41781



## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

**[Preemption Determination No. PD-13(R); Docket No. RSPA-97-2581 (PDA-16(R))]**

### Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases

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

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

**APPLICANT:** New York Propane Gas Association (NYPGA).

**LOCAL LAWS AFFECTED:** Nassau County, New York, Ordinance No. 344-1979, Sections 6.7(A) & (B) and Section 6.8.

**APPLICABLE FEDERAL REQUIREMENTS:** Federal hazardous material transportation law, 49 U.S.C. 5101 et seq., and the Hazardous Materials Regulations, 49 CFR Parts 171– 180.

**MODES AFFECTED:** Highway.

**SUMMARY:** Federal hazardous material transportation law preempts the requirement in Section 6.8 of Nassau County, New York Ordinance No. 344-1979 for a certificate of fitness, insofar as that requirement is applied to a motor vehicle driver who sells or delivers liquefied petroleum gas (LPG) , because Section 6.8 imposes on drivers of motor vehicles used to deliver LPG more stringent training requirements than provided in the HMR. This requirement is not preempted with respect to persons who sell or transfer LPG but do not drive the motor vehicle from which (or to which) the LPG is transferred.

There is insufficient information to find that Federal hazardous materials law preempts the requirement in Sections 6.7(A) and (B) of Ordinance No. 344-1979 for a permit to pick up or deliver LPG within Nassau County. The application and comments submitted in this proceeding fail to show that this requirement, as applied and enforced, creates an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR. The record does not support findings that the requirement for a permit causes an unnecessary delay in the transportation of hazardous materials; that the permit fee is unfair or used for purposes other than relating to transporting hazardous materials; or that the permit sticker is a labeling or marking of hazardous material (within the meaning and intent of the HMR's hazard communication requirements).

**FOR FURTHER INFORMATION CONTACT:** Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001 (Tel. No. 202–366–4400).

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Application and Public Notice*

NYPGA has applied to RSPA for a determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et* seq., preempts Sections 6.7(A) and (B) and Section 6.8 of Nassau County, New York, Ordinance No. 344-1979, concerning Fire Department permits and "certificates of fitness" for the delivery of LPG (including propane) within Nassau County. NYPGA challenges requirements of the Fire Department for issuance of these permits and certificates of fitness, including fees, vehicle inspections, and written and practical examinations.

***Permits.*** Sections 6.7(A) and (B) of Ordinance No. 344-1979 provide as follows:

A. No person, firm or corporation shall use or cause to be used, any motor vehicle, tank truck, tank semi-trailer, or tank truck trailer for the transportation of Liquefied Petroleum Gas, unless after complying with these regulations a permit to operate any such vehicle has been obtained from the Nassau County Fire Marshal. No permit shall be required under this section for any motor vehicle that is used for the transportation of Liquefied Petroleum Gas, not operated or registered by an authorized dealer, in containers not larger than ten (10) gallons water capacity each (approximately thirty-four (34) pounds propane capacity) with aggregate, water capacity of twenty-five gallons (approximately eighty-seven (87) pounds propane capacity) or when used in permanently installed containers on the vehicle as motor fuel. This section shall not apply to any motor vehicle, tank truck, tank semi-trailer or tank truck trailer traveling through Nassau County and making no deliveries within the County.

B. The permit shall be given full force and effect for a period of one (1) year.

In order to obtain a permit, the owner of a vehicle used to deliver LPG must pay a fee of $150, or $75 for renewal, and have the vehicle inspected. Inspections are normally conducted by appointment only on two days each month, although Nassau County states that this schedule is "flexible and does not apply to new vehicles." When a permit is issued, a permit "sticker" must be placed on the vehicle.

***Certificate of Fitness.*** Section 6.8(A) of Ordinance No. 344-1979 requires a "Certificate of Fitness issued by the Fire Marshal," effective for a year and renewable, to be held by "[a]ny person filling containers at locations where Liquefied Petroleum Gas is sold and/or transferred from one vessel to another * * *" Section 6.8(I) of the ordinance further specifies that a certificate of fitness is required for any person who "Fill[s] containers permanently located and installed outdoors equipped with appurtenances for filling by a cargo vehicle at consumer sites," or "Sell[s] Liquefied Petroleum Gas or transfer [s] Liquefied Petroleum Gas from one vessel into another." NYPGA states that this means that each driver of a vehicle used to deliver propane in Nassau County must hold a certificate of fitness.

Other subsections of Sec. 6.8 provide that an applicant for a certificate of fitness must complete "forms provided by the Fire Marshal * * * accompanied by the applicable fee" (Sec. 6.8(B)); must demonstrate proof of qualifications and physical competence (Sec. 6.8(C)); and must undergo an investigation that "include[s] a written examination regarding the use, makeup and handling of Liquefied Petroleum Gas and * * * a practical test" (Sec. 6.8(D)). The affidavit of Nassau County's Supervising Fire Inspector indicates that the certificate of fitness is issued in the form of "an ID card which must be produced upon the request of anyone (in Nassau County) for whom [the holder] seeks to render his services or the Fire Marshal." It appears from the affidavit and NYPGA's application that an applicant for a certificate of fitness must:

- -Submit a notarized application form (Exhibit 7 to NYPGA's application) accompanied by a $150 fee;
- -Take a written examination, given by appointment at the Fire Marshal's Office, and have a photograph taken for the identification card; and
- -Undergo a practical examination given at the applicant's place of employment.

The written and practical examinations are not required for renewing the certificate of fitness, and the renewal fee is $25.

The text of NYPGA's application was published in the **Federal Register** on June 10, 1997, and interested parties were invited to submit comments. 62 FR 31661. Comments were submitted by the National Propane Gas Association (NPGA), National Tank Truck Carriers, Inc. (NTTC), New York State Motor Truck Association (NYSMTA), Star-Lite Propane Gas Corp. (Star-Lite), the Association of Waste Hazardous Materials Transporters (AWHMT) , and Nassau County. NYPGA submitted rebuttal comments.

On February 26, 1998, Congressman Gerald B. Solomon (R-NY) wrote

RSPA's Acting Administrator in support of NYPGA's application and asked RSPA to expedite its determination. On June 24, 1998, Senator Alfonse M. D'Amato (R-NY) forwarded to DOT a letter from the President of Star-Lite expressing concern with the time for issuance of this determination. On July 30, 1998, Star-Lite's President also wrote attorneys in RSPA's Office of the Chief Counsel asking RSPA to "make [its] ruling as soon as possible." All of these additional letters were placed in the public docket.

### *B. Transportation of propane*

Propane (a form of LPG) is a flammable gas which, according to NPGA, is used by more than 18 million installations throughout the United States for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean-air alternative engine fuel for both over-the-road vehicles and industrial lift trucks. Larger cargo tank motor vehicles (with a capacity of more than 3,500 gallons) are generally used to deliver propane to bulk storage plants or large industrial users. Smaller cargo tank motor vehicles are typically used for local deliveries.

RSPA believes that a large number of propane gas dealers are small businesses that serve nearby customers (no more than 50 miles from the dealer's business location). Carriers of LPG that operate cargo tanks solely within one state are not directly subject to the HMR until October 1, 1998. 49 CFR 171.1(a)(1), as adopted September 22, 1997 (62 FR 49560, 49566). However, both intrastate and interstate motor carriers that deliver propane within Nassau County are subject to the substantive requirements in the HMR because New York has adopted the HMR as State law with respect to the "classification, description, packaging, marking, labeling, preparing, handling and transporting all hazardous materials." 17 New York Codes, Rules and Regulations 507.4(a) (l)(i).

### *C. Preemption under Federal hazardous material transportation law*

Section 5125 of Title 49 U.S.C. contains several preemption provisions that are relevant to NYPGA's application. Subsection (a) provides that-in the absence of a waiver of preemption by DOT under § 5 125 (e) or specific authority in another Federal law-a requirement of a State, political subdivision of a State, or Indian tribe is 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 this chapter or a regulation prescribed under this chapter.

These two paragraphs set forth the "dual compliance" and "obstacle" criteria which RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Pub. L. 93-633 § 112(a), 88 Stat. 2161 (1975). 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 (1963); ***Rayv. Atlantic Richfield, Inc., 435*** U.S. 151 (1978).

Subsection (b)(l) of 49 U.S.C. 5125 provides that a non-Federal requirement about any of the following subjects, that is not "substantively the same as" a provision of Federal hazardous material transportation law or a regulation prescribed under that law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

To be "substantively the same," the non-Federal requirement must "conform[] in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted." 49 CFR 107.202(d).

Subsection (g)(l) of 49 U.S.C. 5125 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 in 49 U.S.C. 5 125 carry out Congress's view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In considering the HMTA, 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). When it amended the HMTA in 1990, Congress specifically found that:

(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. 101-615 § 2, 104 Stat. 3244. A Federal Court of Appeals has affirmed that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments which expanded the preemption provisions. ***Colorado Pub. Util. Comm'n*** v. ***Harmon,*** 951 F.2d 1571, 1575 (10th Cir. 1991). (In 1994, the HMTA was revised, codified and enacted "without substantive change," at 49 U.S.C. Chapter 51. Pub. L. 103-272, 108 Stat. 745.)

Under 49 U.S.C. 5125(d)(l), 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 FHWA. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a). This administrative determination has replaced RSPA's process for issuing inconsistency rulings.

Section 5 125 (d) (1) requires that notice of an application for a preemption determination must be published in the **Federal Register.** Following the receipt and consideration of written comments, RSPA publishes its determination in the

**Federal Register. See 49** C.F.R. 107.209(d). A short period of time is allowed for filing petitions for reconsideration. 49 C.F.R. 107.2 11. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the Federal hazardous material transportation 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,*** above, 95 1 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. 12612, entitled "Federalism" (52 FR 4 1685, Oct. 30, 1987). 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 5 125 contains express preemption provisions, which RSPA has implemented through its regulations.

## II. Discussion

### *A. Permits*

NYPGA and other commenters argue that Nassau County's permit requirement constitutes an "obstacle" to transportation because there is a delay in the time necessary to undergo an inspection and pay the permit fee. NYPGA and others also contend that the fee for issuance of a permit (as well as a certificate of fitness) is "inherently unfair" as a "flat tax" which violates the Commerce Clause of the Constitution, because "a one-time entrant to [Nassau County] from any jurisdiction, would pay the same as a frequent entrant." NYPGA further states that the permit sticker is "a separate labeling requirement of a hazardous material and should be preempted, per se, as a covered subject.'' In rebuttal comments, it states that the sticker "is an additional label and causes delay."

NYPGA argues in its application that, because inspections are scheduled for only two days each month, a new vehicle that meets all Federal and State requirements is "unusable until a [Nassau County] inspection can be performed." NYPGA states that an ''out-of-state carrier who attempted to deliver propane to a customer" in Nassau County could not obtain the required permit "without violating the 'unnecessary delay' standard." According to NYPGA, ''[b]ecause both the driver and vehicle are unavailable for long periods of time, the effect of the inspection is to cause unnecessary delay * * *''

The focus of NYPGA's application and many of the comments, however, appears to be the delay experienced by a propane delivery company in being able to compete or do business within Nassau County-rather than any delay in the transportation of trucks loaded with propane. Star-Lite (a member of NYPGA) states that it placed a new vehicle in service "prior to the two monthly available inspection days" and that, ''[f]rom the date of purchase this vehicle would have been unavailable for delivery to customers pending such local inspection for a period of at least 10 days." Star-Lite complains that the "inconvenience, costs and delays" amount to an "obstacle to transportation."

In a similar fashion, NYSMTA states that its members "transport propane in bulk and on rack trucks to the area of New York State in and around Nassau County, but are effectively prevented from entering this market due to the subject ordinance." According to NYSMTA, Nassau County's inspection requirements are "redundant to state-enforced Federal requirements of title 49," and "effectively bar any company not Registered and not regularly engaged in delivering to Nassau County from bidding on any transportation of propane to Nassau regardless of the origin of that product and despite meeting all federal and state requirements of Title 49." Congressman Solomon (who represents a district in upstate New York including Saratoga Springs and Lake Placid) states that one of his constituents "cannot deliver propane * * * to points in Nassau County."

NPGA complains that

> A company who ***might*** be shipping a hazardous material to or from Nassau County by motor vehicle (common or private) would have to anticipate its transportation needs by as much as a full year in advance in order for that particular vehicle to be inspected and "licensed" for operation in the county. Such inspections are an undue and unwarranted interference in ***interstate*** commerce, at the very least, and would actually have a very similar effect upon ***intrastate*** transportation of hazardous materials.

Unlike other commenters, NTTC recognizes a difference in the application of Nassau County's permit requirements to "motor carriers who operate entirely within its jurisdiction" as opposed to a

> a motor carrier, domiciled in New England, the Middle Atlantic States, etc. [that] may be compelled to make one or more deliveries to NC [Nassau County] on an emergency or non-scheduled basis. Absent extraordinary measures, it is likely that such a carrier will be in violation of the ordinance upon entry into that jurisdiction or the carrier will have to delay transportation services until the NC "process" has been completed.

Nassau County denies that there is any inherent delay in applying its permit requirements to trucks that deliver propane within the County, even by a truck dispatched from outside of the County. The County reiterates that its requirements do not apply to vehicles that travel through the County without making deliveries. It asserts that it does not require that the vehicle be loaded with propane during an inspection, so that there is no "unnecessary delay" in the transportation of hazardous materials.

The County also states that the "two day a month schedule is flexible and does not apply to new vehicles." According to an attached affidavit of its Supervising Fire Inspector: vehicles with less than 1,000 miles receive only a "modified" inspection, that "does not have to be during the regular inspection times and is at the owner's convenience"; additional inspection days are scheduled "when the number of vehicles warrant or the vehicle's owner presents exigent circumstances requiring an alternate date"; the Fire Department has "on occasion made inspections when requested at the owner's location"; and out-of-state carriers

> would normally be given a warning before enforcement actions are initiated. Special arrangements are also set up to accommodate these carriers by allowing inspections at other than normal hours.

In rebuttal comments, NYPGA takes issue with the County's asserted flexibility in arranging inspections, but it does not establish that there have been actual delays in the delivery of propane to or within Nassau County.

In PD-4 (R) , RSPA considered California's registration and inspection program applicable to cargo tanks and portable tanks transporting flammable and combustible liquids. California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48933 (Sept. 20, 1993), decision on petition for reconsideration, 60 FR 8800 (Feb. 15. 1995). Among other matters, California required (1) annual registration of these

tanks, (2) an inspection once a year within 30 days of notification, and (3) placement on the tank itself of a metal identification plate, a State "CT number," and a label certifying that the tank had passed inspection and is registered. The applicant and others provided evidence that, while the California Highway Patrol (CHP) was able to promptly inspect some tanks arriving at a port-of-entry location on a main highway near the State border, the transportation of other tanks entering California loaded with hazardous materials had been interrupted for hours or days before an inspector could arrive to perform the required inspection. 58 FR at 48940-41.

In its decision, RSPA noted that "it has encouraged States and local governments to adopt and enforce the requirements in the HMR, 'through both periodic and roadside spot inspections.'" 58 FR at 48940 (quoting from WPD-1, 57 FR 23278, 23295 (June 2, 1992)). However, RSPA found that State and local inspections must be carried out in a manner that does not conflict with the requirement currently set forth at 49 CFR 177.800(d) that

> All shipments of hazardous materials must 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.

(Until October 1, 1996, this requirement was contained in § 177.853(a).)

In PD-4 (R) , RSPA discussed the purpose and its prior analyses of the HMR's prohibition against "unnecessary delay." It referred to three early inconsistency rulings including IR-2, 44 FR 75566, 75571 (Dec. 20, 1979), decision on appeal, 45 FR 71881 (Oct. 30, 1980), where it had stated:

> 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 that their transportation is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.

Quoted in PD-4(R), 58 FR at 48939-40. RSPA noted that "non-Federal registration and inspection requirements, by themselves, do not inevitably have the potential for unnecessary delay proscribed in" the HMR. 58 FR at 48940. RSPA also pointed out that an unnecessary delay was not presented by "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." 58 FR at 4894 1. However, there was an unnecessary delay when tanks loaded with hazardous materials "must be held for inspection for two to three days * * * or as long as five days" until an inspector could arrive. Id. Accordingly, RSPA held that Federal hazardous material transportation law preempted California's inspection requirement

> because, as applied and enforced, that requirement causes unnecessary delays and is an obstacle to the accomplishment and execution of the HMR. California is free, and is encouraged, to conduct inspections of cargo tanks and portable tanks at [ports of entry], other roadside inspection locations, and terminals. However, it may not require an inspection as a condition of traveling on California's roads when the inspection cannot be conducted without delay because an inspector must come to the place of inspection from another location.

Id.

In its decision on CHP's petition for reconsideration, RSPA emphasized that its holding was "a narrow one," and stated that, "[i]f and when California eliminates the unreasonable delays in its inspection program, that requirement will no longer be preempted." 60 FR at 8803. RSPA also noted that tanks that are "based" within the State and "never leave California would not experience delays associated with entering the State or being rerouted around California." ***Id.***

In PD-4 (R), RSPA also found that the annual registration requirement, including payment of a registration fee, was not preempted because there was no evidence that the registration process produced any delays, separate from the wait for an inspection to be conducted. 58 FR at 48940. RSPA further found that Federal law preempted California's requirements for a metal specification plate, the CT number, and the certification label on the tank itself, because they were not "substantively the same as" requirements in the HMR concerning the "marking . . . of hazardous material," and the "marking of a package or container, which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous material." See 58 FR at 48937. In its decision on CHP's petition for reconsideration, RSPA noted that a different standard might apply in determining whether Federal hazardous material transportation law preempts a registration document required to be carried in a vehicle (rather than marked directly on the hazardous materials container) :

> A requirement to carry additional documentation on a vehicle transporting hazardous materials, beyond that required in the HMR, may create an obstacle to the accomplishment and execution of the Federal hazardous material transportation law and the HMR. ***See Colorado Pub. Util. Comm'n v. Harmon,*** 951 F.2d 1571, 1581 (10th Cir. 1991).

As stated in Section I.B., above, RSPA understands that most propane gas dealers serve customers within 50 miles of their principal places of business. Those companies located within Nassau County, and many others located nearby, should have adequate time to plan for and undergo inspections without disrupting actual deliveries within Nassau County. With respect to loaded trucks that may arrive from outside of Nassau County (in an emergency or otherwise), it is uncertain whether the County is able to conduct inspections, collect fees, and issue permits-or waive these requirements—without causing those trucks to wait unnecessarily. So long as the County does not cause the loaded truck to wait for a permit to be issued, there will be no unnecessary delay in the transportation of hazardous materials. The present record lacks information to show that Nassau County's permit requirement, as applied and enforced, actually results in "unnecessary delays" in deliveries of propane within the County.

With respect to the permit fee, the County's Supervising Fire Inspector states that the fee covers the cost of conducting the inspection and actually issuing the permit. He states that, because "it takes less time to reinspect a truck for a renewal permit," the fee is $75 for a renewal permit, rather than $150 for an initial permit. He also states that the fees collected "do not fully cover the cost of administering the tests or performing the inspection," because the County "collects less than $70,000 in LP Gas fees annually and spends over $70,000 in LP related administration," without considering the costs of either the County's hazardous materials emergency response team or the personnel and equipment "necessary to administer and enforce the Hazardous Material laws and regulations."

Because the permit fee is not applied to all trucks that transport propane within Nassau County, but only to those that deliver propane within the County, and 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 Safetyv.*** *Athry,* ***37*** F.3d 139, 142 (1994), cert. denied, 514 U.S. 1036 (1995), citing ***Evansville-Vanderburgh Airport Auth. District v. Delta Airlines, 405*** U.S. 707, 7 17-20 (1972). In this case, no party has shown that the permit fees fail this standard. There is no other information to show that the permit fee is "unfair" or that the fees collected are not used for purposes that do not relate to the transportation of hazardous material.

According to the County, the permit sticker must be placed on the fender or door of the vehicle, and not on the cargo tank itself; otherwise, there is no requirement to carry any paperwork on the vehicle. Because the sticker is not placed on the hazardous material itself (or its container), it is not a "marking * * * of hazardous material." 49 U.S.C. 5 125 (b) (1) (B). There is no evidence showing that placing this sticker on the vehicle results in any unnecessary delay, or that the requirement for affixing the permit sticker, as applied or enforced, is otherwise an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR.

For these reasons, RSPA cannot find that Federal hazardous materials transportation law preempts Sections 6.7(A) and (B) of Nassau County Ordinance No. 344-l 979.

***B. Certificate of fitness***

NYPGA asserts that the certificate of fitness is a second driver's license required by Nassau County that is prohibited under FHWA's regulations concerning commercial driver's licenses (see 49 CFR 383.2 1 (a)) and, accordingly, preempted under both the "dual compliance" and "obstacle" standards in 49 U.S.C. 5125(a). It also contends that Nassau County's requirement for a certificate of fitness conflicts with 49 CFR 172.701, which allows a State, rather than a political subdivision, to impose more stringent training requirements on drivers who are domiciled within the State.

NTTC appears to object to the requirement for a certificate of fitness only as applied to non-residents of Nassau County. It contends that "the process to obtain a 'certificate' produces unnecessary delay" because of the time necessary to obtain a medical certificate, prepare the notarized statement, obtain a color photograph, pass a written examination, and then wait for the County to process the application and issue the certificate. NTTC also states that the requirement for a certificate of fitness is redundant with the training requirements in the HMR and the Federal Motor Carrier Safety Regulations (FMCSR), 49 CFR Parts 350-399, and that, if County officials believe that the Federal requirements are deficient, they should petition DOT for new Federal standards.

Nassau County states that its certificate of fitness is not a driver's license because the driver need not be certified: ''[d]riving skills are ***not*** tested," and only the person who fills the customer's tank or otherwise transfers propane needs to hold a certificate; ''[t]he recipient, usually the yard or retail/commercial center can have their employee certified and no driver need be involved if he neither transfers or fills where LP Gas is sold." The County also argues that its certificate of fitness program is not "training," and that 49 CFR 172.701 does not prohibit this requirement because the limitation in that section of the HMR "deals with minimum training requirement for ***drivers."***

However, Nassau County does not dispute the statement of NYPGA that, in actual practice, the vehicle driver performs the transfer of propane into a customer's tank, so that the requirement for a certificate of fitness is applied to, and enforced against, persons who drive motor vehicles. NYPGA stated in rebuttal that the certificate of fitness is a second driver's license because, in practice, "the driver and the person doing the transfer" are the same individual, and the driver needs the certificate "to complete the delivery or 'sale'." NYPGA also noted that the persons required to hold a certificate of fitness are clearly covered by the HMR's training requirements, because a "hazmat employee" includes an individual who "loads, unloads, or handles hazardous material." 49 U.S.C. 5 102 (3) (C) (i) .

By prescribing only ***"minimum*** training requirements for the transportation of hazardous materials," 49 CFR 172.701, that section in the HMR does not, in itself, preclude States or other governmental bodies from requiring additional training of hazmat employees generally. The one condition that § 172.70 1 places on non-Federal training requirements is that

> 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 [49 CFR Part 172] and in Part 177 * * *; and
>
> (b) Apply only to drivers domiciled in that State.

In proposing the training requirements in rulemaking docket No. HM- 126F, RSPA explained that it intended

> to restrict its preemption of state law to the minimum level necessary to achieve the objectives of the Hazardous Materials Transportation Act (HMTA) and the HMR.
>
> However, RSPA views these proposed training requirements, insofar as they apply to drivers engaged in the highway transportation of hazardous materials, as minimum requirements which a state may exceed only if its greater requirements do not directly conflict with the HMR requirements and apply only to individuals domiciled within that state.

54 FR 31144, 31147 (July 26, 1989). In the preamble to the final rule, RSPA further explained that

> Although the preemption language does allow States to impose more stringent requirements on drivers of vehicles transporting hazardous materials by highway, it is not an unlimited authority. The language recognizes the traditional regulation by States of their own registered drivers, particularly through drivers' licensing requirements and procedures. However, the language does not authorize States to impose requirements on non-residents and also does not authorize other governmental agencies to impose requirements.

57 FR 20944, 20947 (May 5, 1992).

Section 6.8 of Ordinance 344-1979 specifies that, to obtain a certificate of fitness, the applicant must demonstrate proof of qualifications and physical competence, and pass written and practical tests regarding the "use, makeup and handling" of LPG. This falls within the definition of "training" in 49 CFR 172.700(b), as including the recognition and identification of hazardous materials, "knowledge of specific requirements * * * applicable to functions performed by the employee, * * * and knowledge of emergency response information, self-protection measures and accident prevention methods and procedures."

To the extent that the knowledge required for a certificate of fitness duplicates hazmat training required by the HMR, as NTTC contends, Nassau County may adopt as local law and enforce the training requirements in the HMR against all persons who deliver propane within the County. If Nassau County believes that more should be required than under the HMR, it may encourage State officials to apply additional training requirements to drivers who are residents of New York State, or it may petition RSPA to adopt more specific standards for drivers. However, Nassau County's requirement for a certificate of fitness in order to deliver propane within the County is an

obstacle to accomplishing and carrying out the HMR because that requirement applies more stringent training requirements to drivers of motor vehicles.

For this reason, 49 U.S.C. 5125(a) (2) preempts Nassau County's requirement for a certificate of fitness insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG. However, this requirement is not preempted with respect to persons who sell or transfer LPG but do not drive the motor vehicle from which (or to which) the LPG is transferred.

## III. Ruling

Federal hazardous material transportation law preempts the requirement in Section 6.8 of Nassau County, New York Ordinance No. 344-1979 for a certificate of fitness, insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG, because Section 6.8 imposes on drivers of motor vehicles used to deliver LPG more stringent training requirements than provided in the HMR.

The application and comments submitted in this proceeding do not contain sufficient information to find that the requirement for a permit in Sections 6.7(A) and (B), as applied and enforced, creates an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR. The record does not support findings that the requirement for a permit causes an unnecessary delay in the transportation of hazardous materials; that the permit fee is unfair or used for purposes other than relating to transporting hazardous materials; or that the permit sticker is a labeling or marking of hazardous material.

## IV. 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 service of this decision. 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 service 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 service, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.21 l(d).

Issued in Washington, D.C. on August 17, 1998.

**Alan I. Roberts,**

***Associate Administrator for Hazardous Materials Safety.***

[FR Doc. 98-22745 Filed 8-24-98; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### Quarterly Performance Review Meeting on The Contract "Detection of Mechanical Damage in Pipelines" (Contract DTRS–56–96–C–0010)

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

**ACTION:** Notice of meeting.

**SUMMARY:** RSPA invites the pipeline industry, in-line inspection ("smart pig") vendors, and the general public to the next quarterly performance review meeting of progress on the contract "Detection of Mechanical Damage in Pipelines." The meeting is open to anyone, and no registration is required. This contract is being performed by Battelle Memorial Institute (Battelle), along with the Southwest Research Institute, and Iowa State University. The contract is a research and development contract to develop electromagnetic in-line inspection technologies to detect and characterize mechanical damage and stress corrosion cracking. The meeting will cover a review of the overall project plan, the status of the contract tasks, progress made during the past quarter, and projected activity for the next quarter.

**DATES:** The next quarterly performance review meeting will be held on Wednesday, September 23, 1998, beginning at 1:00 p.m. and ending around 5:00 p.m.

**ADDRESSES:** The quarterly review meeting will be held at The Hotel Allegro, 171 West Randolph, Chicago, Illinois 60601. The hotel's telephone number is (312) 236–0123.

**FOR FURTHER INFORMATION CONTACT:** Lloyd W. Ulrich, Contracting Officer's Technical Representative, Office of Pipeline Safety, telephone: (202) 366–4556, FAX: (202) 366–4566, e-mail: lloyd.ulrich@rspa.dot.gov.

**SUPPLEMENTARY INFORMATION:**

## I. Background

RSPA is conducting quarterly meetings on the status of its contract "Detection of Mechanical Damage in Pipelines" (Contract DTRS–56–96–C–0010) because in-line inspection research is of immediate interest to the pipeline industry and in-line inspection vendors. RSPA will continue this practice throughout the three year contract. The research contract with Battelle is a cooperative effort between the Gas Research Institute (GRI) and DOT, with GRI providing technical guidance. The meetings allow disclosure of the results to interested parties and provide an opportunity for interested parties to ask Battelle questions concerning the research. Attendance at this meeting is open to all and does not require advanced registration nor advanced notification to RSPA.

We specifically want that segment of the pipeline industry involved with in-line inspection to be aware of the status of this contract. To assure that a cross section of industry is well represented at these meetings, we have invited the major domestic in-line inspection company (Tuboscope Vetco Pipeline Services) and the following pipeline industry trade associations: American Petroleum Institute, Interstate Natural Gas Association of America, and the American Gas Association. Each has named an engineering/technical representative and, along with the GRI representative providing technical guidance, form the Industry Review Team (IRT) for the contract.

The original objective was to open each quarterly performance review meeting to the public. The first quarterly meeting was conducted on October 22, 1996, in Washington, DC. However, preparing for a formal briefing each quarter takes a considerable amount of time and resources on Battelle's part that could be better used to conduct the research. Therefore, Battelle requested and RSPA concurred that future public meetings would be conducted semi-annually. Conducting public meetings semi-annually will provide all interested parties with sufficient update of progress in the research. Only the IRT and RSPA staff involved with the contract will be invited to the quarterly performance review meetings held between the public semi-annual meetings.

Another objective is to conduct each semi-annual meeting at the same location and either before or after a meeting of GRI's Nondestructive Evaluation Technical Advisory Group to enable participation by pipeline technical personnel involved with nondestructive evaluation. This meeting is being held in Chicago as a dovetail to a meeting of the GRI Nondestructive