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RSPA-00-7092-17

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Law Department

207264

December 4, 2002

Mr. Robert A. McGuire
Associate Administrator for Hazardous
Materials Safety
U.S. Department of Transportation
Research and Special Programs Administration
400 Seventh Street, S.W.
Washington, DC 20590-0001

Via Facsimile and First Class Mail

Re: Response to Petition for Reconsideration (Docket No. RSPA-00-7092/PDA-22(R))

Dear Mr. McGuire:

Pursuant to 49 C.F.R. §107.211, the American Trucking Associations, Inc. ("ATA")[1] submits these comments in response to the Attorney General of New Mexico's Petition for Reconsideration of the Research and Special Programs Administration's ("RSPA") preemption determination, referenced above ("Preemption Determination").[2] For the reasons set forth herein, RSPA should reject New Mexico's Petition for Reconsideration and uphold its Preemption Determination.

On September 13, 2002, RSPA issued a preemption determination, concluding that federal hazardous materials transportation law preempts: New Mexico's cargo tank inspection requirements, as applied to vehicles based outside the State, because the requirement causes unnecessary delay in the transportation of hazardous materials; New Mexico's employee examination and identification card requirements, as applied to non-domiciled, liquefied petroleum gas ("LPG") carrier personnel, because the federal hazardous materials regulations

[1] ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every size, type and class of motor carrier operation, including motor carriers that transport hazardous materials and hazardous wastes in intrastate, interstate and foreign commerce.

[2] *See* 67 *Federal Register* 59,396 (September 20, 2002) (hereinafter "Preemption Determination").

("HMRs") specifically provide that State training requirements may not apply to drivers domiciled outside the State; New Mexico's LPG transporter license fee requirements applicable to intrastate and interstate motor carriers that transport, 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; and 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.[3]

DISCUSSION

New Mexico's Petition for Reconsideration challenges RSPA's Preemption Determination with respect to the following three issues: (1) vehicle inspections; (2) employee examination and identification card requirements; and (3) certain fees associated with the transportation of liquefied petroleum gas. We address each of these issues below.

A. New Mexico Annual Vehicle Inspections

RSPA was correct in concluding that New Mexico's vehicle inspection requirement creates an unnecessary delay in the transportation of hazardous materials.[4] In its Petition for Reconsideration, New Mexico attempts to demonstrate, using the following argument, that its inspection procedures do not cause unnecessary delay in the transportation of hazardous material.

> It is clear that the LP Gas Bureau inspectors do all they reasonably can to avoid disrupting schedules and deliveries. Given nearly three months and inspectors willing to travel anywhere in the state to inspect the vehicles at any time and in any location, any reasonable transporter should be able to have all of its New Mexico licensed vehicles inspected in a timely manner.[5]

As demonstrated below a 3-month renewal window combined with the availability of scheduled inspections does not ensure that New Mexico's annual inspection requirement will not cause an unreasonable delay in the transportation of hazardous materials.

In characterizing its inspection requirement as a "write and request system," the state actually highlights one of the major problems with its inspection requirement. Often carriers do not know when they will be required to deliver LPG to New Mexico. They may receive a phone

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[3] *See* 67 *Federal Register* at 59396/2.

[4] *See* 67 *Federal Register* at 59400/2-3.

[5] Letter from Patrick T. Simpson, Assistant Attorney General, to Nancy Machado, Office of Chief Counsel, p. 2 (October 30, 2002) (hereinafter "NM Petition").

call and be required to dispatch an available vehicle the same day. Under these circumstances, contacting the state to schedule an appointment for an inspection is operationally unrealistic. Similarly, an interstate carrier with one or more vehicles actually dedicated to service New Mexico would have no reasonable means of complying with the annual inspection requirement where one of its dedicated vehicles breaks down and another vehicle must be diverted to New Mexico unexpectedly. Under these circumstances, New Mexico's conclusion that interstate LPG transporters "should be able to schedule an inspection at a time that does not disrupt or unnecessarily delay deliveries" is erroneous.[6]

RSPA previously outlined the limits to a state's right to inspect vehicles traveling within its jurisdiction:

> [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.[7]

In its Petition for Reconsideration, New Mexico concedes that its vehicle inspection system does not provide for an "on the spot" inspection alternative.[8] As such, circumstances exist where compliance with New Mexico's LPG vehicle inspection requirement would result in an unreasonable delay in the transportation of hazardous materials. Accordingly, RSPA properly determined that federal Hazardous Materials Transportation Law preempts New Mexico's LPG vehicle inspection requirement as applied to vehicles domiciled outside the state.

As discussed above, ATA agrees with RSPA's determination that New Mexico's inspection requirement is preempted because it creates unnecessary delay in the transportation of hazardous materials; however, we believe that RSPA should reconsider its decision not to apply the Supreme Court's "cumulative burden" test, which was set forth in Healy v. Beer Institute, 491 U.S. 324 (1989), to its preemption analysis.[9] In applying the internal consistency test, the cumulative impact of multiple jurisdictions imposing identical requirements is considered in determining the impact of such a requirement on commerce. RSPA states that the cumulative burden test is separate and distinct from the obstacle criterion.

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[6] NM Petition at 2 (quoting 67 *Federal Register* at 59,400).

[7] 67 *Federal Register* at 59400/2 (citing PD-4(R), 58 *Federal Register* 48,933 (June 30, 1987)). *See also* 65 *Federal Register* 60,238 (October 10, 2000).

[8] NM Petition at 2.

[9] In analyzing the constitutionality of the Connecticut Liquor Control Act, the Court held that "the practical effect of the statute must be evaluated not only be considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other states and what effect would arise if not one, but many or every, State adopted similar legislation." Healy 491 U.S. at 336. *See also* Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175; 115 S. Ct. 1331, 1338 (1997)

> 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).[10]

In that regard, both standards are applicable in determining whether federal law preempts a state requirement. Where an individual state law creates an obstacle under Section 5125, RSPA must issue a preemption determination based upon the obstacle criterion; however, where a state law does not, in and of itself, create an obstacle, RSPA still could issue a preemption determination under the Supreme Court's cumulative burden test where an individual state law's impact on interstate commerce is examined in the context of the impact upon the interstate transportation of hazardous materials if every other jurisdiction imposed an identical requirement.

There can be little dispute that hazardous materials transportation would be frustrated if every jurisdiction in which a truck operated required that the 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. At what point do individual state and local "on the spot" inspection requirements combine to cause an unnecessary delay in the transportation of hazardous materials? RSPA is the only federal agency vested with the responsibility of ensuring that hazardous materials laws throughout the nation do not compromise the safe and efficient transportation of hazardous materials. RSPA should not turn a blind eye to the very real problem that may be caused by the cumulative burden of individual state and local requirements. Once a vehicle has been subjected to the applicable inspection requirements (49 C.F.R. Part 396), other states should be prohibited from imposing additional inspection requirements.

B. Employee Examinations and Identification Cards

RSPA correctly concluded that New Mexico's LPG examination and licensing requirements are preempted when applied to drivers that reside outside of New Mexico. If upheld, these requirements would force all drivers that transport LPG through New Mexico to train, sit for, and pass a state examination.

The state attempts to defend its training requirements by arguing that the requirements are more stringent than the HMR, but do not conflict with the HMR.

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[10] 67 *Federal Register* at 59399/3.

> [T]here is no conflict between New Mexico requirements and the HMR, the fact that the former are more stringent than the latter is enough for pre-emption. The State respectfully suggests that this is an overbroad reading of pre-emption law. Stringency alone, without an actual conflict with federal law, is not enough for pre-emption.[11]

The rationale underlying New Mexico's argument makes clear that the state has misread the HMRs; specifically, 49 C.F.R. § 172.701, which defines the relationship between the federal training requirements and permissible state training requirements. That section sets up a two-prong standard for states seeking to impose more stringent training requirements:

> For motor vehicle drivers, however, a State may impose more stringent training requirements only if those requirements – (a) Do not conflict with the training requirements in this subpart and in part 177 of this subchapter; <u>and</u> (b) <u>Apply only to drivers domiciled in that State</u>.[12]

Pursuant to 49 C.F.R. § 172.701(b), New Mexico's training requirements cannot apply to out of state drivers. The reason for this prohibition is clear. If an out-of-state driver were required to pass examinations in multiple states, then test taking itself would become an obstacle to the safe and efficient transportation of hazardous materials, as few drivers could devote the time necessary to master the subtle regulatory differences between jurisdictions and sit for examinations in each of those jurisdictions. Thus, RSPA correctly determined that New Mexico's examination and identification card requirements are preempted when applied to out of state drivers.

In this instance the HMRs clearly address the propriety of New Mexico's separate and distinct training requirements and limit their applicability to drivers domiciled within the state. RSPA should deny this aspect of New Mexico's Petition for Reconsideration as contrary to the HMRs. The proper forum for the state to pursue any modification to Section 172.701 is through a petition for rulemaking, not this Petition for Reconsideration.

C. <u>New Mexico Licensing and Inspection Fees</u>

New Mexico asks RSPA to reconsider its decision to preempt certain fees associated with the New Mexico LPG licensing requirements and vehicle inspection requirements. For the reasons set forth below, RSPA should deny this aspect of New Mexico's Petition for Reconsideration and reiterate that the fees sought under New Mexico's licensing and inspection

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[11] NM Petition at 3.
[12] 49 C.F.R. § 172.101 (emphasis added).

requirements are preempted because they are neither fair nor dedicated for purposes related to the transportation of hazardous materials.

Flat annual fees like New Mexico's are discriminatory and impose an undue burden on interstate commerce. The Supreme Court has held that a state 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. . . ."[13] Subsequently, the U.S. Supreme Court further limited the use of flat fees to those situations where the flat fee is the "only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."[14]

The fees that are the subject of New Mexico's Petition for Reconsideration do not satisfy this legal standard. Indeed, New Mexico's fees are flat fees that are unapportioned to the motor carrier's presence or level of activity within the state. Moreover, New Mexico points only to its own financial difficulties as its reason for imposing a flat fee.[15] The state has not shown that flat fees are the "only practicable means of collecting revenues."[16]

Thus, RSPA properly concluded that New Mexico's LPG inspection and licensing fees are preempted by 49 U.S.C. § 5125(g)(1) in that they are not fair.

In addition to the fairness standard discussed above, state imposed hazardous materials transportation fees, such as New Mexico's licensing and inspection fees, must be used for a purpose related to transporting hazardous material.[17] Although New Mexico concedes that the fees it collects are deposited in the state's general fund, it argues that all of the funds collected are allocated to its LPG program. The rationale advanced by New Mexico is that since it presently collects less money than is required to administer its LPG program, all of the fees collected are used for a purpose related to transporting hazardous material. The mere fact that last year the state collected less money than it spent administering the program is not dispositive.

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[13] Evansville-Vanderburgh Airport Auth. District v. Delta Airlines, Inc., 405 U.S. 707, 716 (1972).

[14] American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 296 (1987) (hereinafter "Scheiner"). *See also* RSPA Preemption Determination No. 21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 *Federal Register* 54474, 54478 (a flat fee that is not based on some fair approximation of the use of the facilities is discriminatory and therefore not fair in violation of 49 U.S.C. § 5125(g)(1))(*quoting* American Trucking Associations v. Secretary of Administration, 415 Mass. 337 (1993), "An interstate hazardous waste transporter which travels just one time in the Commonwealth must pay the same fee as a local hazardous waste transporter. It is therefore apparent that the 'privilege" of using the compliance program is more valuable to local transporters so that the practical effect of apportioning total costs on a per vehicle basis is to discriminate against interstate commerce.").

[15] *See* NM Petition at 6.

[16] Scheiner, 483 U.S. at 296.

[17] *See* 49 U.S.C. § 5125(g)(1) (A state may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material. . . .).

New Mexico's statute and regulations authorizing the fees contain no mechanism to ensure that the fees collected do not exceed the amount of money needed to administer its program, nor is there authorization for the state to refund a portion of the fees in the event that the amount collected exceeds the costs of administering the program in a future year. Because New Mexico funnels the fees into its general fund, it is impossible to determine whether the fees collected are used for purposes related to hazardous materials transportation. Thus, RSPA was correct in concluding that federal hazardous materials law preempts New Mexico's licensing and inspection fees because they are not used for a hazardous materials transportation purpose, thus violating 49 U.S.C. § 5125(g)(1).

CONCLUSION

New Mexico has not provided any information in its Petition for Reconsideration to justify a change in RSPA's well-reasoned preemption determination. We respectfully urge RSPA to deny New Mexico's Petition for Reconsideration.

If you have any questions concerning the issues raised herein, please contact the undersigned at (703) 838-1910.

Respectfully submitted,

Richard Moskowitz
Regulatory Affairs Counsel

cc: Ms. Nancy E. Machado
U.S. Department of Transportation
Office of the Chief Counsel
400 Seventh Street, S.W.
Washington, DC 20590-0001

CERTIFICATE OF SERVICE

The undersigned certifies that on December 4, 2002, the American Trucking Associations responsive comments to the State of New Mexico's Petition for Reconsideration was served by depositing a true and correct copy in the United States Mail with sufficient prepaid postage addressed to the following entities:

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PATRICIA A. MADRID
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Deputy Attorney General

November 12, 2002

Nancy Machado
Office of the Chief Counsel
Research and Special Programs Administration
U.S. Department of Transportation
Washington, DC 20590-0001

RE: Docket no. RSPA-00-7092 [PDA-22(R)].

Dear Ms. Machado:

It has come to my attention that some, if not all, of those to whom I sent the October 30, 2002, petition regarding the docket number to which I refer above did not receive the entire accompanying affidavit. The affidavit is enclosed for your review. I apologize for this oversight and, of course, will not object to any party taking more time to respond to this new information. Thank you for your attention to this matter.

Sincerely,

Patrick T. Simpson
Assistant Attorney General
cc Interested Parties
Chris S. Leason

PO Drawer 1508 Santa Fe, New Mexico 87504-1508 505/ 827-6000 Fax 505/ 827-5826

STATE OF NEW MEXICO
REGULATION AND LICENSING DEPARTMENT
CONSTRUCTION INDUSTRIES DIVISION
CONSTRUCTION INDUSTRIES COMMISSION

DOT Petition for Reconsideration
Docket No. RSPA-00-7092 (PDA-22(R))

AFFIDAVIT

I, Marvin J. Vaughn, after being duly sworn, hereby depose and say that am of legal age and state on my oath from personal knowledge as follows:

1. I am the Bureau Chief for the LPG Bureau (Bureau) of the Construction Industries Division (CID) of the Regulation and Licensing Department (RLD) of the State of New Mexico.

2. In my capacity as Bureau Chief, I manage all aspects of the Bureau's operations. I am responsible for collecting statistics on the Bureau's activities and administering the regulatory programs of the Bureau, including the licensing and vehicle inspections programs.

3. I am responsible for designing, implementing and supervising the vehicle inspection system in New Mexico. According to 19.15.4.10.1, NMAC, "each bulk storage plant facility, dispensing station, vehicle fuel dispenser, and cargo container and safety equipment on each vehicular unit used for transporting LP gas in bulk quantities" must pass an annual inspection. Regardless of the state of domicile of any vehicle, all vehicles fitting this description are subject to the annual inspection.

4. In order to conduct the annual inspection, our inspectors exercise a policy of maximum convenience for the transporter. We do not use inspection stations, nor do we require transporters to stop and be subject to inspection en route to a destination. Instead, we 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. We then travel to where the vehicle is parked and make the inspection. Typically, these inspections last from 45-60 minutes. These inspections are strictly limited to the matters authorized by our regulations. We only inspect vehicle safety equipment directly 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.

5. The LP Gas Bureau licenses LP gas transport vehicles on a yearly basis, but the licenses are renewed within a particular quarter. If a vehicle is licensed on any day within a particular quarter, the renewal is due on the last day of the quarter in the next year. For instance, a vehicle newly licensed on January 1, 2002, must be inspected and have its license renewed by March 31, 2003, and every March 31 thereafter. The Bureau sends by regular mail a renewal and inspection notice within the first week of the quarter in which the vehicle must be inspected. The Bureau inspectors and transporter then have well over two months within which to arrange for this inspection, again at the convenience of the transporter.

6. The fees associated with licensure, exams and identification cards are collected by private vendors under contract with RLD and are the only funding source for the licensing and examination process. These fees are not collected by the Bureau, and are not deposited by the Bureau into the State's general fund.

7. In my capacity as Bureau Chief, I participate in the development of exam questions and am responsible for approving each question that is administered by the testing vendor.

8. The exams are administered in connection with the licensing program, and are made up of questions taken exclusively from the *NFPA 58 Liquefied Petroleum Gas Code* (the NFPA 58 Code), which is published by the National Fire Protection Association, an international codes and standards organization. The NFPA 58 Code has been adopted by New Mexico as its minimum standard for LP gas activities, as provided in the New Mexico Administrative Code, Section 14,1,1,7.LL(4).

9. The exams are designed to ensure that individuals who engage in the inherently dangerous activity of transferring LP gas are qualified to do so, and comply with the NFPA 58 Code.

10. A license is required only for engaging in the activity of transferring LP gas in the State, which typically occurs at a point of sale. It is not required for the transportation of LP gas into, out of, or through the State.

11. The Bureau currently employs 10 full-time staff, including myself.

12. The budget for the LP Bureau in fiscal year 2001-02 was approximately $625,000.00.

13. The revenues collected by the Bureau in fiscal year 2001-02 in connection with vehicle inspections totaled approximately $25,000.00. Total revenues collected by the Bureau in fiscal 2001-02 were approximately $184,000.00. These revenues were deposited in the State's general fund.

14. In fiscal year 2001-02 there were 18 accidents investigated by the Bureau. Of those, six were LP gas related resulting in three injuries and two deaths. None of these accidents was related to the transfer of LP gas.

15. The Bureau conducts residential and commercial inspections for code compliance using a batch system because it does not have sufficient staff or resources to conduct on-demand inspections.

16. The Bureau does not have sufficient staff, or resources to quantify and verify transfers of LP gas. For example, there are between 250-300 bulk plants in the State. In winter months some plants could be transferring gas several times a day. Therefore, if fees were tied to numbers of transfers, the Bureau would be unable to supply the data necessary to calculate the fees.

17. I have been informed by the Director of Field Operations for CID that the proposed budget for fiscal year 2003-04 includes proposed across-the-board furloughs of CID staff, including LPG Bureau staff.

18. Cargo tank vehicles are inspected by the Bureau for compliance with NFPA 58 Code provisions applicable to safety equipment on the vehicles' cargo containers only. The NFPA 58 Code provides that the vehicle itself is subject to DOT regulation. NFPA 58 Liquefied Petroleum Gas Code, 2001edition, Section 6.3.1.2. The Bureau inspects for safety devices not covered by the DOT regulation as generally provided in the NFPA 58 Code, at sections 6.3.2 through 6.3.8.

Affidavit of Marvin Vaughn
DOT Petition for Reconsideration
Docket No. RSPA-00-7092 (PDA-22(R))

Further Affiant sayeth not.

Marvin J. Vaughn
Bureau Chief, LP Gas Bureau
Construction Industries Division
Regulation and Licensing Department
State of New Mexico

Subscribed and sworn to before me
this 30th day of October, 2002.
Notary Public Loretta A. Kiaspon Jr
My Commission Expires 8/21/06