

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.”

NGPA 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