

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 graduated user-fee schedule would pose genuine administrative burdens." PD-22(R), 67 FR at 59403, quoting from *American Trucking Ass'n 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