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Preemption Determination No. PD–22(R); New Mexico Requirements for the Transportation of Liquefied Petroleum Gas; Notices

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–00–7092 (PDA–22(R)]

Preemption Determination No. PD–22(R); New Mexico Requirements for the Transportation of Liquefied Petroleum Gas

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

ACTION: Administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Applicant: American Trucking Associations, Inc. (ATA).

State Laws Affected

—5 New Mexico Statutes Annotated (NMSA) 70–5–7(A), containing examination requirement for persons who transport or dispense liquefied petroleum (''LP'') gas.
—5 NMSA 70–5–7(C), containing examination fee requirement for persons who transport or dispense LP gas.
—5 NMSA 70–5–9(A), requiring payment of a reasonable annual license fee.
—5 NMSA 70–5–9(C), requiring payment of a reasonable safety inspection fee.
—5 NMSA 70–5–10, requiring the deposit of fees into the State general fund.
—19 New Mexico Annotated Code (NMAC) 15.4.9.1, establishing examination requirement for persons who transport or dispense LP gas.
—19 NMAC 15.4.9.2, requiring identification card.
—19 NMAC 15.4.9.3, prohibiting persons from working without an identification card.
—19 NMAC 15.4.9.4, establishing identification card annual renewal and reasonable fee requirements.
—19 NMAC 15.4.9.5, requiring re-examination.
—19 NMAC 15.4.10.1, requiring annual vehicle safety inspection.
—19 NMAC 15.4.14.3(C), establishing cargo tank inspection and reinspection fees.
—19 NMAC 15.4.15.1, establishing license classification and fee for wholesale sale, transport, or delivery of LP gas.
—19 NMAC 15.4.15.12, establishing annual identification card renewal fee.
—19 NMAC 15.4.15.13, establishing examination fee.
—19 NMAC 15.4.15.14, establishing re-examination fee.

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

Modes Affected: Highway.

SUMMARY: Federal hazmat law preempts New Mexico's cargo tank inspection requirement, as applied to vehicles based outside the State, because the requirement causes unnecessary delay in the transportation of hazardous materials. On the other hand, Federal hazmat law does not preempt New Mexico's cargo tank inspection requirement, as applied to vehicles based in the State, because there is no evidence in the record that the requirement causes unnecessary delay in the transportation of hazardous materials by those carriers.

Federal hazmat law also preempts New Mexico's employee examination and identification card requirements, as applied to non-domiciled, LP gas carrier personnel, because the HMR specifically provide that State training requirements may not apply to drivers domiciled outside the State. However, Federal hazmat law does not preempt New Mexico's employee examination and identification card requirements, as applied to domiciled, LP-gas carrier personnel, because the HMR specifically provide that State training requirements may apply to drivers domiciled within the State.

Finally, Federal hazmat law preempts New Mexico's LP gas transporter license fee requirements applicable to intrastate and interstate motor carriers that move, load, or unload hazardous materials in commerce because the fee paid to obtain the license is neither fair nor used for hazardous material transportation purposes. Federal hazmat law also preempts New Mexico's vehicle inspection fee, employee examination fee, and identification card fee requirements because the record does not support a finding that the fees are used for hazardous materials transportation purposes. Federal hazmat law does not preempt the New Mexico provisions that require the payment of reasonable licensing, vehicle inspection, and employee examination fees and the deposit of those fees into the State general fund.

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SUPPLEMENTARY INFORMATION:

I. Background

On January 18, 2000, ATA applied for a determination that Federal hazmat law preempts certain licensing, vehicle inspection, and employee testing requirements applicable to intrastate and interstate carriers under New Mexico's 1978 ''LPG and CNG Act,'' 5 New Mexico Statutes Annotated, Chapter 70 (5 NMSA 70), and in the corresponding regulations contained in the Petroleum Gas Standards issued by the Construction Industries Division (CID) of New Mexico's Regulations and Licensing Department, 19 New Mexico Annotated Code, Chapter 15, Part 4 (19 NMCA 15.4).

New Mexico requires each main and branch office of a motor carrier operating within the State to hold a license in order to wholesale, transport, or deliver LP gas. New Mexico imposes an annual $125 license fee. New Mexico also requires annual vehicle inspections for all vehicles transporting LP gas within the State. The inspections are conducted by employees of the New Mexico Liquefied Petroleum Gas Bureau (the ''Bureau''). The annual inspection fee is $37.50.

Furthermore, New Mexico requires all employees who transport or dispense LP gas in the State to prove, by passing an examination, that they are familiar with minimum safety standards and practices regarding the handling of LP gas. A person who passes the examination must carry an identification card. A person who has not passed the New Mexico examination may not transport or dispense LP gas within the State. New Mexico charges a $25 examination fee and a $10 identification card fee per employee.

All fees collected under the provisions of the LPG and CNG Act are deposited into the State general fund.

On March 31, 2000, the Research and Special Programs Administration (''RSPA'' or ''we'') published a public notice and invitation to comment on ATA's application (63 FR 17335). The notice set forth the text of ATA's application. Comments were submitted by the Hazardous Materials Advisory Counsel (HMAC, now known as the Dangerous Goods Advisory Council), the National Propane Gas Association (NPGA), the National Tank Truck Carriers, Inc. (NTTC), the New Mexico Propane Gas Association (NMPGA), and the CID. We received no rebuttal comments.

II. New Mexico's Statutory and Regulatory Requirements

In its application, ATA asserts that New Mexico's LP gas requirements go beyond the HMR, create confusion, and impose burdens on transporters and, thus, are obstacles to accomplishing the objectives of Federal hazmat law and the HMR. Specifically, ATA argues that the following New Mexico statutory and regulatory requirements are preempted by Federal hazmat law:

(1) *5 NMSA 70–5–7(A) and (C),* which authorize the Bureau to establish examination requirements for employees who transport or dispense LP gas and to assess an examination fee. Those subsections read as follows:

70–5–7. Requiring competent employees in transporting, dispensing, installation, service or repair.

A. The bureau may require each person, firm or corporation that transports or dispenses LP gas or that installs, repairs or services appliances, containers, equipment or piping for the use of LP gas to have all persons who perform these activities pass an appropriate examination based on the safety requirements of the commission.

* * * * *

C. The bureau shall set a reasonable fee for administering an examination.

(2) *5 NMSA 70–5–9(A) and (C),* which require persons transporting LP gas within the State to pay annual license and vehicle inspection fees. Those subsections read as follows:

70–5–9. Annual License Fees; Inspection Fees.

A. For the purpose of defraying the expenses of administering the laws relating to the use of CNG in motor vehicles or the LP gas industry, each person, firm or corporation, at the time of application for a license and annually thereafter on or before December 31 of each calendar year, shall pay to the bureau reasonable fees as set, classified and defined by the bureau for each operating location. Provided, the total annual fees charged any one licensee for a combination of LP gas activities at one location and subject to licensure under this section shall not exceed three hundred fifty dollars ($350) and the fee charged for any single activity or operation as set, classified and defined by the bureau shall not exceed one hundred and fifty dollars ($150).

* * * * *

C. In addition, there shall be paid a reasonable fee for the safety inspection, made by a representative of the bureau, of each LP gas bulk storage plant, LP gas liquid transfer facility and of the LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities. The fee shall be set by the bureau and shall not be assessed more frequently than once in each twelve months. The bureau may also charge a reasonable fee for late payment of any fees.

(3) *5 NMSA 70–5–10,* which requires that all fees collected under the LPG and CNG Act be deposited into the State general fund. That section reads as follows:

70–5–10. All fees and money collected under the provisions of the LPG and CNG Act * * * shall be remitted by the bureau to the director of the division to be deposited in the general fund of the state. * * *

(4) *19 NMAC 15.4.9,* which requires personnel who transport or dispense LP gas to pass a safety examination. Persons who pass the examination must pay a fee to obtain an identification card from the Bureau. The Bureau reissues the cards annually and charges a fee. Persons who have not passed the examination may not transport or dispense LP gas within the State. That section reads as follows:

9. Examination

No licensee or employee of a licensee shall install or modify any appliance or piping system until he has proved his knowledge of acceptable minimum standards by passing an examination required by the Bureau.

9.1 All personnel whose duties require that they transport or dispense LP Gas shall prove by passing an examination, as required by the Bureau, that they are familiar with minimum safety standards and practices with regard to the handling of LP Gas. LP Gas may not be dispensed by any person who has not passed the examination by the Bureau.

9.2 An identification card shall be issued to each person who passes the examination required by the LP Gas Bureau. The identification card shall contain pertinent information such as examinee's name, address and classification(s) for which examinee is certified, and may also provide space for listing violations of the LP Gas Act.

9.3 No licensee or employee shall perform the work he has examined for until he has received an identification card for that classification from the Bureau.

9.4 An identification card shall only be valid while employed by a licensee. The identification card shall be renewed annually with payment of a reasonable fee to the Bureau on the anniversary date of the employer's license. The renewal fee shall be paid with the licensee's renewal for all listed qualifying parties.

9.5 An identification card holder not employed by a licensee for a period of two (2) years shall retest before being qualified.

(5) *19 NMAC 15.4.10.1,* which requires annual safety inspections of vehicles transporting bulk quantities of LPG. That section reads as follows:

10. Annual Inspections

10.1 There shall be an annual safety inspection, made by an inspector of the Bureau, of each bulk storage plant facility, dispensing station, vehicle fuel dispenser, and cargo container and safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities. Each bulk plant, dispenser, and vehicular unit shall display a current decal showing it has passed the required inspection.

* * * * *

(6) *19 NMAC 15.4.14.3(C),* which establishes a $37.50 fee for vehicle safety inspections and re-inspections. That subsection reads as follows:

14. Printed Forms, Permits and Fees

* * * * *

14.3 Printed forms listed below by number or name are hereby adopted and their use for the purpose stated:

* * * * *

14.3.C LP Gas Visual Cargo Tank and Equipment Inspection Form.—$37.50

(Shall not be assessed more than one time in each 12 month period)

Re-inspection of Cargo Tank and Equipment and additional charge for re-inspection.—$37.50

Licensee must obtain Form prior to inspection of vehicle or placing a new vehicle in service. Bureau inspector will complete Form upon inspection. Corrections after inspection will require a Correction Form and re-inspection. To expedite inspections, vehicle licensee will be notified by the LP Gas Bureau that vehicle annual inspection is due during the first month of the inspection quarter.

* * * * *

(7) *19 NMAC 15.4.15.1,* which establishes a $125 annual license fee for persons wholesaling, transporting, or delivering LP gas in the State. That section reads as follows:

15.1 LP–1 Wholesale Sale or Delivery of LP Gas—$125.00

A licensee under this classification is authorized to wholesale, transport and/or deliver gas in vehicular units into or out of any location except that of an ultimate consumer. This classification will allow delivery to the ultimate consumer whose facilities require a bulkhead.

(8) *Sections 12, 13, and 14 of 19 NMAC 15.4.15,* which impose examination, re-examination, and identification card fees. Those sections read as follows:

* * * * *

15.12 Annual renewal fee per qualifying party identification card—$10.00

15.13 Licensing examination fee—$25.00

15.14 Licensing re-examination fee—$25.00

III. Federal Preemption

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation (''DOT'') greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.'' Pub. L. 93–633 § 102, 88 Stat. 2156, presently codified as revised in 49 U.S.C. 5101. The HMTA ''replace[d] a patchwork of state and

federal laws and regulations * * * with a scheme of uniform, national regulations.'' *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n,* 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified, and enacted ''without substantive change'' by Public Law 103–272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51. The HMR carry out the direction in 49 U.S.C. 5103(b)(1) that DOT ''shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce.''

A statutory provision for Federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee ''endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.'' S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, a Federal Court of Appeals found that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments that expanded the preemption provisions. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

The 1990 amendments to the HMTA codified the ''dual compliance'' and ''obstacle'' criteria that RSPA had applied in issuing inconsistency rulings before 1990.[1] The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 83 S. Ct. 1210 (1963); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151, 98 S. Ct. 988 (1978). As now set forth in 49 U.S.C. 5125(a), these criteria provide that, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e) or unless it is authorized by another Federal law, ''a requirement of a State, political subdivision of a State, or Indian tribe'' is explicitly preempted if:

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

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

In the 1990 amendments to the HMTA, Congress also added additional preemption provisions on certain ''covered subject'' areas that must be ''substantively the same as'' a provision of Federal hazmat law or the HMR and with regard to fees imposed by a State, political subdivision, or Indian tribe on the transportation of hazardous material. 49 U.S.C. 5125(b)(1).

Section 5125(g)(1) of Federal hazmat law, 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.

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.73(d)(2); 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination be published in the **Federal Register**. Following the receipt and consideration of written comments, RSPA will publish its determination in the **Federal Register**. *See* 49 CFR 107.209(d). A short period of time is allowed for filing petitions for reconsideration. 49 CFR 5125(f).

Preemption determinations do not directly address issues of preemption arising under the Commerce Clause of the Constitution, except that, as discussed in more detail in section IV.C.1, below, 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. A State, local, or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d at 1581, n. 10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 13132, entitled ''Federalism'' (64 FR 43255, Aug. 10, 1999). Section 4(A) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

IV. Discussion

A. New Mexico Vehicle Inspection Requirements

1. The New Mexico Requirements

New Mexico requires annual safety inspections of vehicles transporting bulk quantities of LP gas within the State. 19 NMAC 15.4.10.1. The inspections are conducted by the Bureau. *Id.* Each vehicle that passes the required inspection must display a State-issued decal.

In its application, ATA challenges the New Mexico safety-inspection requirement at 19 NMAC 15.4.10.1 and states that neither the NMSA nor NMAC set forth procedures for how these annual safety inspections are to be conducted. Moreover, ATA states that at least one of its carrier members has been required to present each of its LP gas vehicles to New Mexico inspectors at a preset date and location, without regard to its principal place of business. In addition, ATA submits that motor carriers are already subject to Federal annual and random roadside inspections, in accordance with 49 CFR part 396 of the Motor Carrier Safety Regulations, and to inspection, repair and maintenance requirements for cargo tanks, in accordance with 49 CFR part 180 of the HMR. Consequently, ATA asserts that the New Mexico requirements are redundant with the Federal requirements, disrupt motor carrier operations, and cause unnecessary delay.

In support of its application, ATA submitted the affidavit of Mr. Lloyd Dean, Vice President of Operations and the Chief Operating Officer of Basin Western, Inc., an interstate motor carrier. Basin Western is located in Roosevelt, Utah, and provides transportation services throughout the Western United States inter-mountain region, including New Mexico. In his

[1] While advisory in nature, RSPA's inconsistency rulings were ''an alternative to litigation for a determination of the relationship of Federal and State or local requirements'' and also a possible ''basis for an application * * * [for] a waiver of preemption.'' Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended to be used by a Public Utility, 44 FR 75566, 76657 (Dec. 20, 1979).

affidavit in support of ATA's application, Mr. Lloyd Dean of Basin Western states,

> Basin Western does not know in advance which of its vehicles will be used to transport LPG into or through the State of New Mexico. Consequently, to be in compliance, Basin Western must annually submit each of its 45 vehicles engaged in LP gas transportation in New Mexico for inspections by the State. Appointments for vehicle inspections are made by informing the Division prior to the date of entry into the State. At that time, a representative of the State informs Basin Western as to the location and time of the inspection. If however, no inspector is available on the date, Basin Western is prohibited from transporting LP gas to destinations within or through the State in that vehicle and must rearrange its schedule for delivery of the product and later inspection of the vehicle or risk penalty of non-compliance. Twice, Basin Western has tried but been unable to schedule inspections in time to meet scheduled deliveries.

Mr. Dean also indicates that Basin Western complies with the Federal annual and daily vehicle inspection requirements. Moreover, he asserts that Basin Western's vehicles are subject to an average of 112 roadside inspections per year, conducted by various State agencies.

NTTC, HMAC, and NPGA support ATA's argument and state that New Mexico's inspection requirements create a time-consuming, impractical, and costly process that impacts drivers, and operational and administrative personnel. Moreover, NTTC submits that Part 180 of the HMR is the standard for cargo tank testing and inspections and that it sets the benchmark by which to measure whether delays in hazardous materials transportation are ''necessary'' and acceptable. NTTC concludes that the New Mexico inspection requirement should be preempted because the requirement is contrary to the mandate in 49 CFR 177.800(d) that all shipments of hazardous materials be transported without unnecessary delay.

ATA also argues that the interstate transportation of hazardous materials would come to a halt if every jurisdiction required that trucks operating within the State undergo a separate, duplicative, fee-supported inspection. ATA submits that RSPA has erred in not considering the impact of multiple, fee-supported State inspections on the interstate transportation of hazardous materials. ATA asserts that, in determining whether the New Mexico safety inspection requirement is preempted, RSPA should apply the ''internal consistency'' test set forth by the Supreme Court in *Oklahoma Tax Comm'n* v. *Jefferson Lines,* 514 U.S. 175; 115 S. Ct. 1331, 1338 (1995), which weighs a law's impact on interstate commerce in the context of its impact if every other jurisdiction imposed an identical requirement.

ATA asserts that a review under the ''internal consistency'' test would find that allowing a proliferation of New Mexico-like inspection and fee requirements would result in unreasonable transportation delays. ATA concludes that the New Mexico vehicle inspection requirements are contrary to the HMR's mandate in section 49 CFR 177.800(d) that shipments of hazardous materials be transported without unnecessary delay, present an obstacle to the purposes and objectives of Federal hazmat law and the HMR and, thus, should be preempted.

In response to ATA's application, CID argues that the LPG and CNG Act, and corresponding regulations, neither impair nor interfere with the statutory or regulatory authority of DOT involving interstate commerce. CID also argues that the New Mexico requirements are not obstacles to the accomplishment of Federal hazmat law but instead complement it. CID asserts that the ability to comply with the New Mexico requirements is ''within the capability of any entity who desires to deliver and transfer liquefied petroleum gas and compressed natural gas product (gases) or, to sell or offer to sell, or provide any such related merchantable item within the jurisdictional authority of the State of New Mexico.'' CID states that the prudent protection of New Mexico's citizens, and their health and property, is both the State's obligation and its right.

Also, CID indicates that carriers performing loading and unloading activities regulated under the HMR are not subject to the State's vehicle inspection or licensing requirements. It notes, however, that loading and unloading activities not subject to the HMR requirements are within New Mexico's jurisdiction and must be accomplished in accordance with State-adopted standards. CID relates that New Mexico has not experienced a hazardous materials transfer incident in the last ten years and attributes that safety record to the State's adoption of National Fire Protection Association (NFPA) Standard 58 and the State's licensing and enforcement program. In conclusion, CID asserts that the New Mexico requirements should not be preempted. NMPGA, in its comments, supports the New Mexico requirements challenged by ATA.

2. The ''Obstacle'' Test

The HMR require that ''all shipments of hazardous materials * * * be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.'' 49 CFR 177.800(d). Consequently, a non-Federal inspection requirement is preempted as an obstacle to the accomplishment and execution of Federal hazmat law and the HMR when, as applied and enforced, it creates unnecessary delay in the transportation of hazardous material. Preemption Determination (''PD'')–4(R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48933, 48941 (Sept. 20, 1993).

RSPA rejects ATA's argument that we should not only consider ''unnecessary delay'' in ascertaining whether the New Mexico inspection requirement is preempted but should also apply the Supreme Court's ''internal consistency'' test, which measures the impact of a requirement on commerce. As we have stated before in response to similar arguments,

> The obstacle criterion for preemption in 49 U.S.C. 5125(a)(2) is a different standard for preemption than whether there is an improper burden on interstate commerce. If the two standards were meant to be equivalent, Congress would have said so, and it would not require RSPA to make a finding with regard to the burden on commerce in considering whether to waive preemption, under § 5125(e), or to consider whether a non-Federal fee is 'fair' or not under 5125(g)(1).

PD–13(R), Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases, Decision on Reconsideration, 65 FR 60238, 60243 (Oct. 10, 2000).

In prior preemption determinations and inconsistency rulings, RSPA has explained why it is concerned with unnecessary delays in hazardous materials transportation. For example, in discussing a requirement to obtain a permit for each shipment of liquefied natural gas and liquefied propane gas, RSPA has indicated:

> The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and their transportation is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading is minimized.

IR–2 (Rhode Island), 44 FR at 75571.

In discussing restrictions on the use of city streets by trucks carrying hazardous

materials, RSPA found that ''[t]he mere threat of delay may redirect commercial hazardous materials traffic into other jurisdictions that may not be aware of or be prepared for a sudden, possibly permanent, change in traffic patterns.'' IR–3, City of Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City, 46 FR 18918, 18921 (March 26, 1981).

As for what constitutes ''unnecessary delay,'' RSPA has found that a delay of hours or days waiting for the arrival of an inspector from another location is ''unnecessary, because it substantially increases the time [hazardous materials] are in transportation, increasing exposure to the risks of hazardous materials without corresponding benefit.'' PD–4(R) (California), 58 FR at 48941.

On the other hand, in PD–4(R) RSPA reaffirmed decisions that ''the minimal increase in travel time when an inspection is actually being conducted, or the vehicle is waiting its 'turn' for an inspector to finish inspecting another vehicle that arrived earlier at the same facility is not unnecessary delay.'' PD–4(R) (California), 58 FR at 48941, quoted in PD–13(R) (Nassau County), 63 FR 45283, 45286 (Aug. 25, 1998), Decision on Reconsideration, 65 FR at 60243; *See also,* IR–17, Illinois Fee on Transportation of Spent Nuclear Fuel, 51 FR 2120926, Decision on Appeal, 52 FR 36200, 36205 (Sept. 25, 1987) (delay of 1.5 to 2 hours during which a State inspection is conducted is reasonable and ''presumptively valid'').

RSPA has also found that a State's annual inspection requirement applied to vehicles or tanks that operate solely within the State is presumptively valid because it would not create the potential for delays ''associated with entering the State or being rerouted around'' the State. PD–4(R) (California), Decision on Reconsideration, 60 FR at 8803, quoted in PD–13(R) (Nassau County), 63 FR at 45286. A carrier whose vehicles are based within the inspecting jurisdiction should be able to schedule an inspection at a time that does not disrupt or unnecessarily delay deliveries, and such inspections are consistent with the traditional authority of a State or political subdivision to license, inspect, and otherwise regulate a motor vehicle based within its jurisdictional boundaries. PD–13(R) (Nassau County), Decision on Reconsideration, 65 FR at 60243.

Conversely, RSPA has recently determined that non-Federal vehicle inspection requirements have an inherent potential to cause unnecessary delays in the transportation of hazardous materials when the requirement is applied to vehicles based outside the inspecting jurisdiction. *See* PD–28(R), Town of Smithtown, New York, Ordinance on Transportation of Liquefied Petroleum Gas, 67 FR 15276 (March 29, 2002). In PD–28(R) (Smithtown), RSPA found that ''the '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.'' *Id.* at 15279. Consequently, the applicant in PD–28(R) (Smithtown) was not required to present more specific evidence of the local inspection requirement's effect on the movement of hazardous materials in vehicles based outside the State in order for RSPA to determine that the requirement was preempted as an obstacle to accomplishing and carrying out the HMR.

In discussing New Mexico's vehicle inspection requirements, Basin Western—an interstate carrier based in Utah—asserts that twice it has tried but been unable to obtain inspections in time to meet scheduled deliveries. In those instances, under New Mexico's regulations, Basin Western was prohibited from transporting LP gas to its destination within or through New Mexico in the uninspected vehicle and was forced to rearrange its schedule for delivery of the product and later inspection of the vehicle. ATA and HMAC note that New Mexico's inspection requirement results in deviation of hazardous materials shipments from their destination route in order to fulfill the inspection provision or, where obtaining a timely inspection is not possible, rerouting of the hazardous materials shipments through other States in order to avoid penalties for noncompliance; both scenarios result in unnecessary delays.

As noted above, neither Federal hazmat law nor the HMR preclude a State from inspecting vehicles traveling within or through the State. Under the principles announced in PD–4(R) (California), a State generally may apply an annual inspection requirement to trucks based outside its jurisdictional boundaries but only if it can actually conduct an ''on the spot'' inspection upon the truck's arrival within the jurisdiction. The State cannot require a permit or inspection for trucks that are not based within the local jurisdiction if the truck must interrupt its transportation of hazardous materials for several hours in order for an inspection to be conducted. In its comments, New Mexico did not address its ability to conduct ''on the spot'' inspections.

For the reasons set forth above, RSPA finds that, as applied and enforced, NMAC 15.4.10.1 creates an obstacle to accomplishing and carrying out the HMR's prohibition against unnecessary delays in the transportation of hazardous material on vehicles based outside of the State. Accordingly, Federal hazmat law preempts 19 NMAC 15.4.10.1 with respect to trucks that are based outside New Mexico. Based on the lack of information in the record regarding how the New Mexico inspection requirements are applied and enforced with respect to trucks that are based within the State, RSPA finds that Federal hazmat law does not preempt New Mexico's vehicle inspection requirement at 19 NMAC 15.4.10.1 with respect to trucks based within the State.

B. New Mexico Employee Examination and Identification Card Requirements

1. The New Mexico Requirements

The LPG and CNG Act gives the Bureau the authority to require persons that transport or dispense LP gas to pass an appropriate examination based on the safety requirements of the Construction Industries Commission (the ''Commission''), 5 NMSA 70–5–7(A). The Bureau's implementing regulations require that all personnel who transport or dispense LP Gas prove, by passing an examination, that they are familiar with minimum safety standards and practices regarding the handling of LP Gas. 19 NMAC 15.4.9.1 and 15.4.9.5. A licensee or employee may not transport or dispense LP gas until he has passed the examination and received an identification card from the Bureau. 19 NMAC 15.4.9.1, 15.4.9.2, and 15.4.9.3. The identification card must be renewed annually. 19 NMAC 15.4.9.4.

In its application, ATA asserts that New Mexico requires any person who operates, loads, or unloads an LP gas transport vehicle, including drivers in interstate commerce, to take a safety examination before being allowed to perform those functions within the State. ATA further asserts that the New Mexico examination is scheduled at various times at different locations throughout the State and that all applicants, whether domiciled within the State or not, must take the test at one of the designated locations. ATA alleges that the testing requirement is in addition to the training and testing requirements in the HMR and imposes costs and other burdens on transporters of LP gas.

ATA notes that while the HMR permit States to impose more stringent training requirements on hazmat drivers, a State may only do so if the requirements (1) do not conflict with the training requirements in 49 CFR part 172 Subpart H and in 49 CFR part 177, and (2) do not apply to drivers domiciled outside the State. ATA asserts that New Mexico's testing requirements are more stringent than those under the HMR and apply to drivers domiciled outside the State. Consequently, ATA argues that the New Mexico training requirements are an obstacle to accomplishing the objectives of Federal hazmat law and the HMR.

Basin Western and other industry commenters support ATA's position. Basin Western states that its drivers must take time to prepare for the New Mexico examination and then must travel to San Juan Community College in Farmington, New Mexico, on the second Saturday of a given month to take a written examination. Basin Western states that it not only must pay a $25 examination fee and $10 identification card fee but also must cover travel expenses, driver wage-related costs, and lost business income for each of its drivers who must take the examination. Basin Western indicates that its drivers hold Commercial Driver's Licenses with appropriate hazardous material and tank vehicle endorsements and are trained in accordance with the HMR. Consequently, Basin Western asserts that the New Mexico training requirements are ''needlessly redundant'' and should be preempted.

2. HMR Training Requirements for Motor Vehicle Operators

The HMR establish general training requirements for persons who package, offer, or transport hazardous materials. 49 CFR part 172, subpart H. The training requirements apply to hazmat employees, including those who operate a vehicle used to transport hazardous material. 49 CFR 171.8 (definition of ''hazmat employee''), 172.702(b). At least every three years, a hazmat employer is required to train and test its hazmat employees to ensure that they have ''familiarity with the general provisions of the HMR, [are] able to recognize and identify hazardous materials, [have] knowledge of specific requirements of the HMR applicable to functions performed by the employee[s], and [have] knowledge of emergency response information, self-protection measures and accident prevention methods and procedures.'' 49 CFR 172.700(b). Moreover, a hazmat employer is required to maintain records showing that it has trained and tested each of its hazmat employees as required under the HMR.

In addition, the HMR impose training requirements for individual modes of transportation, including highway transportation. For example, 49 CFR 177.816(a) requires that motor vehicle operators receive training in a number of areas, including: the requirements of the Federal Motor Carrier Safety Regulations, 49 CFR parts 390 through 397 (incorporated into the HMR by 49 CFR 177.804); pre-trip safety inspection requirements; use of vehicle controls and equipment, including emergency equipment; vehicle operation; vehicle attendance, parking, smoking, routing and incident reporting requirements; and hazardous material loading and unloading procedures, including compatibility and segregation, package handling, and load securement.

In addition to the above training requirements, a person who operates a cargo tank or a vehicle with a portable tank having a capacity of 1,000 gallons or more must have the appropriate State-issued Commercial Driver's License required by 49 CFR part 383. They also must receive specialized training in the following: operation of emergency control features of the cargo tank or portable tank; special vehicle handling characteristics; loading and unloading procedures; the properties and hazards of the material transported; and retest and inspection requirements for cargo tanks. 49 CFR 177.816(b).[2]

The HMR provide that the training requirements set forth above are minimum training requirements for the transportation of hazardous material. 49 CFR 172.701. However, a State may impose more stringent training requirements on motor vehicle drivers only if those requirements: (1) Do not conflict with the training requirements of 49 CFR subpart H and part 177; and (2) apply only to drivers domiciled in that State. 49 CFR 172.701(a) and (b). State training requirement that violate 49 CFR 172.701 are an obstacle as a matter of law. PD–7(R), Maryland Certification Requirements for Transporters of Oil or Controlled Hazardous Substances, Decision on Reconsideration, 60 FR 10419, 10420 (Feb. 24, 1995) citing PD–7(R) (Maryland), 59 FR 28913, 28919 (June 3, 1994).[3]

The record reflects that New Mexico's training requirements are more stringent than those imposed under the HMR. Specifically, any person who operates, loads, or unloads an LP gas transport vehicle in New Mexico—regardless of that person's domicile—must appear at a designated time and at a designated place in New Mexico to pay a fee and take a written examination.[4] The HMR do not require persons who operate, load, or unload LP gas transport vehicles to take a government-administered examination or to pay an examination fee to the government. Moreover, a person may not transport or dispense LP gas in New Mexico until he has passed the examination and received an identification card from the Bureau, which must be renewed every year for a fee. The HMR do not require an operator to obtain an identification card, as proof of training and examination, from a governmental body prior to engaging in hazardous materials transportation activities. The record is clear that the New Mexico training requirements go beyond the HMR training requirements. *See* PD–7(R) (Maryland), 60 FR 10420 (requirement to obtain a certificate of training from a State is ''more strict'' than the HMR); *see also Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d at 1581 (requirement to submit proof of training goes beyond HMR).

In summary, it is clear from the record that New Mexico's training requirement at 5 NMSA 70–5–7(A), and the implementing regulations at 19 NMAC 15.4.9.1 through 15.4.9.5, are more stringent than the HMR training requirements. While there is no evidence in the record that the substance of the New Mexico training requirements conflicts with the HMR training requirements, the record does support ATA's assertion that the New Mexico training requirements are being applied to motor vehicle operators domiciled outside the State.

Consequently, New Mexico's training requirements at 5 NMSA 70–5–7(A), and the implementing regulations at 19 NMAC 15.4.9.1 through 15.4.9.5, violate 49 CFR 172.701(b) and, as applied to non-domiciled operators, are preempted as an obstacle to accomplishing the goals of Federal hazmat law and the HMR.

[2] The training requirements in 49 CFR 177.816(a) and (b) may be satisfied by compliance with the current requirements for a Commercial Driver's license with a tank vehicle or hazardous materials endorsement. 49 CFR 177.816(c).

[3] The authority granted to States to impose stricter requirements on their domiciled operators ''recognizes the traditional regulation by States of their own resident drivers.'' PD–7(R) (Maryland), 59 FR at 28919.

[4] There is no specific information in the record regarding the substance of the New Mexico safety examination. Basin Western, however, characterizes the New Mexico testing requirements for LP gas transportation as ''needlessly redundant'' with the HMR training requirements.

As applied to operators domiciled in New Mexico, the New Mexico training requirements are more stringent than those imposed under the HMR. However, as noted above, there is no evidence in the record that the substance of the New Mexico training requirements conflicts with the HMR training requirements. Accordingly, as applied to operators domiciled in New Mexico, the New Mexico training requirements at 5 NMSA 70–5–7(A) and at 19 NMAC 15.4.9.1 through 15.4.9.5 are not preempted.

C. Fees

1. LP Gas License Fee Requirement

a. The New Mexico Requirements

New Mexico requires a person to obtain a license from the State prior to transporting LP gas within the State. 5 NMSA 70–5–6(A). The LPG and CNG Act directs the Bureau to issue a license only after it has determined that an applicant meets all safety requirements provided for under that act and under the regulations of the Commission, and after the Bureau finds that an applicant is fit and able to perform the work for which a license is requested. *Id.* The LPG and CNG Act also authorizes the Bureau to establish a reasonable licensing fee. 5 NMSA 70–5–9(A). Fees collected under the LPG and CNG Act must be deposited into the State general fund. 5 NMSA 70–5–10.

In its application, ATA challenges the authority given to the Bureau in 5 NMSA 70–5–9(A) to establish reasonable licensing fees but does not challenge the general licensing requirement in 5 NMSA 70–5–6(A). ATA also challenges the implementing regulation at 19 NMAC 15.4.15.1, which imposes a $125 licensing fee. ATA states that motor carriers who transport LP gas in New Mexico are in category ''LP–1'' and subject to an annual flat fee of $125 that is not apportioned to the level of a motor carrier's presence or activities in the State and, thus, is discriminatory and violates the Commerce Clause.

ATA argues that the privilege of conducting LP gas transportation in New Mexico is inherently more valuable to intrastate carriers that conduct all of their operations in the State than to carriers that operate predominantly in interstate commerce. Consequently, ATA concludes that imposing a flat fee to cover regulatory costs places a disproportionate share of those costs on interstate motor carriers. ATA contends that the $125 licensing fee imposed on interstate carriers by New Mexico is discriminatory and violates the Commerce Clause, citing *American Trucking Associations, Inc.* v. *Scheiner,* 483 U.S. 266, 107 S. Ct. 2829 (1987). ATA also states that the fee violates the Commerce Clause and, thus, is not fair and is preempted under section 5125(g)(1) of Federal hazmat law, in accordance with RSPA's decision in PD–21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 FR 54474 (Oct. 6, 1999).[5]

Mr. Dean, in his affidavit in support of ATA's application, states that Basin Western transports various types of petroleum products and has a 45-vehicle fleet dedicated to LP gas transportation. Mr. Dean states that for the last two years Basin Western has paid a $125 fee in order to obtain an LP–1 license to transport LP gas into and through New Mexico. Mr. Dean argues that fees imposed by New Mexico, including the licensing fee, would be prohibitive if replicated by other States.

NTTC supports ATA's application and states that, because of the '''flat tax' nature of the State fees, preemption is mandated.'' NPGA argues that New Mexico's imposition of a license fee on all LP gas transporters in the State, regardless of where they are domiciled, creates an obstacle to achieving the HMR's goal of uniformity regarding the movement of hazardous materials in commerce. NPGA also asserts that New Mexico's licensing fee is a flat fee and that such fees have been struck down by the courts. NPGA also notes that RSPA has issued preemption determination decisions, such as PD–21(R) (Tennessee), finding that flat fees are preempted by Federal hazmat law.

HMAC also strongly supports ATA's application and agrees with ATA's conclusion that New Mexico's $125 assessment against interstate carriers is unfair because, if enacted by other States or jurisdictions, it would lead to assessments on interstate carriers many times the rate paid by local carriers for the same number of miles.

Finally, ATA asserts that the $125 assessment is deposited into the State general fund and is not earmarked for purposes related to the transportation of hazardous materials. Consequently, ATA argues that the fee is preempted because it is neither fair nor used for hazardous materials transportation purposes as required under section 5125(g)(1) of Federal hazmat law, 49 U.S.C. 5125(g)(1).

b. The Fairness Test

ATA asserts, and the record supports, that New Mexico requires interstate and intrastate carriers to obtain a license, at a cost of $125 annually, in order to move LP gas in commerce within the State. On the other hand, while the New Mexico licensing requirement states that it applies to persons who ''dispense'' LP gas, CID denies that carriers who are subject to the HMR's loading and unloading requirements must obtain a license from New Mexico to perform those activities within the State.[6]

A New Mexico license authorizes a carrier to perform certain transportation-related and non-transportation-related activities within the State upon payment of a fixed annual fee. In essence, a New Mexico license is a permit to conduct those activities within the State. Permit requirements do not, *per se,* make it impossible to comply with Federal hazmat law or HMR requirements, or create an obstacle to accomplishing and carrying out Federal hazmat law or the HMR. *See* PD–9(R), Los Angeles County, California Requirements Applicable to the Transportation and Handling of Hazardous Materials on Private Property, 60 FR 8774, 8785 (Feb. 15, 1995)[7]. Whether or not a permit

[5] Complaint for judicial review filed Dec. 3, 1999 (No. C–3–99–1126, M.D. Tenn.). On February 27, 2001, the District Court rejected a magistrate-judge's recommendation that sovereign immunity bars a determination of preemption. Tennessee has appealed the District Court's decision to the U.S. Court of Appeals for the Sixth Circuit (No. 01–5373).

[6] Motor carrier personnel who load or unload a hazardous material incidental to the material's movement in intrastate or interstate commerce are subject to the HMR's loading and unloading requirements. *See* 49 CFR 177.834.

[7] On February 15, 1995, RSPA simultaneously issued preemption decisions in PD–8(R), PD–9(R), PD–10(R), and PD–11(R) regarding certain California and Los Angeles County requirements. 60 FR 8774. Those collectively-issued decisions are known as the ''Four-Pack'' decisions. Five petitions for reconsideration of those decisions are pending. RSPA deferred issuing a decision on reconsideration until its completion of a rulemaking, RSPA docket HM–223. 61 FR 38513 (July 24, 1996). Both the petitions for reconsideration and RSPA Docket HM–223 raise issues regarding the on-site handling and transportation of hazardous materials and whether certain transportation and unloading activities are regulated under the HMR. *Id.* RSPA deferred action on the petitions for reconsideration in order not to prejudge matters that are more appropriately handled through notice-and-comment rulemaking. *Id.*

On June 3, 2000, two petitioners for reconsideration—The Chlorine Institute and the Chemical Manufacturers' Association (now known as the American Chemistry Council)—withdrew their joint petition for reconsideration of the Four-Pack decisions. On June 7, 2000, they filed a complaint in the U.S. District Court for the District of Columbia challenging RSPA's determination that Federal hazmat law does not preempt certain California and Los Angeles County requirements applicable to the movement of hazardous materials exclusively within the confines of a private facility and to certain storage and unloading activities at those facilities. *See,* Civil Action No. 00–1312

requirement is preempted depends on the steps required to obtain the permit. *Id.; See also* IR–28, City of San Jose, California, Restrictions on Storage of Hazardous Materials, 55 FR 8884 (Mar. 8, 1990); IR–20, Triborough Bridge and Tunnel Authority Regulations Governing Transportation of Radioactive Materials and Explosives, 52 FR 24396 (June 30, 1987); IR–3 (City of Boston), Decision on Appeal, 47 FR 18457 (Apr. 29, 1982); IR–2 (Rhode Island), 44 FR 75566; *New Hampshire Motor Transport Ass'n* v. *Flynn,* 751 F.2d 43 (1st Cir. 1984); *Colorado Public Utilities Comm'n* v. *Harmon,* CV 88–Z–1524 (D. Colo. 1989), *rev'd on other grounds,* 951 F.2d 1571 (10th Cir. 1991). To obtain a license to move hazardous materials within or through New Mexico, the applicant must demonstrate that it meets the State safety requirements, the Bureau must find that the applicant is fit and able to perform the work for which a license is sought, and the applicant must pay a $125 annual fee per business location. ATA specifically challenges the regulations implementing New Mexico's licensing fee requirement.

Section 5125(g)(1) of Federal hazmat law provides that a State, a political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if: (1) The fee is fair, and (2) the fee is used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. ATA cites both *ATA* v. *Scheinner* and PD–21(R) (Tennessee) in support of its argument that the New Mexico license fee is not fair and violates the Commerce Clause. In PD–21(R) (Tennessee), RSPA found, based on the legislative history of section 5125(g)(1), that the ''reasonableness'' test set forth in *Evansville-Vanderburgh Airport Auth. District* v. *Delta Airlines, Inc.,* 405 U.S. 707, 92 S. Ct. 1349 (1972), was ''the most appropriate one for interpreting the fairness requirement in 49 U.S.C. 5125(g)(1).'' 64 FR 54478. *See also* PD–18(R), Broward County, Florida's Requirements on the Transportation of Certain Hazardous Materials to or from Points in the County, 65 FR 81950 (Dec. 27, 2000).

In *Evansville-Vanderburgh,* the Supreme Court held that a State or local fee does not violate the Commerce Clause if it ''is based on some fair approximation of use or privilege for use * * * and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred. * * *'' *Evansville-Vanderburgh,* 405 U.S. at 716. The Court also held that ''a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive.'' *Id.* at 717. Subsequently, in *ATA* v. *Scheinner,* the Court limited this latter holding to situations where a flat tax is the ''only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.'' *Scheinner,* 483 U.S. at 296.

In addition, ATA and some commenters argue that the New Mexico fee is unfair because it would be prohibitive if replicated by other States. RSPA has never relied on the potential cumulative effect of a fee as the basis for a finding of preemption. *See* IR–17 (Illinois), 51 FR 20926, 20934 (June 9, 1986), Decision on Appeal, 52 FR 36200 (Sept. 25, 1987). *See also* PD–21(R), 64 FR at 54478. Also, there is no evidence that the potential for other States to adopt fees, by itself, makes the New Mexico fee unfair. Indeed, the Court in *Scheinner* found that ''even if more than one jurisdiction applies a charge to participants in interstate commerce, the Commerce Clause may be satisfied if the revenue measure maintains state boundaries as a neutral factor in decision making.'' *Scheinner,* 483 U.S. at 283.

The record supports ATA's contention that both intrastate and interstate carriers must pay New Mexico's $125 annual license fee in order to move LP gas in commerce within the State. There is no evidence that this annual fixed fee is apportioned to a carrier based on number of miles traveled within the State, number of pick-ups or deliveries made within the State, size or 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. Moreover, while interstate and intrastate carriers pay the same fixed fee annually, the privilege of moving LP gas within the State is clearly more valuable to the local transporter than to the interstate transporter. Therefore, New Mexico's assessment of a $125 license fee on a per facility basis, rather than on some approximation of the benefit conferred to licensees, discriminates against interstate commerce.[8] Furthermore, there is no evidence in the record that a more finely gradated fee would pose genuine administrative burdens on the State.

The record is less clear on whether New Mexico's licensing requirement is being applied to intrastate and interstate carriers that load or unload hazardous material within the State. While 19 NMAC 5.4.15.1 states that an LP–1 license holder is authorized to ''wholesale, transport and/or deliver gas in vehicular units,'' CID denies that carriers subject to the HMR's loading and unloading requirements must obtain a license to perform those activities within the State. Regardless, carriers that load or unload a shipment of LP gas within the State presumably moved that shipment within the State and, therefore, are required to obtain a license.

As noted above, Section 5125(g)(1) does not prohibit a State from imposing a fee related to transporting hazardous material, so long as the fee is fair and is actually used for a purpose related to transporting hazardous material. Consequently, the requirement in 5 NMSA 70–5–9(A) that each person, firm, or corporation pay a reasonable license fee as set, classified, and defined by the Bureau, is not preempted.

On the other hand, the Bureau imposes a flat $125 license fee on carriers that move or deliver LP gas in the State. The fee is not a ''reasonable'' fee as defined in *Evansville-Vanderburgh* because it is not based on some fair approximation of a carrier's use of State facilities and because it discriminates against interstate commerce. Thus, under 5125(g)(1) of Federal hazmat law, the fee is not a fair fee. Consequently, the fee imposed on interstate and intrastate carrier movement of LP gas by the Bureau under 19 NMAC 15.4.15.1 violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazmat law. To the extent that New Mexico imposes its licensing requirement on interstate or intrastate motor carriers performing loading or unloading activities subject to the HMR requirements at 49 CFR 177.834, the licensing requirement, as it applies to

(WBB). On May 6, 2002, the U.S. District Court for the District of Columbia granted RSPA's motion to dismiss on the ground that the Four-Pack decisions are not final and, thus, not ripe for judicial review.

On June 14, 2001, RSPA published an NPRM in Docket HM–223. 66 FR 32420. We expect to publish a final rule by June 2003.

[8] On the question of whether a fee is discriminatory, the Court in *Scheinner* found dispositive prior Supreme Court cases ''which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.'' *Scheinner,* 483 U.S. at 282.

intrastate and interstate carriers that ''deliver'' LP gas, is also preempted for the reasons set forth above.

c. The ''Used For'' Test

As discussed above, Federal hazmat law provides that ''[a] State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is * * * used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' 49 U.S.C. 5125(g)(1). Consequently, fees levied in connection with the transportation of hazardous materials must be used for a purpose related to the transportation of hazardous materials. Fees that are not used for a purpose related to hazardous materials transportation are preempted. *See* PD–9(R) (Los Angeles), 60 FR 8784; *See also* PD–18(R) (Broward County), 65 FR at 81959; PD–21(R) (Tennessee), 64 FR 54479.

Section 70–5–9(A) of 5 NMSA requires persons transporting LP gas within the State to pay annual license fees ''for the purpose of defraying the expenses of administering the laws relating to the use of CNG in motor vehicles or the LP gas industry * * *.'' Activities subject to the LPG and CNG Act include both transportation-related and non-transportation-related activities, specifically ''the selling, offering for sale, constructing, assembling, repairing, equipping, installing, filling with fuel, storage of fuel within, [and] dispensing of fuel from or transporting fuel'' in certain approved containers. 5 NMSA 70–5–4. Fees collected to administer the LPG and CNG Act are deposited into the State general fund. 5 NMSA 70–5–10.

ATA argues that section 5125(g)(1) of Federal hazmat law preempts the $125 annual licensing fee requirement (and, as discussed below, vehicle-inspection, testing, and other fee requirements) because the fees are deposited in the State's general fund and are not used for hazardous materials transportation purposes. NPGA and HMAC agree with ATA's conclusion. NPGA remarks that the New Mexico law does not indicate that the monies collected will be used for purposes relating to hazardous materials transportation, enforcement and planning, or development and maintenance of emergency response capability. CID, in its comments, is silent on this issue.

The record supports that the Bureau collects licensing fees from intrastate and interstate carriers, for the purpose of administering the LPG and CNG Act, and deposits those fees into the State general fund. While Federal hazmat law does not prohibit a State from directing the deposit of fees into the State's general fund, Federal hazmat law does require that the funds be used for hazardous materials transportation purposes. CID does not rebut ATA's or commenters' assertions that licensing fees deposited into New Mexico's general fund are not earmarked or actually used for hazardous materials transportation purposes as required under 5125(g)(1). Consequently, RSPA cannot find that the licensing fees collected under the LPG and CNG Act are used for purposes related to hazardous materials transportation. Therefore, the licensing fee requirement at 19 NMAC 15.4.15.1 violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazmat law. Federal hazmat law does not preempt the requirement at 5 NMSA 70–5–10 that the fees be deposited into the State general fund.

2. Vehicle Inspection Fees

Section 70–5–9(C) of 5 NMSA requires persons transporting LP gas within the State to pay annual vehicle inspection fees ''for the purpose of defraying the expenses of administering the laws relating to the use of CNG in motor vehicles or the LP gas industry * * *.'' Activities subject to the LPG and CNG Act include both transportation-related and non-transportation-related activities. 5 NMSA 70–5–4. The cost of New Mexico's annual vehicle safety inspection is $37.50 per vehicle. 19 NMAC 15.4.14.3(C). Like the licensing fees discussed above, the vehicle inspection fees are deposited into New Mexico's general fund. 5 NMSA 7–5–10.

In its application, ATA argues, and the majority of commenters agree, that the annual, per-vehicle inspection fee is preempted because the fee is not used for purposes related to hazardous materials transportation, in violation of 49 U.S.C. 5125(g)(1).

As discussed above, Federal hazmat law provides that ''A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is * * * used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' 49 U.S.C. 5125(g)(1). Consequently, fees levied in connection with the transportation of hazardous materials must be equitable and used for a purpose related to the transportation of hazardous materials. Fees that are not used for a purpose related to hazardous materials transportation are preempted. *See* PD–9(R) (Los Angeles), 60 FR at 8784; *See also* PD–18(R) (Broward County), 65 FR at 81959; PD–21(R) (Tennessee), 64 FR at 54479.

The fee at issue appears to be related, in some measure, to the work involved in performing the inspection required under 19 NMAC 15.4.14.3(C). In PD–21(R) (Tennessee), RSPA noted that fees covering the cost of a required inspection ''would be expected to be the same amount for both interstate and intrastate companies'' and have not been found to violate the Commerce Clause. PD–21(R) (Tennessee), 64 FR 54478; *see also* PD–13(R) (Nassau County), Decision on Petition for Reconsideration, 65 FR 60244. Cnsequently, there is no evidence that New Mexico's vehicle inspection fee is unfair.

On the other hand, the record supports that the Bureau collects vehicle inspection fees from intrastate and interstate carriers and deposits those fees into the State's general fund. CID does not dispute ATA's and commenters' assertions that the fees are not earmarked for hazardous materials transportation purposes or actually used for hazardous materials transportation purposes as required under 5125(g)(1). Consequently, RSPA cannot find that the vehicle inspection fees collected under the LPG and CNG Act are used for purposes related to hazardous materials transportation. Therefore, the vehicle inspection fee requirement in 19 NMAC 15.4.14.3(C) violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazmat law. The general provision mandating the collection of a reasonable fee for safety inspections, set forth at 5 NMSA 70–5–9(C), is not preempted.

New Mexico's Examination and Identification Card Fees

As discussed above, New Mexico requires a person who transports or dispenses LP gas to pass an appropriate examination based on the safety requirements of the Commission, 5 NMSA 70–5–7(A). New Mexico also requires the Bureau to set a reasonable fee for administering the safety examination. 5 NMSA 70–5–7(C). Persons who pass the examination may not transport or dispense LP gas until they have received an identification card from the Bureau. 19 NMAC 15.4.9.3. The Bureau's regulations require that identification cards be renewed annually after payment of a ''reasonable'' fee. 19 NMAC 15.4.9.4. In addition, the Bureau has established a $25 examination/re-examination fee, 19 NMAC 15.4.15.13 and 15.4.15.14, and

an annual $10 identification card renewal fee. 19 NMAC 15.4.15.12.

ATA argues, with the support of the majority of commenters, that New Mexico's examination and identification card fees are preempted because the fees are not used for purposes related to hazardous materials transportation, in violation of 49 U.S.C. 5125(g)(1).

As discussed above, a State, political subdivision of a State, or Indian tribe may impose a fee related to hazardous materials transportation if the fee is fair and used for hazardous materials transportation purposes. 49 U.S.C. 5125(g)(1). Fees that are not fair and used for hazardous materials transportation purposes are preempted. *See* PD–9(R) (Los Angeles), 60 FR 8784; *See also* PD–18(R) (Broward County), 65 FR 81959; PD–21(R) (Tennessee), 64 FR 54479.

Because Federal hazmat law and the HMR specifically allow a State to impose fees related to hazardous materials transportation, under certain conditions, the New Mexico requirements at 5 NMSA 70–5–7(C) and 19 NMAC 15.4.9.4 that the Bureau set ''reasonable'' examination and identification card fees are not preempted. With regard to the Bureau's implementing regulations—19 NMAC 15.4.15.12 through 15.4.15.14—there is no evidence that the fees imposed by the Bureau on employees of interstate and intrastate carriers are disproportionate to the work involved in administering the New Mexico safety examination and in issuing identification cards. Consequently, the fees appear to be fair. On the other hand, CID does not dispute ATA's and commenters' assertions that the fees, which are deposited into the State's general fund, are not earmarked or actually used for purposes related to hazardous materials transportation. As a result, the employee examination and identification card fee requirements in 19 NMAC 15.4.15.12 through 15.4.15.14, fail to satisfy the requirement at 49 U.S.C. 5125(g)(1) and are, thus, preempted.

V. Ruling

For the reasons set forth above, RSPA finds that Federal hazmat law preempts the following New Mexico requirements:

A. *Vehicle inspection requirements as applied to vehicles based outside the State:*

- 19 NMAC 15.4.10.1, requiring annual vehicle safety inspection.

B. *Written examination requirements as applied to non-domiciled drivers:*

- 5 NMSA 70–5–7(A), containing examination requirement for persons who transport or dispense LP gas.
- 19 NMAC 15.4.9.1, establishing examination requirement for persons who transport or dispense LP gas.
- 19 NMAC 15.4.9.2, requiring identification card.
- 19 NMAC 15.4.9.3, prohibiting persons from working without an identification card.
- 19 NMAC 15.4.9.4, to the extent it requires annual identification card renewal.
- 19 NMAC 15.4.9.5, requiring re-examination.

C. *Fees:*

(1) *Licensing fee requirement as applied to intrastate and interstate motor carriers that move, load, or unload LP gas:*

- 19 NMAC 15.4.15.1, establishing license classification and fee for wholesale sale, transport, or delivery of LP gas.

(2) *Vehicle inspection and reinspection fee requirements:*

- 19 NMAC 15.4.14.3(C), establishing vehicle inspection and reinspection fees.

(3) *Written examination fee requirements:*

- 5 NMSA 70–5–7(C), containing examination fee requirement for persons who transport or dispense LP gas.
- 19 NMAC 15.4.9.4, to the extent that it establishes an annual identification card requirement.
- 19 NMAC 15.4.15.12, establishing annual identification card renewal fee.
- 19 NMAC 15.4.15.13, establishing examination fee.
- 19 NMAC 15.4.15.14, establishing re-examination fee.

For the reasons set forth above, RSPA finds that Federal hazmat law does not preempt the following New Mexico requirements:

A. *Vehicle inspection requirements as applied to vehicles based within the State:*

- 19 NMAC 15.4.10.1, requiring annual vehicle safety inspection.

B. *Written examination requirements as applied to domiciled drivers:*

- 5 NMSA 70–5–7(A), containing examination requirements for persons who transport or dispense LP gas.
- 19 NMAC 15.4.9.1, establishing examination requirement for persons who transport or dispense LP gas.
- 19 NMAC 15.4.9.2, requiring identification card.
- 19 NMAC 15.4.9.3, prohibiting persons from working without an identification card.
- 19 NMAC 15.4.9.4, to the extent it requires annual identification card renewal.
- 19 NMAC 15.4.9.5, requiring re-examination.

C. *Fees:*

- 5 NMSA 70–5–7–(C), containing examination fee requirement for persons who transport or dispense LP gas.
- 5 NMSA 70–5–9(A), requiring payment of a reasonable annual license fee.
- 5 NMSA 70–5–9(C), requiring payment of a reasonable safety inspection fee.
- 5 NMSA 70–5–10, requiring deposit of fees into the State general fund.
- 19 NMSA 15.4.9.4, to the extent that it establishes a reasonable annual identification card fee.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), ''[a]ny person aggrieved'' by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register**. Any party to this proceeding may seek review of RSPA's decision ''in an appropriate district court of the United States * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

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

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register**, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, DC on September 13, 2002.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

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