Issued on: June 2, 1997.

**Jane F. Garvey,**

*Acting Administrator.*

[FR Doc. 97–15073 Filed 6–9–97; 8:45 am]

BILLING CODE 4910–22–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. RSAC–96–1, Notice No. 5]**

### Railroad Safety Advisory Committee; Notice of Meeting

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of Railroad Safety Advisory Committee (''RSAC'') meeting.

**SUMMARY:** As required by Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), and 41 C.F.R. 101–6.1015(b), the Federal Railroad Administration (FRA) gives notice of a meeting of the Railroad Safety Advisory Committee (''RSAC''). The meeting is designed to accomplish several things: (1) the RSAC's receipt of status reports, containing progress information, from the Power Brake working group (to revise the power brake regulations contained in 49 CFR part 232), the Locomotive Engineer Certification working group (to revise the locomotive engineer certification regulations contained in 49 CFR part 240), and the Tourist and Historic Railroads working group's Steam Standards task force (to revise the steam locomotive inspection and testing standards contained in 49 CFR part 230); (2) the agency's tasking of the RSAC with the development of Locomotive Crew Safety standards (crashworthiness and working conditions); (3) the tasking of the RSAC with the development of Locomotive Event Recorder accident survivability standards; (4) the agency's engagement in exploratory discussions with the RSAC regarding positive train control; (5) the address of various issues relating to recent FRA regulatory actions (Accident/Incident Reporting and Passenger Safety); (6) a general briefing and discussion relating to other regulatory and related matters before the agency; and (7) miscellaneous administrative matters.

**DATES:** The meeting of the RSAC is scheduled to commence at 9:30 a.m. and conclude at 4:00 p.m. on Tuesday, June 24.

**ADDRESSES:** The meeting of the RSAC will be held at the BWI Airport Marriott, 1743 West Nursery Road, Baltimore, Maryland. The meeting is open to the public on a first-come, first-served basis and is accessible to individuals with disabilities. Sign language interpreters will be available for individuals with hearing impediments.

**FOR FURTHER INFORMATION CONTACT:** Vicky McCully, FRA, 400 7th Street, S.W. Washington, D.C. 20590, (202) 632–3330, Grady Cothen, Deputy Associate Administrator for Safety Standards and Program Development, FRA, 400 7th Street, S.W., Washington, D.C. 20590, (202) 632–3309, or Lisa Levine, Office of Chief Counsel, FRA, 400 7th Street, S.W., Washington, D.C. 20590, (202) 632–3189.

**SUPPLEMENTAL INFORMATION:.**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), FRA is giving notice of a meeting of the Railroad Safety Advisory Committee (''RSAC''). The meeting is scheduled to begin at 9:30 a.m. and conclude at 4:00 p.m. on Tuesday, June 24, 1997. The meeting will be held at the BWI Airport Marriott, 1743 West Nursery Road, Baltimore, Maryland. All times noted are Eastern Standard Time.

RSAC was established to provide advice and recommendations to the FRA on railroad safety matters. The Committee consists of 48 individual representatives, drawn from among 27 organizations representing various rail industry perspectives, and 2 associate non-voting representatives from the agencies with railroad safety regulatory responsibility in Canada and Mexico.

During this meeting, the RSAC will be receiving status reports, containing progress information, from the Power Brake working group (to revise the power brake regulations contained in 49 CFR part 232), the Locomotive Engineer Certification working group (to revise the locomotive engineer certification regulations contained in 49 CFR part 240), and the Tourist and Historic Railroads working group's Steam Standards task force (to revise the steam locomotive inspection and testing standards contained in 49 CFR par 230). The RSAC will also be receiving two new tasks: (1) the development of Locomotive Crew Safety standards (crashworthiness and working conditions); and (2) the development of Event Recorder Data Survivability standards.

Finally, the agency will engage in exploratory discussions with the RSAC regarding positive train control, address issues relating to recent FRA regulatory actions (Accident/Incident Reporting, Passenger Safety), discuss other regulatory and related actions before the agency, and address several administrative matters before the RSAC.

Please refer to the notice published in the **Federal Register** on March 11, 1996 (61 F.R. 9740) for more information about the RSAC.

Issued in Washington, D.C. on June 5, 1997.

**Bruce Fine,**

*Associate Administrator for Safety.*

[FR Doc. 97–15161 Filed 6–9–97; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

**[Docket No. RSPA–97–2581 (PDA–16(R))]**

### Application by New York Propane Gas Association for a Preemption Determination as to Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases

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

**ACTION:** Public notice and invitation to comment.

**SUMMARY:** The New York Propane Gas Association (NYPGA) has applied for an administrative determination whether Federal hazardous materials transportation law preempts certain sections of a Nassau County, New York, ordinance that require a permit for any motor vehicle used to deliver liquefied petroleum gas (LPG) within Nassau County and a ''certificate of fitness'' for any person who delivers LPG.

**DATES:** Comments received on or before July 25, 1997, and rebuttal comments received on or before September 8, 1997, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

**ADDRESSES:** The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. Comments may be submitted to the Dockets Office at the above address. Three copies of each written comment should be submitted. Comments may also be submitted by E-mail to ''rspa.counsel@rspa.dot.gov.'' In every case, the comment should refer to the Docket Number set forth above.

A copy of each comment must also be sent to (1) Mr. Richard Brescia, New York Capitol Consultants, Inc., 120 Washington Avenue, Albany, New York 12210 (who submitted the application on behalf of NYPGA), and (2) The Honorable Thomas S. Gulotta, County Executive, Nassau County, 1 West Street, Mineola, New York, 11501. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I hereby certify that copies of this comment have been sent to Messrs. Brescia and Gulotta at the addresses specified in the **Federal Register.**'')

**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. NYPGA's Application for a Preemption Determination

NYPGA has applied 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 within Nassau County. NYPGA challenges requirements of the Fire Department for issuance of these permits and certificates of fitness, including fees, inspections, and written and practical examinations.

### *A. Permit*

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.

NYPGA states that, in order to obtain a permit, the owner of a vehicle used to deliver LPG must (1) Pay a fee of $150, or $75 for renewal, and (2) have the vehicle inspected. According to NYPGA, inspections are conducted by appointment only on two days each month (the first and fourth Tuesdays). NYPGA also states that, when a permit is issued, a ''windshield sticker'' must be placed on the vehicle.

NYPGA asserts that the fee is ''inherently unfair'' and preempted by 49 U.S.C. 5125(g) which provides that ''a political subdivision * * * may impose a fee related to transporting hazardous materials only if the fee is fair and used for a purpose related to transporting hazardous material * * *'' NYPGA states that the inspection requirement is preempted by 49 U.S.C. 5125(a) as an ''obstacle'' to accomplishing RSPA's regulations, because the limited inspection times created delays in conflict with 49 CFR 177.853(a), which prohibits ''unnecessary delays'' in the transportation of hazardous materials. And NYPGA contends that the windshield sticker is a labeling requirement that is not substantively the same as RSPA's regulations and thus is preempted as a ''covered subject'' under 49 U.S.C. 5125(b).

### *B. 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 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)). According to Exhibits 8 and 9 to NYPGA's application, an applicant for a certificate of fitness must, among other requirements:

—Submit a notarized application form (Exhibit 7) accompanied by a $150 fee;
—Schedule an appointment for having photographs taken by the Fire Marshal's Office;
—Schedule an appointment for taking the written examination at the Fire Marshal's Office; and
—Arrange for the practical examination to be given at the applicant's place of employment.

NYPGA asserts that the certificate of fitness is a second driver's license required by Nassau County that is prohibited under the Federal Highway Administration's regulations concerning commercial driver's licenses (see 49 CFR 383.21(a)) and, accordingly, preempted under both the ''dual compliance'' and ''obstacle'' standards in 49 U.S.C. 5125(a). NYPGA further states that Nassau County's requirement for a certificate of fitness conflicts with 49 CFR 172.701 that allows a State, rather than a political subdivision, to impose more stringent training requirements on drivers who are domiciled within the State.

The text of NYPGA's application is set forth in Appendix A. The following attachments to NYPGA's application are not reproduced, but copies will be provided at no cost upon request to RSPA's Dockets Unit, located in Room 8421, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone 202–366–4453:

1. Ordinance No. 344–1979.
2. Application for Motor Vehicle Transportation Permit.
3. Permit for Use of Motor Vehicle or Trailer to Transport LPG.
4. Windshield Sticker.
5. Affidavit of John DiBiasi, President, Star-Lite Propane Gas Corp.
6. Letter concerning renewal of permit.
7. Application for Certificate of Fitness.
8. Letter concerning renewal of Certificate of Fitness.
9. Information for Liquefied Petroleum Gas Certificate of Fitness.

## II. Federal Preemption

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.''

Public Law 93–633 section 102, 88 Stat. 2156, amended by Public Law 103–272 and codified as revised in 49 U.S.C. 5101. The HMTA ''replace[d] a patchwork of state and federal laws and regulations * * * with a scheme of uniform, national regulations.'' *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted ''without substantive change'' by Public Law 103–272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51.

A statutory provision for Federal preemption was central to the HMTA. In 1974, 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). More recently, a Federal Court of Appeals found 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 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 sec. 2, 104 Stat. 3244.

Following the 1990 amendments and the subsequent 1994 codification of the Federal hazardous material transportation law, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e), ''a requirement of a State, political subdivision of a State, or Indian tribe'' is explicitly preempted (unless it is authorized by another Federal law) 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.

49 U.S.C. 5125(a). These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria which RSPA had applied in issuing inconsistency rulings before 1990. While advisory in nature, these inconsistency rulings were ''an alternative to litigation for a determination of the relationship of Federal and State or local requirements'' and also a possible ''basis for an application * * * (for) a waiver of preemption.'' Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, etc. 44 FR 75566, 76657 (Dec. 20, 1979). 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); *Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

In the 1990 amendments, Congress also confirmed that there is no room for differences from Federal requirements in certain key matters involving the transportation of hazardous material. As now codified, a non-Federal requirement ''about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter,'' 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.

49 U.S.C. 5125(b)(1). RSPA has defined ''substantively the same'' to mean ''conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d).

Since 1990, Federal hazardous material transportation law has also limited the fees that a State, political subdivision, or Indian tribe may impose ''related to the transportation of hazardous material.'' These fees must be ''fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' 49 U.S.C. 5125(g)(1).

Under 49 U.S.C. 5125(d)(1), 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. This administrative determination replaced RSPA's process for issuing inconsistency rulings. 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).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the **Federal Register**. *Id.* Following the receipt and consideration of written comments, RSPA publishes its determination in the **Federal Register**. *See* 49 CFR 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. 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, 951 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. 12,612, entitled ''Federalism'' (52 FR 41685, 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 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

## III. Public Comment

All comments should be limited to the issue whether Federal hazardous material transportation law preempts the Nassau County LPG permit and certificate of fitness requirements in Section 6.7 (A) and (B) and Section 6.8, respectively. Comments should:

(1) Set forth in detail the manner in which these permit and certificate of fitness requirements are applied and enforced; and

(2) Specifically address the preemption criteria described in Part II, above (''dual compliance,'' ''obstacle,'' and ''covered subjects'').

Persons intending to comment should review the standards and procedures governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201–107.211.

Issued in Washington, DC, on June 3, 1997.

**Alan I. Roberts,**

*Associate Administrator for Hazardous Materials Safety.*

*Appendix A*

Associate Administrator for Hazardous Materials Safety Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001.

Attention: Hazardous Materials Preemption Docket.

*Political Subdivision Ordinance: County of Nassau, State of New York*

The New York Propane Gas Association, a group consisting of refiners, wholesale suppliers, transporters and marketers supplying propane by vehicle to customers in Nassau County and other jurisdictions, applies for an administrative determination that Section 6.7 (A) and (B) and Section 6.8 of the Nassau County Fire Prevention Ordinance, Art III, Liquefied Petroleum Gases, Ordinance No. 344–1979, As Amended By Ordinance No. 415–82 are preempted by the Hazardous Materials Transportation Act (HMTA) (49 USC 5101, *et seq.*) and its regulations, 49 CFR, § 107.202: Standards for Determining Preemption.

*Section 6.7 (A) and (B)*

The subject Nassau County (NC) ordinance (hereinafter, the ordinance) at § 6.7(A) reads in part ''[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 first been secured from the Nassau County Fire Marshall.'' The last sentence of § 6.7(A) limits the applicability of the permit requirement: ''[t]his 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.'' Section 6.7(B) sets the length of the permit at one year. (Exhibit #1)

*Fees, Inspection and Labeling*

A renewal fee of seventy-five dollars is required with the ''Application for Motor Vehicle Transportation Permit'' and by custom and practice, a vehicle inspection time and date is specified by the Fire Marshall as the only time and date on which an inspection will be conducted. New vehicle fees are $150.00. Upon application and satisfactory inspection, the Nassau County Fire Marshall issues a permit and windshield sticker reading ''Transportation Permit, Nassau County Fire Marshall'' with a permit number specific to that vehicle. (See attached two page application [exhibit #2], a permit, 2538, for NY plate #VR 2395 [exhibit #3] and photograph of windshield sticker #3126 [exhibit #4] of a vehicle owned by John DiBiasi, President, Star-Lite Propane Gas Corp., 111 So. 4th St., North Bayshore, N.Y. 11706, and described in attached affidavit, [exhibit #5]. The effect of § 6.7 of the ordinance is to impose fee, inspection and labeling requirements on propane vehicles, as therein defined, delivering to a sites within the County of Nassau (NC) regardless of the origin of the product or vehicle or the domicile of the driver. Based on previous rulings, we believe, these requirements for flat fees, specified limits on inspection hours and the display of a label on the vehicle as evidence of compliance with the ordinance are inconsistent with the HMTA and HMR. Accordingly, the petitioner seeks review and relief from the Research and Special Programs Administration (RSPA) under 49 USC 5125 and 49 CFR § 107.202.

*Fees*

The HMTA (5125[g]) provides that a ''political subdivision * * * may impose a fee related to transporting hazardous materials only if the fee is fair and used for a purpose related to transporting hazardous material * * *'', but the NC fee is inherently unfair by disproportionately taxing users who are differently situated: a one-time entrant to NC from any jurisdiction, would pay the same as a frequent entrant. Further, because under any different reading all jurisdictions would be able to impose such fees, the NC fee is an obstacle to transportation and is preempted if ''the requirement of the * * * political subdivision, * * * as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.'' (49 USC 5125[a][2]). While the fees reach all carriers delivering to the NC, not just carriers domiciled within the county, any attempt to limit fees to in-county propane carriers would similarly run afoul of the obstacle test, since no two carriers are likely to be equally situated, i.e., same number of deliveries, same amount of product per drop, same risk of accidents, etc. And while any carrier could choose not to deliver propane to NC or any jurisdictions because of such fees, their existence make them obstacles to transportation and commerce and impermissible under the HMTA.

*Inspections*

The ordinance at § 6.7 requires that a vehicle, as defined, undergo an annual inspection by submitting an Application for Motor Vehicle Transportation Permit, (exhibit #2), paying $75.00 in advance, appearing with the vehicle at a point in NC where inspections are conducted by appointment only (see exhibit #6), and as a matter of practice, (see exhibit #5) only on the first and fourth Tuesday each month. A driver must accompany the vehicle making him and the vehicle unavailable for deliveries for two to three hours, minimum. These requirements have the effect of making a new vehicle which has met all state and federal requirements unusable until a NC inspection can be performed. A windshield sticker (exhibit #4) must be affixed to the vehicle which indicates a ''PERMIT FOR USE OF A MOTOR VEHICLE OR TRAILER TO TRANSPORT LIQUID PETROLEUM GAS'' (exhibit #3) has been issued to the owner. These requirements apply to any carrier seeking to deliver to points within NC, regardless of location of vehicle registrant or domicile of driver.

These requirements are in conflict with 49 CFR § 177.853(a) ''No unnecessary delay in movement of shipments. All shipments of hazardous material shall be transported without unnecessary delay, from and including the time of commencement of the loading of the cargo until its final discharge at destination.'' We believe the NC ordinance ''creates an obstacle to the accomplishment and execution of the Act or the regulations issued under the Act.'' (§ 107.202(b)(2).

An out-of-state carrier who attempted to deliver propane to a customer in NC would be barred if the ordinance were not preempted, for it would not be reasonable or possible to obtain a permit from NC without violating the ''unnecessary delay'' standard the HMTA mandates at 5125(a)(2). A less extreme example of a carrier in any in-state jurisdiction provides no protection for the ordinance from preemption under the ''obstacle test,'' since inspections are provided only by appointment at the office of the Fire Marshall and only on the first and fourth Tuesday of each month. For NC to argue that its inspections by appointment are verification of New York State roadside inspections of hazardous materials transport vehicles similarly should run afoul of the ''obstacle test,'' since roadside checks on previously inspected vehicles can be conducted with the least delay to transportation, a stated purpose of the Act. Because both the driver and vehicle are unavailable for long periods of time, the effect of the inspection is to cause unnecessary delay and should be preempted under 5125(a)(2).

It should not matter which class of propane carrier § 6.7 attempts to regulate since NC's requirements for non-federal registration and permitting forms and procedures are not ''substantively the same'' as federal

regulations and are therefore preempted under the ''dual compliance'' standard at § 5125(a)(1). In addition, the applicability of the NC fee, inspection and labeling requirements exclusively to propane, or even to other hazardous materials, runs contrary to section 5125(b), which reserves ''the designation, description, and classification of hazardous materials'' to US DOT. By singling out propane for special or exclusive treatment, NC has impinged on the jurisdiction of the US DOT, reserved to it by Congress.

*Labeling*

NC uses permits to meet its goal of vehicle registration and the display of a numbered permit ''on exterior of vehicle'' as evidence of compliance. (Exhibit #4). Information provided by NC Fire Marshall directs vehicle owners to display the registration permit number on the windshield of vehicles. While this is merely a consequence of the registration requirement for which preemption is sought, it is a separate labeling requirement of a hazardous material and should be preempted, per se, as a covered subject under section 5125 and 49 CFR 107.202(a)(2).

*Section 6.8 (A) Through (L)*

Section 6.8(A) requires a certificate of fitness issued by the NC Fire Marshall be secured by ''[a]ny person filling containers at a location where Liquefied Petroleum Gas is sold *and/or transferred from one vessel into another.*'' [Emphasis added]. After application (§ 6.8[B]), proof of qualifications (§ 6.8[C]), investigation and examination (§ 6.8[D]), etc., § 6.8(I) ''Certificate of Fitness Issued'' requires said certificate ''of any person performing the following activities: 2. [s]elling Liquefied Petroleum Gas or Transferring Liquefied Petroleum Gas from one vessel to another.'' Section 6.8(K), 1 through 6 specifies the contents of the certificate of fitness and section (L) the requirement of the holder to display or produce same upon request ''to anyone for whom he seeks to render his services or to the Fire Marshall.''

By custom and practice no driver of a vehicle used to deliver propane is exempt from these requirements, since he necessarily engages in ''transferring Liquefied Petroleum Gas from one vessel to another.'' The two activities are inextricably linked. Under the NC ordinance, drivers of propane vehicles without certificates of fitness would be barred from delivering propane, since section 6.0 (C) states ''[t]he provisions of this Article *shall apply to all uses of Liquefied Petroleum Gas* and installation of all apparatus, piping, and equipment pertinent to systems for such uses.'' [Emphasis added]. (See exhibit [#1]). Even more compelling, NC's ''Application for Certificate of Fitness,'' (exhibit #7) specifying categories of licenses including, among others, ''Flammable Gas Bulk Transport (1)'' and ''Flammable/Compressed Gas Transport/ Handling (3),'' clearly demonstrates the intent and purpose of the ordinance to license hazardous materials transport drivers delivering to points within NC no matter where domiciled.

*Certificate of Fitness*

This requirement of the ordinance has several discreet steps the applicants must take in order to secure certification. The application (exhibit #7), the NC letter to Certificate of Fitness holders (exhibit #8) and the Information for Liquefied Petroleum Gas Certificate of Fitness instructions (exhibit #9) clearly represent a protocol designed to regulate the qualifications of hazardous material transportation drivers: applicant must, ''be employed by company with valid permits, (i.e., meet the requirements of section 6.7); must possess valid medical certification; must file a complete notarized application; must pass written examination by N.C.F.D; must pass practical examination by N.C.F.D.'' Further, ''[a]ll applications must be accompanied by: two (2) color (Passport Type) photos of applicant; one-hundred and fifty dollars ($150) check, etc.,'' and all tests are by appointment only. Recent telephonic communications from NC to applicants instruct that photographs must now be taken at NC offices and only by appointment. (Exhibit #5) Any driver entering or delivering propane within NC, no matter where domiciled, needs such certification, as do, presumably, domiciled drivers, though section 6.8, unlike section 6.7, makes no distinction.

The HMTA and its regulations require that hazardous materials transportation employees receive training, and allow that ''a State may impose more stringent training requirements only if those requirements—(a) [d]o not conflict with the training requirements in this subpart and in 177 of this subchapter; and (b) [a]pply only to drivers domiciled in that state.'' (49 CFR 172.701). NC is a political subdivision of New York State and has no jurisdiction over licensing requirements, and even state jurisdiction over such requirements applies only to domiciled drivers, and only if those requirements are imposed under New York State Department of Motor Vehicle law.

The NC ordinance certification requirement is preempted since it cannot meet the ''dual compliance'' and ''obstacle'' standards because ''[t]o the extent the HMRs recognize the CDL with its hazardous materials and/or cargo tank endorsements as 'certification' of federal training requirements, a driver cannot comply with the requirement that 'no person who operates a commercial motor vehicle * * * have more than one drivers license' '' (See FR/Vol. 58, No. 95 / Wednesday, May 19, 1993). Since persons engaged in the transportation and off-loading of propane within the County of Nassau are required to demonstrate evidence of certification to the Fire Marshall, the requirement is duplicative of the CDL.

The **Federal Register** of May 19, 1993 makes it clear that proliferation of such training and licensing requirements by other jurisdictions (states) would make it ''burdensome for non-domiciled drivers who must preregister for tests at specified times and locations * * *''. By parity of reasoning, counties or other political subdivisions would cause ''obstacles'' to transportation that are at least as great, if not greater.

For the foregoing reasons, petitioner seeks preemption of those portions of the Nassau County Fire Prevention ordinance as described.

Submitted by: Richard Brescia, New York Capitol Consultants, 120 Washington Ave., Albany, New York 12210.

For Petitioner: New York Propane Gas Association, P.O. Box 5006, Albany, New York 12205.

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[EE–175–86]**

### Proposed Collection; Comment Request For Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Currently, the IRS is soliciting comments concerning an existing final regulation, EE–175–86 (TD 8357), Certain Cash or Deferred Arrangements and Employee and Matching Contributions Under Employee Plans (§§ 1.401(k)–1, 1.401(m)–1, and 54.4979–1).

**DATES:** Written comments should be received on or before August 11, 1997 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

**SUPPLEMENTARY INFORMATION:**

*Title:* Certain Cash or Deferred Arrangements and Employee and Matching Contributions Under Employee Plans.

*OMB Number:* 1545–1069.

*Regulation Project Number:* EE–175–86.

*Abstract:* This regulation provides the public with the guidance needed to