prohibits the Secretary from assigning specific weights to the "factors to consider" in the Federal standards but does provide for Federal preemption and dispute resolution of State and Indian tribe routing designations to allow for reasonably consistent application of the Federal standards among adjacent jurisdictions. The Federal routing regulations, as a minimum, are required to be applicable to motor vehicles transporting in commerce hazardous materials for which placarding of the vehicle is required in accordance with 49 CFR 172.504. However, section 4 does not require that the existing radioactive routing regulations be revised and, therefore, no changes are proposed for those regulations in this rulemaking. Also, the proposed routing regulations, as required by the HMTUSA, would not supersede or affect application of the existing Federal truck size and weight regulations.

Section 4 of the HMTUSA also partially amends section 105(c) of the HMTA (49 U.S.C. 1804(c)) and requires the Secretary, in coordination with the States, to periodically update and publish a list of currently effective hazardous materials highway route designations.

Discussion of Proposed Regulations

Purpose and Scope

The FHWA is proposing regulations to implement the requirements of the HMTUSA in a new subpart C, Routing, in part 397 of title 49, Code of Federal Regulations. This proposed regulation would implement the requirements of the HMTUSA by establishing Federal standards and procedures which States and Indian tribes would be required to follow if they establish, maintain or enforce routing designations for the highway transportation of non-radioactive hazardous materials (NRHM). The intent is to ensure that NRHM are moved safely and that commerce is not burdened by restrictive,

uncoordinated or conflicting requirements of various jurisdictions. For example, the regulation would require that through routing be maintained by prohibiting a forced deviation of over 100 miles or an increase of more than 25% in a trip length, whichever is shorter, from the most direct route. This would prevent a jurisdiction from imposing unreasonable routes or delays, with the consequential extra costs for the motor carrier. Although the proposed regulation limits the policy making discretion of the States, political subdivisions or Indian tribes if they decide to control or regulate NRHM routing, the standards and requirements of this regulation allow flexibility as prescribed or allowed by the HMTUSA. The FHWA does not propose to designate or approve routes used for transporting NRHM. However, any State or Indian tribe that chooses to establish, maintain or enforce NRHM routing designations would be required to follow the Federal standards being established by this rulemaking. The States and Indian tribes would also be required to ensure that any NRHM routing designations by political subdivisions under their jurisdiction are made in accordance with these standards. Any NRHM routing designations that fail to comply with these standards would be preempted by the HMTA. Any person, including a State, political subdivision thereof, or Indian tribe affected by such a NRHM routing designation could apply to the Administrator for a preemption determination. Procedures for obtaining Federal preemption determinations, waivers of preemptions and dispute resolutions are included in the proposed regulation.

The proposed routing regulations would require States and Indian tribes to report existing NRHM routing designations within their boundaries to the FHWA and, thereafter, to report any new additions or changes to these routing designations when established.

The motor carriers transporting NRHM would be required to comply with the State and Indian tribe NRHM routing designations, or, if no such designations, the routing requirements currently set forth in 49 CFR 397.9(a) which would be incorporated into the proposed regulation. The routing plan requirements currently set forth in 49 CFR 397.9(b) for transporting Class A or Class B explosives also would be incorporated into the proposed NRHM regulation.

Federal regulations for highway routing of radioactive materials, under 49 CFR 177.825, will remain unchanged

by this rulemaking. The FHWA and the RSPA are currently considering the moving of the highway routing provisions of 49 CFR 177.825 into 49 CFR part 397, and the changing of the location for reporting from the RSPA to the FHWA. These issues will be addressed in a separate rulemaking action.

When this regulation 49 CFR part 397, subpart C is issued, 49 CFR 177.810 which specifically applies to tunnels used for mass transit would no longer be applicable to the highway routing of hazardous materials. Because 49 CFR 177.810 would no longer be applicable to the highway routing of hazardous materials, comments are invited regarding whether 49 CFR 177.810 should be deleted from the hazardous materials regulations.

Applicability

The provisions of this proposed regulation would be applicable to States, including any political subdivisions, and Indian tribes that establish routing designations affecting the transportation of non-radioactive hazardous materials for which placarding of the vehicle is required pursuant to the Federal hazardous materials regulations. The proposed regulations also contain several provisions which would be applicable to motor carriers transporting in commerce NRHM for which placarding of the vehicle is required under Federal regulations.

The HMTUSA authorizes the Secretary to extend the applicability of the regulation to all hazardous materials. Therefore, the FHWA is hereby soliciting comments from the public as to whether other hazardous materials should be covered by the proposed regulations. As stated earlier in this document, existing regulations governing highway route designations for the transportation of radioactive materials will remain in 49 CFR 177.825; however, FHWA intends to incorporate the regulation into 49 CFR part 397 as part of a separate rulemaking action in the future.

This proposed regulation would be specifically applicable to NRHM routing designations. The general term "routing designations" as defined in the proposed regulation would include any regulation, limitation, or restriction which would have the effect of restricting or prohibiting the transportation of all hazardous materials over a highway route, a specific portion of a route, or during a specific time period. Accordingly, this proposed regulation would be applicable to NRHM routing designations—such as curfews or time

limitations, lane restrictions, prior notice, bonding, permit, and escort requirements—that affect the transportation of NRHM.

Any routing designation, as defined, would be subject to the jurisdiction of the FHWA. Regulations, limitations, or restrictions affecting the transportation of hazardous materials and which are not related to routing designations, such as those relating to packaging, labeling, shipping papers, and reporting of releases, would not be affected by this proposed rule and would remain under the jurisdiction of the RSPA. Other regulations, limitations, or restrictions on motor vehicles which are not specific to the transporting of hazardous materials, such as height, width or weight restrictions for roads and bridges or prohibitions on use of downtown streets by trucks over certain sizes, would not be affected or reported.

Motor Carrier Responsibility for Routing

Motor carriers transporting NRHM would be required to comply with the NRHM routing designations of States or Indian tribes. Where States and Indian tribes do not have NRHM routing designations, motor carriers would be required to operate over routes which avoid heavily populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys, as is currently required by 49 CFR 397.9. The proposed rule would incorporate this and the written route plan requirement of § 397.9 into the proposed § 397.67.

Motor carriers transporting radioactive hazardous materials would continue to follow the requirements of existing 49 CFR 177.825, which would remain unchanged by this rulemaking. The reporting requirements of § 177.825 will be modified so that the information is sent to the FHWA instead of the RSPA in a separate rulemaking action which will be separately published in the Federal Register.

State and Indian Tribe Jurisdiction Over Routing

This portion of the proposed rule would establish regulations that must be followed by States and Indian tribes if they impose routing designations for NRHM. If a political subdivision of a State wished to impose NRHM routing designations, the State would be required to ensure that the political subdivision follows these regulations including coordination with and approval by the routing agency designated by the Governor. The States would be responsible for any NRHM routing designations that local jurisdictions establish, including

resolving any disputes between subdivisions. The proposed regulations would require the States and Indian tribes to designate routing agencies, which would ensure that all NRHM routing designations are made in compliance with the Federal standards.

Procedures for States and Indian Tribes

1. Federal Standards

The proposed Federal regulations include standards which closely follow the specific requirements of the HMTUSA 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 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 State and Indian tribes would be required to use in regulating routing is contained in the proposed § 397.71 and includes the factors required by the HMTUSA and proposed additional factors regarding climatic conditions and congestion. The list also includes a proposed explanation for each factor. In accordance with the HMTUSA, the FHWA will not assign any specific weight to be given by the States or Indian tribes in considering the factors. These factors, together with the "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials", DOT/RSPA/OHMT-89-02, July 1989 (or an equivalent routing analysis) would be used in making any NRHM routing designations. Failure to comply with the standards would result in preemption. In order to ensure compliance with the Federal standards, the FHWA would monitor the practices and procedures being used by the States and Indian tribes.

2. Public Information and Reporting Requirements

The HMTUSA requires the Secretary, in coordination with the States, to periodically update and publish a list of currently effective hazardous materials highway routing designations. Accordingly, the FHWA proposes to compile and publish in the Federal Register, annually, a listing of all

hazardous materials routing designations. To comply with this requirement, the FHWA proposes to require States and Indian tribes to initially submit, to FHWA, information on all the existing NRHM routing designations within their boundaries. After the initial submission, any new or changed NRHM routing designation would be required to be submitted to FHWA within 60 days after establishment of such routing designation. Any NRHM routing designation which is not reported to the FHWA would be considered preempted. The States' and Indian tribes' routing agencies would report the required information to the FHWA.

The States and Indian tribes would be required to consider and use additional 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 through highway routing or agreements between political jurisdictions within a State would be settled by the State's routing agency. Disputes involving through highway routing or agreements between States or Indian tribes would be submitted to the Federal Highway Administrator for resolution. Details of the dispute would be furnished, together with a description of what was done to try to settle it, plus a recommendation for action by the Administrator. Once a dispute is submitted to the Administrator, no court action could 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 could obtain judicial review of the decision if such court action is filed within 90 days after the Administrator's decision becomes final.

5. Preemption.

Any person, including a State, political subdivision thereof, or Indian tribe, affected by a NRHM routing designation could apply to the Administrator for a determination of whether such routing designation is preempted. Any NRHM routing designation would be preempted if it did not comply with the requirements in the Federal standards. Detailed procedures are in the proposed regulation for carrying out this provision. Preemption would not apply if a waiver of preemption is granted by the

Administrator, if the grandfather provision as noted in paragraph number 7, below, applies, or if Federal law provides otherwise.

6. Waivers of Preemption

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

7. Grandfather Provisions

The proposed regulations would incorporate the grandfather clause of the HMTUSA, which allows routing designations which were established before the date of issuance of these regulations to be exempted from the: (1) Public participation, (2) consultation and (3) timeliness requirements of the proposed Federal standards. In addition, the proposed regulations would incorporate the HMTUSA requirement that allows routing designations established before the date of the HMTUSA enactment (November 16, 1990) to be exempted from complying with the "factors to be considered" by the States or Indian tribes in making routing designations.

8. Timeliness

Petitions for preemption determinations and waivers of preemption would be considered denied if the Administrator did not take action on an application within 180 days.

9. Judicial Review of Preemptions or Waivers of Preemption Decisions

A party to a proceeding involving a preemption determination or waiver of preemption could seek review of the Administrator's decision in a U.S. District Court if a petition were filed with the court within 60 days after the decision become final.

Request for Comments

Specific comments pertaining to the practicability and any alternatives to the proposed regulation are requested. The FHWA is particularly interested in receiving responses to the following specific questions:

1. Will the proposed Federal standards, particularly the "factors to consider," provide for the safe through-movement of NRHM or should other specific factors be established?
2. Are the proposed provisions of 49 CFR 397.71(b)(4) for through routing (no deviation of more than 100 miles or an

increase of more than 25 percent in the trip length, whichever is shorter) and routes to terminals (no deviation over twice the shortest route) reasonable in terms of costs and effects or would other distances or percentage deviations be more appropriate?

3. Should stricter Federal standards be applied for some types and quantities of HRHM or is the proposed standard, which allows States and Indian tribes flexibility, considered adequate and desirable?

4. Are the dispute resolution procedures reasonable and adequate?

5. How should the routing information be reported by the States and Indian tribes?

6. What, if any, situations or problems could arise from the FHWA/RSPA jurisdictional overlap of routing and non-routing issues.

7. Comments are requested on anticipated costs and benefits associated with this rulemaking.

Commenters are not limited to responding to the above issues and may submit any comments or relevant information on the highway routing of hazardous materials in responding to this docket.

Rulemaking Analysis and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this rulemaking is not major within the meaning of Executive Order 12291. 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 proposed regulations would not require the use of NRHM routing designations or Federal preemption determinations, waivers of preemption, and dispute resolution but would provide standards and procedures which would be required to be followed if these actions are chosen to be used. The benefits from implementing the proposed regulations, such as NRHM routing designation continuity, public participation, uniform standards, and preemption and dispute resolution procedures, are considered greater than the costs of providing the required coordination, documentation, and analysis which would allow discretion in level of detail. The FHWA anticipates that the economic impact of this rulemaking will be minimal and,

therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; 5 U.S.C. 605(b)), the FHWA has evaluated the effects of this proposed rule on small entities such as local governments and businesses. The proposed regulations would not require the use of NRHM routing designations or Federal preemption determinations, waivers of preemption, and dispute resolution but would provide standards and procedures which would be required to be followed if these actions are chosen to be used. The proposed discretionary nature of the actions would allow 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 (2) and local jurisdictions (approximately 20) have chosen to establish NRHM routing designations. The grandfather provisions would allow these existing NRHM routing designations to remain without full re-justification. The FHWA has concluded that the proposed regulation would not substantially affect the ability of or cost to local jurisdictions in establishing needed NRHM routing designations. The preemption and dispute resolution procedures provide all small entities more effective and efficient means of resolving routing issues. The benefits from implementing the proposed regulations, such as routing continuity, public participation, uniform standards, and preemption and dispute resolution procedures, are considered greater than the costs of providing the required coordination, documentation, and analysis which, for the most part, would be flexible and discretionary in level of detail. Based on the evaluation, the FHWA certifies that this rulemaking would not have a significant economic impact on a substantial number of small entities. The need to further evaluate economic consequences will be reviewed on the basis of comments submitted in response to this notice and the public meetings.

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 and may not be transported within their

jurisdictions; limitations or requirements for highway routing). The proposed rule would recognize the State and Indian tribe roles in the designation of highway routes for NRHM while de-emphasizing the role of local governments. The proposed rule would allow discretion by the States and Indian tribes as to whether they impose NRHM routing designations. Each State and Indian tribe would be 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 proposed NRHM routing standards, however, recognize that it is difficult for local governments to designate highway routes that are sensitive to national and State transportation needs.

The proposed rule would limit policy making discretion of the States, their political subdivisions and Indian tribes. The proposed rule is necessary, however, to achieve the purposes and implement the requirements of the HMTUSA. Accordingly, it is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order as well as the applicable legislative authority for this proposal.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

The information collection, reporting, and record-keeping provisions in § 397.73 of this proposed rule are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, attention: Desk Officer for the Department of Transportation. All comments must reference the title for this notice, "Transportation of

Hazardous Materials, Highway Routing."

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 397

Hazardous materials transportation, Highways and roads, Motor carrier safety permits.

In consideration of the foregoing, the Federal Highway Administration proposes to amend title 49, Code of Federal Regulations, subtitle B, chapter III, part 397, by adding subpart C as set forth below.

Issued on: August 18, 1992.

T.D. Larson,
Administrator.

PART 397—TRANSPORTATION OF HAZARDOUS MATERIALS

1. The authority citation for part 397 is revised to read as follows:

Authority: 49 App. U.S.C. 1801 *et seq.*; 49 CFR 1.48.

§ 397.9 [Removed]

2. Part 397 is amended by removing § 397.9 and by adding a new subpart C to read as follows:

Subpart C—Routing

Sec.	
397.61	Purpose and scope.
397.63	Applicability.
397.65	Definitions.
397.67	Motor carrier responsibility for routing.
397.69	Highway routing designations; preemption.
397.71	Federal standards.
397.73	Public information and reporting requirements.
397.75	Dispute resolution.
397.77	Judicial review of dispute decision.
397.79	Preemption determinations; procedure.
397.81	Waivers of preemption.
397.83	Grandfather provisions.
397.85	Timeliness.

Sec.

397.87 Judicial review of preemption or waiver of preemption decision.

Subpart C—Routing

§ 397.61 Purpose and scope.

This subpart contains routing requirements and procedures that States and Indian tribes are required to follow if they establish, maintain, or enforce routing designations over which placarded non-radioactive hazardous materials (NRHM) may and may not be transported by motor vehicles.

§ 397.63 Applicability.

The provisions of this subpart apply to any State or Indian tribe that establishes, maintains, or enforces routing designations over which NRHM may and may not be transported by motor vehicle. They also apply to any motor carrier that transports or causes to be transported placarded NRHM in commerce.

§ 397.65 Definitions.

For purposes of this subpart, the following definitions apply:

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

Commerce. Any trade, traffic, or transportation in the United States which is between a place under the jurisdiction of a State or Indian tribe and any place outside of such jurisdiction; or is solely within a place under the jurisdiction of a State or Indian tribe.

FHWA. The Federal Highway Administration, an agency within the Department of Transportation.

Hazardous material. A substance or material 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 section 4 of the Indian Self-Determination and Education Act, 25 U.S.C. 450(b).

Motor carrier. A for-hire motor carrier or a private motor carrier of property. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment or accessories.

Motor vehicle. Any vehicle, machine tractor, trailer, or semitrailer propelled

or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof.

NRHM. A non-radioactive hazardous material transported by motor vehicle in quantities which require placarding, pursuant to Tables 1 and 2 of 49 CFR 172.504. The term NRHM does not include radioactive materials covered by 49 CFR 177.825.

Political subdivision. A municipality, public agency or other instrumentality of one or more States, or a public corporation, board, or commission established under the laws of one or more States.

Radioactive material. Any material having a specific activity greater than 0.002 microcurie per gram ($\mu\text{Ci/g}$), as defined in 49 CFR 173.403.

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

Routing designations. Any regulation, limitation, or restriction which would have the effect of restricting or prohibiting the transportation of hazardous materials over a highway route, a specific portion of a route, or during a specific time period. This includes such highway route restrictions as curfews or time limitations, lane restrictions, prior notice, bonding, permit, and escort requirements, that affect the transportation of hazardous materials.

Secretary. The Secretary of Transportation.

State. A State of the United States, District of Columbia, Commonwealth of Puerto Rico, Commonwealth of the Northern Mariana Islands, the Virgin Islands, American Samoa or Guam.

§ 397.67 Motor carrier responsibility for routing.

(a) A motor carrier transporting NRHM shall comply with NRHM routing designations of a State or Indian tribe pursuant to this subpart.

(b) Where States and Indian tribes have not designated NRHM routes pursuant to this subpart, the motor carrier shall operate over routes which do not go through or near heavily populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys, except where the motor carrier determines that:

(1) There is no practicable alternative,

(2) A reasonable deviation is necessary to reach terminals, points of loading and unloading, facilities for food, fuel, repairs, rest, or a safe haven, or

(3) A reasonable deviation is required by emergency conditions.

(c) Operating convenience is not a basis for determining whether it is practicable to operate a motor vehicle in accordance with paragraph (b) of this section.

(d) Before a motor carrier requires or permits a motor vehicle containing Class A or Class B explosives, defined in 49 CFR 173.53 and 173.68, respectively, to be operated, a written route plan that complies with this section must be prepared and a copy furnished to the driver. However, the driver may prepare the written plan as agent for the motor carrier when the trip begins at a location other than the carrier's terminal.

(e) Motor carriers transporting radioactive materials must comply with § 177.825 of this title.

§ 397.69 Highway routing designations; preemption.

(a) Any State or Indian tribe that establishes, maintains, or enforces a highway routing designation over which NRHM may and may not be transported shall comply with the highway routing standards set forth in § 397.71 of this subpart. For purposes of this subpart, any highway route designation affecting the highway transportation of NRHM, made by a political subdivision of a State shall be considered as one made by that State, and all requirements of this subpart apply.

(b) Except as provided in §§ 397.75, 397.81, and 397.83, a NRHM route designation made in violation of paragraph (a) of this section is preempted pursuant to section 105(b)(4) of the Hazardous Materials Transportation Act (49 U.S.C. App. 1804(b)(4)). This provision shall become effective on [2 years after issuance of final rule].

(c) A State or Indian tribe may petition for a waiver of preemption in accordance with § 397.81 of this subpart.

§ 397.71 Federal standards.

(a) A State or Indian tribe shall comply with the Federal standards under paragraph (b) of this section when establishing, maintaining or enforcing specific NRHM routing designations over which NRHM may and may not be transported.

(b) The Federal standards are as follow:

(1) **Enhancement of public safety.** The State or Indian tribe shall make a

finding, supported by the record to be developed in accordance with paragraphs (b)(2)(ii) and (b)(3)(iv) of this section, that any NRHM routing designation enhance public safety in the areas subject to its jurisdiction and in other areas which are directly affected by such highway routing designation. In making such a finding, the State or Indian tribe shall consider:

- (i) The factors established in paragraph (b)(9) of this section; and
- (ii) The DOT "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials," DOT/RSPA/OHMT-89-02, July 1989¹ or its most current issuance, or
- (iii) An equivalent routing analysis which adequately considers overall risk to the public.

(2) *Public participation.* Prior to the establishment of any NRHM routing designation, the State or Indian tribe shall undertake the following actions to ensure participation by the public in the routing process:

- (i) The public shall be given notice of the proposed NRHM routing designation at least 30 days prior to the date of the public hearing required to be held under paragraph (b)(2)(ii) of this section. Such notice shall be given by publication in at least two newspapers of general circulation in the affected area or areas; and shall contain a complete description of the proposed routing designation, together with the date, time, and location of any public hearings.

(ii) The State or Indian tribe shall hold at least one public hearing on the record during which the public will be afforded the opportunity to present their views and any information or data related to the proposed NRHM routing designation. The State shall make available to the public, upon payment of prescribed costs, copies of the transcript of the hearing, which shall include all exhibits and documents presented during the hearing or submitted for the record.

(3) *Consultation with others.* Prior to the establishment of any NRHM routing designation, the State or Indian tribe shall consult with officials of affected political subdivisions, States and Indian tribes, and any other affected parties. Such actions shall include the following:

- (i) At least 60 days prior to issuing any such routing designation, the State or Indian tribe shall provide notice, in writing, of the proposed routing designations to officials responsible for highway routing in all affected States

and Indian tribes. This notice shall request the approval of those States and Indian tribes, in writing, of the proposed routing designation.

(ii) The manner in which consultation under this paragraph is conducted is left to the discretion of the State or Indian Tribe.

(iii) The State or Indian tribe shall attempt to resolve any concerns or disputes expressed by the consulted officials related to the proposed routing designation.

(iv) The State or Indian tribe shall keep a record of the name and address 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 concerns or disputes presented by the officials; and any actions undertaken to resolve such disputes or address any concerns.

(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 designation must ensure continuity of movement so as to not impede or unnecessarily delay the transportation of NRHM. Any designation shall not force a deviation of more than 100 miles or result in an increase of more than 25% in the trip length, whichever is shorter, from the most direct highway route between the primary origin and destination of an individual carrier's shipment. The State or Indian tribe shall utilize the procedures established in paragraphs (b)(2) and (b)(3) of this section in meeting this requirement.

(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 paragraphs (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, the State or Indian tribe shall use the shortest practicable route considering

the factors listed in paragraph (b)(9) of this section; however, such route or deviation shall not exceed twice the distance of the most direct route. 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 and unloading, 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.* Except as provided in § 397.83, 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

¹ This document may be secured from Traffic Control Division, HHS-30, Federal Highway Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590-0001.

control, and median and shoulder structures are examples of characteristics which a State or Indian tribe must consider.

(iii) *Types of 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 relative 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 may 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.

(vii) *Terrain considerations.* Topography along and adjacent to proposed NRHM routing designations must 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 alternative routes for NRHM, which shall be reviewed, examined, and evaluated during any public hearings or consultations conducted in accordance with this section.

(x) *Effects on commerce.* Any NRHM routing designations 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 unreasonable delays in the transportation of NRHM.

(xii) *Climatic conditions.* Weather, wind, and other climatic conditions affect the dispersion of the NRHM upon release and increase the difficulty of controlling it and cleaning it up, and as such, these conditions shall be given appropriate consideration.

(xiii) *Congestion.* The possibility of congestion in the traffic flow during certain times of the day or on certain days of the week shall be considered, since the exposure to any release and the subsequent emergency response operations are affected by congestion.

§ 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 placement must comply with the provisions of the Manual on Uniform Traffic Control Devices,² published by 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 [DATE OF ISSUANCE OF FINAL REGULATION] to the FHWA, HHS-30, 400 7th St., SW., Washington, DC 20590-0001 by [90 DAYS AFTER ISSUANCE OF FINAL REGULATION]. The State or Indian tribe shall include descriptions of these routing designations, along with the dates they were established. Information on any subsequent changes or new NRHM routing designations shall be furnished within 60 days after establishment to the FHWA at the above address. This information will be consolidated by the FHWA and published in whole or as updates in the Federal Register annually.

§ 397.75 Dispute resolution.

(a) *Petition.* One or more States or Indian tribes may petition the Federal Highway Administrator to resolve a dispute relating to through highway routing of NRHM or to an agreement on

a proposed NRHM routing designation. In resolving a dispute under these provisions the Administrator will provide the greatest level of highway 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 Federal Highway Administrator, Federal Highway Administration, U.S. Department of Transportation, 400 7th St., SW., Washington, DC 20590-0001. Attention: Hazardous Materials Routing Dispute Resolution Docket, HCC-20.

(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.

(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 States, political subdivisions, or Indian tribes, 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 States, political subdivisions, or Indian tribes 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

² This publication may be purchased from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, DC 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 part 655, subpart F.

Administrator may afford those persons an opportunity to file written comments on the petition.

(3) Any affected States, political subdivisions, or Indian tribes 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) *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.

§ 397.79 Preemption determinations; procedure.

(a) *Application.* Any person including a State, political subdivision thereof, or Indian tribe, affected by a NRHM routing designation may apply to the Administrator for a determination of whether such routing designation is preempted in accordance with § 397.69. The Administrator will publish notice of the application in the Federal Register.

(b) *Filing.* Each application filed under this section for a determination of preemption must:

(1) Be submitted to the Federal Highway Administrator, Federal Highway Administration, U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590-0001. Attention: Hazardous Materials Routing Preemption Docket, HCC-20;

(2) Describe or state the NRHM routing designation for which the determination is sought;

(3) Specify each requirement of the Hazardous Materials Transportation Act, or the regulations issued under the Act, which constitutes a basis for the petition;

(4) Explain why the applicant believes the NRHM routing designation should be preempted; and

(5) Set forth how the applicant is affected by the NRHM routing designation.

(c) *Relief restriction.* Once the Administrator has published notice in the Federal Register of an application received pursuant to the requirements set forth in this section, no applicant for such determination may seek relief with respect to the same or substantially the same issue in any court until final action has been taken on the application or until 180 days after filing of the application, whichever occurs first.

(d) *Eligibility.* This section shall not be construed as prohibiting any person, State, political subdivision, or Indian tribe directly affected by the NRHM routing designation from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Administrator under paragraph (b)(1) of this section.

(e) *Notice.* (1) The applicant shall mail a copy of the application to any affected State or Indian tribe. The notice must

include a statement that the State or Indian tribe may submit comments regarding the application to the Administrator within 45 days. The application filed with the Administrator must include a certification that the applicant has complied with this paragraph, and it must include the names and addresses of each State or Indian tribe official to whom a copy of the application was sent.

(2) The Administrator may, by serving notice on any other persons determined by the Administrator as persons who will be affected by the ruling sought, or by publication in the Federal Register, afford those persons an opportunity to file written comments on the application.

(3) Each person submitting written comments to the Administrator with respect to an application filed under this section shall send a copy of the comments to the applicant 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 within 45 days.

(f) *Processing.* The Administrator may investigate any statement in an application and may consider any relevant facts obtained by that investigation. The Administrator may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions within 45 days. The Administrator may convene a hearing or conference, to advance the consideration of the application. 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 determination by the Administrator.

(g) *Determination.*—(1) *Dismissal.* The Administrator may dismiss the application without prejudice if:

(i) It is determined that there is insufficient information upon which to base a determination; or

(ii) There is a request for additional information from the applicant, and the applicant fails to submit the additional information with 30 days.

(2) *Issuance.* Upon consideration of the application and other relevant information received, the Administrator will issue a determination. The determination will include a written statement setting forth the relevant facts and the legal basis for the determination.

(3) *Record.* The Administrator will serve a copy of the determination upon the applicant, upon any other person who participated in the proceeding, and upon any other person determined by the Administrator as affected by the determination. A copy of each determination will be placed on file in the Hazardous Materials Routing Preemption Docket. The Administrator may publish the determination or notice of the determination in the Federal Register.

(4) *Administrative determination.* A determination issued under this section constitutes an administrative determination as to whether a particular NRHM routing designation is preempted. The fact that a determination has not been issued under this section with respect to a particular highway routing designation carries no implication as to whether the designation is preempted.

§ 397.81 Waivers of preemption.

(a) *General rule.* The Administrator may waive the preemption of a NRHM routing designation upon a determination that such designation affords an equal or greater level of protection to the public than is afforded by this subpart and that it does not unreasonably burden commerce.

(b) *Procedure.*—(1) *Application.*—Any State, political subdivision, or Indian tribe may apply to the Administrator for a waiver of preemption with respect to any NRHM routing designation that the State, political subdivision, or Indian tribe acknowledge to be preempted in accordance with § 397.69 of this subpart. The Administrator will publish notice of the application in the Federal Register.

(2) *Filing.* Each application filed under this section for a waiver of preemption determination must:

(i) Be submitted to the Federal Highway Administrator, Federal Highway Administration, U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590-0001. Attention: Hazardous Materials Routing Preemption Docket, HCC-20;

(ii) Set forth the text of the NRHM routing designation for which the determination is being sought;

(iii) Include a copy of any court order and any determination issued pursuant to § 397.75 of this part pertinent to the application;

(iv) Contain an express acknowledgment by the applicant that the NRHM routing designation is preempted by this subpart unless a preemption has been so determined by a court of competent jurisdiction or in a ruling issued under § 397.75 of this subpart;

(v) State why the applicant believes the State, political subdivision, or Indian tribe NRHM routing designations afford an equal or greater level of protection to the public than is afforded by the requirements of the Act or the regulations issued under the Act; and

(vi) State why the applicant believes the State, political subdivision, or Indian tribe NRHM routing designations do not unreasonably burden commerce.

(c) *Notice.* (1) The applicant State, political subdivision, or Indian tribe shall mail a copy of the application and any subsequent amendments or other documents relating to the application to each person who is reasonably ascertainable by the applicant as a person who will be affected by the determination sought. The copy of the application must be accompanied by a statement that the person may submit comments regarding the application to the Administrator within 45 days. The application filed with the Administrator must include a certification that the application has complied with this paragraph, and it must include the names and addresses of each person to whom the application was sent.

(2) The Administrator may, by serving notice on any other persons readily identifiable as persons who will be affected by the ruling sought, or by publication in the Federal Register, afford those persons an opportunity to file written comments on the application.

(d) *Processing.* The Administrator may investigate any statement in an application and consider any relevant facts obtained by that investigation. The Administrator may solicit and accept submissions relevant to an application and will provide the applicant an opportunity to respond to all submissions. The Administrator may convene a hearing or conference to further investigate and consider any matter relevant to the advance of the application. 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 determination by the Administrator.

(e) *Determination.*—(1) *Dismissal.* The Administrator may dismiss the application without prejudice if:

(i) It is determined that there is insufficient information upon which to base a waiver; or

(ii) There is a request for additional information from the applicant, and the applicant fails to submit the additional information.

(2) *Issuance.* Upon consideration of the application and other relevant information received, the Administrator

will issue a determination. The determination will include a written statement setting forth the relevant facts and the legal basis for the determination.

(3) *Record.* The Administrator will serve a copy of the determination upon the applicant and place a copy of the waiver determination in the Hazardous Materials Routing Preemption Docket. The Administrator may publish the waiver determination or notice of the waiver determination in the Federal Register.

§ 397.83 Grandfather provisions.

NRHM routing designations established before [date of issuance of final regulations] are not required to comply with § 397.71(b)(2) on public participation; § 397.71(b)(3) on consultation with others; and § 397.71(b)(6) on timeliness. Any NRHM routing designations established before November 16, 1990, do not need to comply with the "factors to consider" contained in § 397.71(b)(9).

§ 397.85 Timeliness.

If the Administrator fails to take action on the application within 180 days of serving the notice required by §§ 397.79 or 397.81 of this subpart, the applicant may treat the application as having been denied in all respects.

§ 397.87 Judicial review of preemption or waiver of preemption decision.

A party to a proceeding under §§ 397.79 or 397.81 of this subpart may seek review by the appropriate district court of the United States of a decision of the Administrator under such proceeding only by filing a petition with such court within 60 days after such decision becomes final.

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DEPARTMENT OF TRANSPORTATION 49 CFR Part 397

Transportation of Hazardous Materials; Highway Routing

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of public hearings.

SUMMARY: The FHWA announces that it will hold four public hearings on the subject of proposed Federal regulations which would be applicable to the designation, limitation or restriction of routes for the highway transportation of placarded non-radioactive hazardous materials in commerce. The proposed