the requirement that the right foot pedal operate the brake control. It is also evident from the previous grants of similar petitions that we have repeatedly found that the motorcycles exempted from the brake control location requirement of FMVSS No. 123 have an overall level of safety at least equal to that of nonexempted motorcycles.

In consideration of the foregoing, we hereby find that the petitioner has met its burden of persuasion that to require compliance with FMVSS No. 123 would prevent it from selling a motor vehicle with an overall level of safety at least equal to the overall safety level of nonexempt vehicles. We further find that a temporary exemption is in the public interest and consistent with the objectives of motor vehicle safety. Therefore, Motive Power Industry Co., Ltd. is hereby granted NHTSA Temporary Exemption No. EX03–4 from the requirements of item 11,column 2, table 1 of 49 CFR 571.123 Standard No. 123 *Motorcycle Controls and Displays,* that the rear brakes be operable through the right foot control. This exemption applies only to the following Motive Power models: My BuBu 100: P100DA; My BuBu 125: PA125DA; and T-Rex 150: CP 150D. The exemption will expire on August 1, 2005.

(49 U.S.C. 30113; delegation of authority at 49 CFR 1.50).

Issued on September 17, 2003.

Jeffrey W. Runge,

Administrator.

[FR Doc. 03–24147 Filed 9–18–03; 12:01 pm]

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DEPARTMENT OF TRANSPORTATION

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

[Docket No. RSPA–00–7092 (PD–22(R))]

New Mexico Requirements for the Transportation of Liquefied Petroleum Gas

AGENCY: Research and Special Programs Administration (RSPA), DOT.

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

Petitioner: Attorney General of New Mexico (New Mexico) on behalf of the New Mexico Regulation and Licensing Department, Construction Industries Division (CID), and the New Mexico Construction Industries Commission.

Local Laws Affected: New Mexico Statutes Annotated (NMSA), Chapter 70, Article 5 (LNG and CNG Act), and New Mexico Annotated Code (NMAC), Title 19, Chapter 15, Part 4 (LP Gas Standards).

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171–180.

Mode Affected: Highway.

SUMMARY: RSPA is modifying its September 20, 2002 determination with respect to the fees specified in New Mexico's LNG and CNG Act and LP Gas Standards for vehicle inspections, employee examinations, and identification cards. Based on additional information in New Mexico's petition for reconsideration about the collection and application of these fees, together with the prior finding that these fees appear to bear some approximation to the work involved in inspecting vehicles and administering examinations and issuing identification cards, RSPA finds that Federal hazardous material transportation law does not preempt: (1) NMAC 19.15.4.14.3(C), with respect to the fees charged for inspecting or reinspecting the cargo container and safety equipment on vehicles based within New Mexico that are used for the transportation of LP gas in bulk quantities, or (2) NMSA 70–5–7(C) and NMAC 19.15.4.15.12 through 19.15.4.15.14 with respect to the fees charged for administering examinations and issuing identification cards to motor vehicle drivers domiciled in New Mexico or non-drivers who dispense liquefied petroleum (LP) gas.

In all other respects, RSPA affirms its prior determination that Federal hazardous material transportation law preempts New Mexico's requirements in:

—NMAC 19.15.4.10.1 for an annual inspection of the cargo container and safety equipment on vehicles used for transportation of LP gas in bulk, as that requirement is applied to vehicles based outside New Mexico;

—NMSA 70–5–7(A) and NMAC 19.15.4.9.1 through 19.15.4.9.5 for examination of, and issuance of an identification card to each person who transports or delivers LP gas, as those requirements are applied to motor vehicle drivers domiciled outside of New Mexico; and

—NMAC 19.15.4.15.1 for payment of an annual license fee to ''wholesale, transport and/or deliver'' LP gas in vehicles (other than to an ultimate consumer).

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Telephone: 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

In Preemption Determination (PD) No. 22(R), published in the **Federal Register** on September 20, 2002 (67 FR 59396), RSPA considered certain requirements in New Mexico's LPG and CNG Act and CID's implementing LP Gas Standards with respect to companies, their vehicles, and their employees that transport and deliver propane and other liquefied petroleum (LP) gases. These statutory and regulatory requirements, set forth in full in Part II of RSPA's determination (67 FR at 59397), govern:

Licensing: A company must pay an annual fee of $125 for each of its business locations within New Mexico in order to obtain a license to ''wholesale, transport and/or deliver [LP] gas in vehicular units into or out of any location except that of an ultimate consumer.'' NMAC 19.15.4.15.1. The LPG and CNG Act authorizes the CID's Liquefied and Petroleum Gas Bureau (LPG Bureau) to collect ''reasonable license fees,'' NMSA 70–5–9(A), and provides that ''[a]ll fees and money collected under the provisions of [that] Act * * * shall be * * * deposited in the general fund of the state.'' NMSA 70–5–10.

Vehicle inspections: The ''cargo container and safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities'' must pass an annual safety inspection by the LPG Bureau. NMAC 19.15.4.10.1. The fee for the annual inspection (or a reinspection) is $37.50 per vehicle. NMAC 19.15.4.14.3(C).

Driver testing and identification: Any person who ''transports or dispenses LP gas'' must pass an ''appropriate examination.'' NMSA 70–5–7(A). The applicant must show that he or she is ''familiar with minimum safety standards and practices with regard to handling of LP Gas. LP Gas may not be dispensed by any person who has not passed the examination.'' NMAC 19.15.4.9.1. An individual who passes the examination is issued an ''identification card,'' renewable annually, and valid only ''while employed by a licensee.'' NMAC 19.15.4.9.2–9.4. If an individual holding an identification card is not employed by a licensee for two years, the individual must take a new examination. NMAC 19.15.4.9.5. There is a fee of $25.00 for an examination (or a re-examination) and $10.00 for

renewal of an identification card (without taking the examination). NMAC 19.15.4.15.12–15.14.

In PD–22(R), RSPA found that Federal hazardous material transportation law preempts:

1. The annual inspection requirement with respect to vehicles based outside the State because ''non-Federal vehicle inspection requirements have an inherent potential to cause unnecessary delay in the transportation of hazardous materials when the requirement is applied to vehicles based outside of the inspecting jurisdiction.'' 67 FR at 59400.

2. The examination and identification card requirements with respect to motor vehicle drivers domiciled outside of New Mexico that transport and dispense LP gas, because these ''New Mexico training requirements go beyond the HMR training requirements.'' 67 FR at 59401.

3. The fees for a license, vehicle inspection, and employee examination and identification card. RSPA found that the annual license fee is not ''fair'' because it is not based on some approximation of a carrier's use of State facilities and discriminates against interstate commerce, and that the licensing fees ''deposited into New Mexico's general fund are not earmarked or actually used for hazardous materials transportation purposes as required.'' 67 FR at 59403, 59404. RSPA also found that the vehicle inspection fee and the employee examination and identification card fees are also not ''earmarked'' or ''actually used for hazardous materials transportation purposes.'' 67 FR at 59404, 59405.

RSPA found that Federal hazardous materials transportation law does not preempt requirements for an annual safety inspection of vehicles based within New Mexico; the examination and identification card requirements for drivers domiciled within the State; and provisions in the LPG and CNG Act and LP Gas Standards authorizing ''reasonable'' fees for licensing, vehicle inspection, driver examination, and identification cards. 67 FR at 59400, 59402, 59403, 59404, 59405.

In PD–22(R), RSPA addressed the application submitted by the American Trucking Associations, Inc. (ATA) pursuant to 49 U.S.C. 5125(d) and 49 CFR 107.203 and the comments on that application submitted by CID, the National Propane Gas Association (NPGA), the New Mexico Propane Gas Association, the National Tank Truck Carriers, Inc., and the Hazardous Materials Advisory Counsel (now known as the Dangerous Goods Advisory Council). In Part III of its determination, RSPA discussed the standards for making determinations of preemption under the Federal hazardous material transportation law. 67 FR at 59397–98. As amended by Section 1711 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2319), 49 U.S.C. 5125(a) & (b) preempt a State (or other non-Federal) requirement (unless DOT grants a waiver or there is specific authority in another Federal law) if:

—It is not possible to comply with both the State requirement and a requirement in the Federal hazardous material transportation law, a regulation issued under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security;

—The State requirement, as applied or enforced, is an ''obstacle'' to accomplishing and carrying out the Federal hazardous material transportation law, a regulation issued under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security; or

—The State requirement concerns any of five specific subjects and is not ''substantively the same as'' a provision in the Federal hazardous material transportation law, a regulation issued under that law, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

In addition, 49 U.S.C. 5125(g)(1) provides that a State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material ''only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.''

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

Preemption determinations do not address issues arising under the Commerce Clause of the Constitution, except that * * * RSPA considers that Commerce Clause standards are relevant to a determination whether a fee related to the transportation of hazardous material is ''fair'' within the meaning of 49 U.S.C. 5125(g)(1). Preemption determinations also do not address statutes other than the Federal hazmat law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law.''

67 FR at 59398.

Within the 20-day time period provided in 49 CFR 107.211(a), the Attorney General of New Mexico submitted a petition for reconsideration of RSPA's decision in PD–22(R) on behalf of the New Mexico Regulation and Licensing Department, Construction Industries Division, and the New Mexico Construction Industries Commission. New Mexico sent a copy of its petition and its October 30, 2002 supporting brief (submitted pursuant to the extension granted by RSPA) to each person who had previously submitted comments in this proceeding. ATA and NPGA submitted comments in response to New Mexico's petition for reconsideration.

II. Discussion

A. Vehicle Inspection Requirements

With its petition for reconsideration, New Mexico included an affidavit by the Chief of the LPG Bureau in which he stated that he is ''responsible for designing, implementing and supervising the vehicle inspection system in New Mexico.'' He stated that his ''inspectors exercise a policy of maximum convenience for the transporter'' and ''arrange with the transporter to meet the vehicle to be inspected at a time and place most convenient and least disruptive to the transporter's scheduling.'' He also stated that the inspection is limited to ''vehicle safety equipment related to the storage and loading or unloading of LP Gas. We do not inspect any other part of the vehicle, including its motor, drive train, chassis, wheels and tires or exterior.'' The LPG Bureau Chief also stated that his office ''sends by regular mail a renewal and inspection notice within the first week of the quarter in which the vehicle must be inspected [so that the] inspectors and transporter then have well over two months within which to arrange for this inspection, again at the convenience of the transporter.''

New Mexico refers to this affidavit as showing that its vehicle inspection system is not one where ''the inspectors 'call and demand' an inspection at a

time and place.'' It states that the ''inspectors do all they reasonably can to avoid disrupting schedules and deliveries,'' and that because the inspectors are ''willing to travel anywhere in the state to inspect vehicles at any time and any location, any reasonable transporter should be able to have all of its New Mexico licensed vehicles inspected in a timely fashion.'' It asserts that ''the LP Gas Bureau [did not cause] the scheduling problem, and thus the delay,'' when Basin Western, Inc. (a carrier based in Utah) was not able to obtain inspections in time to make deliveries. (In PD–22(R), RSPA discussed the information provided by Basin Western's vice president that his company had been unable to have vehicles inspected ''in time to meet scheduled deliveries.'' 67 FR at 59398–99.)

Separately, New Mexico indicates that its annual vehicle inspection, and the inspection fee it charges, ''are associated only tangentially, if at all, with the transportation of hazardous materials.'' It states that it inspects only the ''safety equipment and devices on the trucks that transport LP gas *for transfer* in New Mexico,'' and that the inspection requirement ''is not triggered until gas is transferred in or out of the vehicle that transported it.'' Thus, it argues that its inspection requirement ''only concerns safe transfer,'' after transportation is over and ''federal regulation ceases.'' At the same time, New Mexico also asserts that the fees it collects for vehicle inspections are ''earmarked for hazardous materials transportation purposes,'' because the LP gas ''must be transported to be transferred, and the transfer process is the subject of the vehicle inspection process.''

ATA responds that New Mexico's ''write and request system'' is unsatisfactory because ''[o]ften carriers do not know when they will be required to deliver LPG to New Mexico.'' According to ATA, a carrier may receive a request to ''dispatch an available vehicle the same day,'' and ''contacting the state to schedule an appointment for an inspection is operationally unrealistic.'' ATA states that it is not practical to ''dedicate'' one or more vehicles for deliveries to New Mexico. It also urges RSPA to look at the ''cumulative burden'' if multiple jurisdictions impose similar requirements, stating that ''hazardous materials transportation would be frustrated if every jurisdiction in which a truck operated required that a truck undergo a separate, duplicative fee-supported inspection. To ignore the cumulative burden of these requirements is tantamount to RSPA's sanctioning of an unconstitutional burden upon interstate commerce.''

NPGA states that New Mexico's asserted ''flexibility'' in scheduling inspections ''miss[es] the mark'' because of the ''inherent potential for unnecessary delay,'' and that ''even with a flexible inspection program, the transportation of propane is based on customer needs and, as such, a propane marketer outside New Mexico will likely not know when a shipment is needed in New Mexico until the last minute.''

In PD–22(R), RSPA reviewed its prior consideration of annual vehicle inspection requirements of California (PD–4(R), 58 FR 48933 (Sept. 20, 1993), decision on petition for reconsideration, 60 FR 8800 (Feb. 15, 1995)); Nassau County, New York (PD–13(R), 63 FR 45283 (Aug. 25, 1998), decision on petition for reconsideration, 65 FR 60238 (Oct. 10, 2000), judicial review dismissed, *The Office of the Fire Marshal of the County of Nassau* v. *U.S. Dept. of Transportation,* No. CV–00–7200 (E.D.N.Y. Mar. 18, 2002)); and Smithtown, New York (PD–28(R), 67 FR 15276 (Mar. 29, 2002)). RSPA found that the information submitted in this proceeding confirmed that

> any State or local periodic inspection requirement has an inherent potential to cause unnecessary delays in the transportation of hazardous materials when that requirement is applied to vehicles based outside of the inspecting jurisdiction. * * * [T]he ''call and demand'' nature of common carriage makes it (1) impossible to predict in advance which vehicles may be needed for a pick-up or delivery within a particular jurisdiction and (2) impractical to have all vehicles inspected every year or, alternatively, have a few vehicles inspected in order to be ''dedicated'' to the inspecting jurisdiction. * * *
>
> The inherent potential for unnecessary delay, when a periodic inspection applies to a vehicle based outside the inspecting jurisdiction, is not eliminated by a ''flexible'' scheduling policy. The impracticability of scheduling an inspection in advance of knowing whether a particular truck will be needed to make a delivery within the inspecting jurisdiction creates unnecessary delay—not the time that the inspection takes place. As discussed in PD–4(R) and PD–13(R), that unnecessary delay would be eliminated if the Town performed the equivalent of a spot or roadside inspection, upon the unannounced arrival of a truck carrying LPG.

PD–28(R), 67 FR at 15279 (quoted in part in PD–22(R), 67 FR at 59400).

RSPA cannot accept New Mexico's argument that its vehicle inspection requirement applies only to the ''transfer'' (or delivery) of LPG after transportation has ended. By its very terms, this requirement applies to ''each vehicular unit used for *transportation* of LP gas in bulk quantities.'' NMAC 19.15.4.10.1 (emphasis supplied). Moreover, RSPA has long considered that the act of unloading hazardous material from a vehicle is within the scope of ''transportation,'' and subject to regulation under the HMR, when it is ''performed by a person employed by or under contract to a for-hire carrier or, in the case of a private carrier, when performed by the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement in commerce is completed.'' Notice of Proposed Rulemaking in Docket No. RSPA–98–4952 (HM–223), 66 FR 32420, 32433 (June 14, 2001); *see also* the loading and unloading requirements for Class 2 materials (gases) in 49 CFR 177.834, 177.840.

New Mexico's petition for reconsideration does not directly address (much less provide any basis for reconsidering) the finding in PD–22(R) that a periodic inspection requirement has an ''inherent potential for unnecessary delay'' when applied to a vehicle based outside of the inspecting jurisdiction. It is the ''call and demand'' nature of deliveries of LPG and other hazardous material (not a ''call and demand'' inspection system) that makes it impossible to always schedule an inspection of any particular vehicle (or the safety equipment on the vehicle) before the carrier knows that the vehicle is needed to make a delivery in another jurisdiction. New Mexico's ''write and request'' system of scheduling inspections will unnecessarily delay or frustrate some deliveries of hazardous materials from outside the State, no matter how accommodating its inspection force, unless the State ''can actually conduct an 'on the spot' inspection upon the truck's arrival within the jurisdiction.'' PD–22(R), 67 FR at 59400. Because New Mexico cannot meet this standard for vehicles based outside of the State, its annual inspection requirement is an obstacle to accomplishing and carrying out the requirement in 49 CFR 177.800(d) for the transportation of hazardous materials ''without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.'' RSPA reaffirms its determination that NMAC 19.15.4.10.1 is preempted with respect to vehicles based outside New Mexico.

B. Employee Examination and Identification Card Requirements

New Mexico acknowledges in its petition for reconsideration that its

employee examination and identification card requirements are ''more stringent'' than the HMR, but it asserts that these requirements are not preempted unless there is ''an actual conflict with federal law.'' It states that, ''[i]f a matter is not clearly addressed in the HMR,'' then RSPA should not find preemption of ''local regulations related to but nonetheless distinct from what the HMR specifically covers.'' New Mexico adds that a ''driver may learn what the federal government expects and, absent an inability or refusal to understand New Mexico's safety requirements, may learn what this state expects as well.'' According to the LPG Bureau Chief, the examination is based on Standard 58 issued by the National Fire Protection Association (NFPA). New Mexico states that this promotes uniformity because the State ''is testing prospective drivers from the uniform National Fire Protection Association document 58,'' which is ''nothing more than what any local jurisdiction uniformly requires by ascribing to the NFPA protocols.''

ATA contends that New Mexico has misread 49 CFR 172.701, which provides that a State may not impose ''more stringent training requirements'' on an out-of-state driver. It states that ''test taking itself would become an obstacle to the safe and efficient transportation of hazardous materials, as few drivers could devote the time necessary to master the subtle regulatory differences between jurisdictions and sit for examinations in each of those jurisdictions.''

NPGA agrees with ATA that imposing examination and licensing on drivers domiciled outside of New Mexico ''is in conflict with § 172.701 and, therefore, preempted by the HMTA and HMR.'' NPGA also states that it supports ''adoption of NFPA Standard 58 as part of State's regulation of LPG,'' but that the NFPA Standard 58 explicitly states that it is intended to apply ''to areas not subject to DOT regulation.''

In PD–22(R), RSPA discussed the specific provision in 49 CFR 172.701 that allows a State to impose more stringent training requirements on a motor vehicle driver only when the driver is domiciled within the State. 67 FR at 59401, citing PD–7(R), Maryland Certification Requirements for Transporters of Oil or Controlled Hazardous Substances, 59 FR 28913, 28919 (June 3, 1994), decision on petition for reconsideration, 60 FR 10419 (Feb. 24, 1995). RSPA has also specifically found that these additional requirements for drivers of motor vehicles are ''more stringent training requirements.'' PD–7(R), 59 FR at 28919; PD–13(R), 63 FR at 45287; PD–28(R), 67 FR at 15280. New Mexico acknowledges that its employee examination and identification card requirements are more stringent than the training requirements in the HMR, and there is no basis to reconsider the finding in PD–22(R) that these requirements are an obstacle to accomplishing and carrying out the HMR. Accordingly, RSPA reaffirms its determination that Federal hazardous material transportation law preempts the State's employee examination and identification card requirements in NMSA 70–5–7(A) and NMAC 19.15.4.9.1 through 19.15.4.9.5.

C. Fees

New Mexico asserts that all the fees it imposes on the transportation and delivery of LPG are ''based on a fair approximation of use, do not discriminate, and are not excessive. * * * [T]hey are a deminimus charge assessed to ensure the safe handling of LP gas in the transfer of it from one container to another.'' According to New Mexico, its ''licensing process is a means of ensuring safe transfer of LP gas in the State, and each license authorizes unlimited transfer privileges.'' It states that the annual license

> has no logical relationship to the use of roads or other State infrastructure. It does not authorize movement of LP gas within or through the State, or authorize a carrier to enter the State; therefore, there are no border checks. The license relates only to material transfers, not movement, and it is the State's sole means of ensuring that the human beings who engage in the inherently dangerous activity of handling LP gas are qualified to do so.

New Mexico also contends that it would not be practical to construct a graduated fee schedule ''based on the number of transfers of gas made by a carrier,'' because the LPG Bureau lacks sufficient resources to verify the number of transfers, and fees based ''on transfer activity * * * would not be collectable by the vendors.'' New Mexico also raises the possibility that an out-of-state carrier might actually pay ''more for a license than an in-state carrier,'' if it made more deliveries within New Mexico.

According to the affidavit submitted by the LPG Bureau Chief, that office has ten full-time employees, including himself, and the total budget for the LPG Bureau in fiscal year 2001–2002 was approximately $625,000. New Mexico states that besides ''regulating the transfer of LP gas, the program [of the LP Gas Bureau] also investigates accidents and is responsible for inspecting LP activities related to residential and commercial use, bulk plants, and special events such as the International Balloon Festival, and the State Fair.'' During fiscal year 2001–2002, the LPG Bureau investigated 18 accidents, but ''[n]one of the accidents was related to the transfer of LP gas,'' according to the affidavit of the LPG Bureau Chief.

The LPG Bureau Chief stated that his Bureau collected approximately $184,000 in fees during fiscal year 2001–2002 and ''[t]hese revenues were deposited in the State's general fund.'' New Mexico asserts that the fees that it collects for vehicle inspections ''are returned 100% to the LP gas regulatory program,'' because the annual budget far exceeds the revenue generated by vehicle inspections. ''Therefore, all vehicle inspection fees were entirely recovered for use in the regulation of LP gas.'' The vehicle inspection fees represented approximately $25,000 of the total $184,000 collected by the LPG Bureau in fiscal year 2001–2002, according to the affidavit of the LPG Bureau Chief. However, he also stated that the LPG Bureau did not directly collect fees for administering examinations and issuing identification cards. ''The fees associated with licensure, exams and identification cards are collected by private vendors under contract with [CID] and are the only funding source for the licensing and examination process. These fees are not collected by the Bureau, and are not deposited by the Bureau into the State's general fund.''

Both ATA and NPGA state that all of New Mexico's fees are preempted because they are not ''fair'' and because they are not used for a purpose related to transporting hazardous material. They argue that these ''flat fees'' discriminate against interstate commerce because they are not apportioned to the motor carrier's presence or level of activity within the State. They also state that it is not possible to determine whether these fees are used for purposes relating to hazardous materials transportation because New Mexico deposits them into its general fund. ATA and NPGA attribute no significance to the fact that the LPG Bureau collected less in fiscal year 2001–2002 than it spent on its entire LPG program because that program includes activities outside transportation, such as inspections of LPG bulk plants.

In one sense, all these fees are a ''flat,'' or fixed amount. However, in PD–22(R), RSPA clearly distinguished New Mexico's annual license fee from the other fees. RSPA found that the annual license fee remained the same regardless of the

number of miles traveled within the State, number of pick-ups or deliveries made within the State, size of weight of the vehicle used to transport LP gas within the State, or any other factor that relates the amount of the fee to a carrier's use of State roads or facilities. Consequently, an interstate carrier that travels just one time in New Mexico must pay the same fee as a local carrier that conducts all of its business within the State.

67 FR at 59403. There is no doubt that New Mexico could adopt a license fee that varies according to one or more of these activities by a company transporting LP gas within the State, or that it would be more ''fair'' to apportion the fees accordingly and base the amount of the fee upon the amount of those activities reported by the carrier. This could be done in the same manner that New Mexico may apply its gross receipts tax in NMSA 7–9–4 only to sales within the State, and not sales to customers located outside of New Mexico. *See Evco* v. *Jones,* 409 U.S. 91, 93 S.Ct. 349 (1972). Similar issues regarding verification exist for both, and the ''fairness'' standard in 49 U.S.C. 5125(g)(1) cannot rest solely on the preference of the LPG Bureau for a fee that it considers easier to enforce. New Mexico has not shown that its ''flat'' annual license fee is the ''only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.'' PD–22(R), 67 FR at 59403, quoting from *American Trucking Ass'ns* v. *Scheiner,* 483 U.S. 266, 296, 97 S.Ct. 2829 (1987).

Nor has New Mexico shown that the annual license fees are ''used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response,'' as required by 49 U.S.C. 5125(g)(1). Even if the annual license fees are considered to be returned to the LPG Bureau as part of its total budget, there is no information to show that these fees are used for transportation-related purposes. The costs of inspecting residential and commercial facilities, or participating in the State Fair and a balloon festival, cannot be paid out of a State-imposed fee ''related to transporting hazardous material.'' Accordingly, RSPA reaffirms its finding that Federal hazardous material transportation law preempts New Mexico's annual license fee because that fee is an obstacle to carrying out the requirements in 49 U.S.C. 5125(g)(1) that the fee must be ''fair'' and ''used for a purpose related to transporting hazardous material.''

In contrast to the licensing fee, RSPA found that the vehicle inspection fee ''appears to be related, in some manner, to the work involved in performing the inspection required.'' 67 FR at 59404. In other words, there should be the same effort and time required to inspect each vehicle, whether operated by an in-state or out-of-state carrier. As RSPA stated in PD–13(R), when

the amount of the fee is related in some measure to the work involved in conducting the required inspection, this fee appears more like a user fee than a tax. According to the U.S. Court of Appeals for the Fourth Circuit, user fees are to be distinguished from taxes, so long as they ''reflect a fair, if imperfect, approximation of the cost of using state facilities for the taxpayer's benefit, * * * [and are] not * * * excessive in relation to the costs incurred by the taxing authorities. *Center for Auto Safety* v. *Athry*, 37 F.3d 139, 142 (1994), citing *Evansville-Vanderburgh Airport Auth. District* v. *Delta Airlines*, 405 U.S. 707, 717–20 (1972).

63 FR at 45287, 65 FR at 60244; *see also* PD–21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 FR 54474. 54478 (Oct. 6, 1999), judicial review pending, *Tennessee* v. *U.S. Dep't of Transportation*, petition for certiorari filed July 18, 2003 (No. 03–111 U.S. Sup. Ct.). Thus, RSPA must reject the contention of ATA and NPGA that the vehicle inspection fee is not ''fair'' under the standard in 49 U.S.C. 5125(g)(1).

The fiscal year 2001–2002 budget and staffing figures for the LPG Bureau actually confirm that $37.50 appears to be a reasonable approximation of the cost to conduct a vehicle inspection or reinspection. When allocated to 10 full-time employees, the total $625,000 budget works out to an average cost of more than $30.00 per employee-hour, and the LPG Bureau Chief stated that a vehicle inspection typically takes ''from 45–60 minutes'' plus travel time. This is sufficient for RSPA to find that the vehicle inspection fee has a ''fair approximation'' to the service provided (*i.e.*, the inspection) and that the LPG Bureau is ''actually spending these fees on the purposes permitted by the law,'' even if the fees are not earmarked or deposited into a separate account. PD–21(R), 64 FR at 54478, 54479. For that reason, RSPA finds that the vehicle inspection and reinspection fee in NMAC 19.15.4.14.3(C) is not an obstacle to accomplishing and carrying out the standards in 49 U.S.C. 5125(g)(1) and is not preempted by the Federal hazardous material transportation law. However, that fee may be collected only for inspecting the cargo containment and safety equipment on a vehicle based within New Mexico, because the underlying inspection requirement is preempted with respect to vehicles based outside the State.

In a similar manner, it should take the same amount of time to administer an examination and issue an identification card to each applicant. In PD–22(R), RSPA noted that the absence of any evidence that the amounts of the employee examination and identification card fees are ''disproportionate to the work involved in administering the New Mexico safety examination and issuing identification cards. Consequently, the fees appear to be fair.'' 67 FR at 59405. New Mexico has now provided information that these fees are not deposited into the State's general fund but paid to and retained by ''private vendors'' who administer the examinations and issue identification cards. This is sufficient to show that these fees are directly related to the work that the private vendor actually performs and, in this manner, are actually ''used for a purpose related to transportation.'' As with the vehicle inspection fee, RSPA finds that the employee examination and identification card fees do not create an obstacle to accomplishing and carrying out the standards in 49 U.S.C. 5125(g)(1) and are not preempted by the Federal hazardous material transportation law. However, these fees may be collected only for administering examinations and issuing identification cards to motor vehicle drivers domiciled in New Mexico or non-drivers who dispense LP Gas, because the underlying examination and identification card requirements are preempted with respect to motor vehicle drivers domiciled outside of New Mexico.

III. Ruling

For the reasons set forth above, New Mexico's petition for reconsideration is granted in part and denied in part.

A. RSPA finds Federal hazardous material transportation law does not preempt:

(1) NMAC 19.15.4.14.3(C), with respect to fees charged for inspecting or reinspecting the cargo container and safety equipment on vehicles based within New Mexico;

(2) NMSA 70–5–7(C) and NMAC 19.15.4.15.12 through 19.15.4.15.14, with respect to the fees are charged for administering examinations and issuing identification cards to motor vehicle drivers domiciled in New Mexico or non-drivers who dispense liquefied petroleum (LP) gas;

(3) the requirements for payment of a ''reasonable'' annual license fee, in NMSA 70–5–9(A), a ''reasonable'' safety inspection fee, in NMSA 70–5–9(C), and a ''reasonable'' fee for issuance of an

identification card, in NMAC 19.15.4.9.4; and

(4) NMSA 70–5–10, requiring deposit of fees into the State's general fund.

B. RSPA incorporates and reaffirms its determination in PD–22(R) that Federal hazardous material transportation law preempts the requirements in:

(1) NMAC 19.15.4.10.1, with respect to the requirement for an annual inspection of the cargo containment and safety equipment on vehicles based outside New Mexico, but that this requirement is not preempted with respect to vehicles based within New Mexico;

(2) NMSA 70–5–7(A) and NMAC 19.15.4.9.1 through 19.15.4.9.5, with regard to requirements for a motor vehicle driver domiciled outside of New Mexico to take an examination and obtain an identification card, but that these requirements are not preempted with respect to motor vehicle drivers domiciled in New Mexico or non-drivers who dispense LP gas; and

(3) NMAC 19.15.4.15.1, requiring intrastate and interstate motor carriers that move, load, or unload LP gas in New Mexico to pay an annual license fee.

IV. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes RSPA's final agency action on ATA's application for a determination of preemption as to certain requirements in New Mexico's LNG and CNG Act (NMSA Chapter 70, Article 5) and LP Gas Standards (NMAC Title 19, Chapter 15, Part 4). Any party to this proceeding may bring a civil action in an appropriate district court of the United States for judicial review of this decision not later than 60 days after publication of this decision in the **Federal Register**.

Issued in Washington, DC, on September 17, 2003.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 03–24148 Filed 9–18–03; 12:01 pm]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub–No. 613X)]

CSX Transportation, Inc.—Abandonment Exemption—in Jefferson County, AL

CSX Transportation, Inc. (CSXT) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 16.47-mile line of railroad extending from milepost ONC 384.00 at Black Creek to milepost ONJ 400.47 at West Jefferson, in Jefferson County, AL. The line traverses United States Postal Service ZIP Codes 35130, 35139, and 35207.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on October 22, 2003, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 2, 2003. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by October 14, 2003, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to applicant's representative: Natalie S. Rosenberg, Senior Counsel, CSX Transportation, Inc., 500 Water Street, J150, Jacksonville, FL 32202.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

CSXT has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by September 26, 2003. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by September 22, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: September 15, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 03–23984 Filed 9–18–03; 12:01 pm]

BILLING CODE 4915–00–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF TRANSPORTATION

BUREAU OF TRANSPORTATION STATISTICS

Agency Information Collection; Activity Under OMB Review; Report of Passengers Denied Confirmed Space—BTS Form 251

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, the Bureau of