

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