Actions by the agency since November 2000, in response to Congressional requirements, have addressed most of the concerns raised by Advocates in its docket submission. As previously stated, written comments to the ANPRM on tire labeling issues indicated that the tire construction information molded onto the tire is of little safety value to the general public since most consumers do not understand tire construction technology. Additionally, few consumers use the tire construction information as input to tire or vehicle purchasing decisions, according to the results of focus group surveys sponsored by the agency. However, the tire repair, retread, and recycling industries use the tire construction information and the agency is considering retaining all the current labeling requirements of FMVSS No. 109 in some form.

The agency believes that the true measure of inconsequentiality to motor vehicle safety in this case is the effect of the noncompliance on the operational safety of vehicles on which these tires are mounted. The safety of people working in the tire retread, repair, and recycling industries must also be considered. The tires have been chosen by GM as original equipment, suited for pickup trucks. Further, the tires are certified to meeting all the performance requirements of FMVSS No. 109. The agency agrees with GM's statement indicating that, in customer use, the LW or outboard side or the tire would likely stay in the original configuration through the life of the tire. Although tire construction affects tire strength and durability, neither the agency nor the tire industry provides information relating the strength and durability of a tire to the number and types of plies in the tread and sidewall. The agency believes the incorrect labeling of the tire construction information will have an inconsequential effect on consumer safety. The agency believes the safety of the GM pickup truck users and the users of these tires as replacements will not be adversely affected by the noncompliance because most consumers do not base tire purchases or vehicle operation parameters on tire construction information. The agency believes the noncompliance will have an inconsequential effect on the safety of the tire retread, repair, and recycling industries. The use of steel cord construction is the primary safety concern of these industries, according to ITRA. In this case, the steel used in the construction of the tires is properly labeled.

In consideration of the foregoing, NHTSA has decided that the burden of persuasion has been met and that the noncompliance is inconsequential to motor vehicle safety. Accordingly, Continental's application is granted and the applicant is exempted from providing the notification of the noncompliance that would be required by 49 U.S.C. 30118, and from remedying the noncompliance, as would be required by 49 U.S.C. 30120.

(49 U.S.C. 301118, 301120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: August 3, 2001.

Stephen R. Kratzke,

Associate Administrator for Safety Performance Standards.

[FR Doc. 01–20037 Filed 8–8–01; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2001–10312; Notice 1]

Michelin North America, Inc.; Receipt of Application for Decision of Inconsequential Noncompliance

Michelin North America, Inc., has determined that approximately 173,800 205/55R16 Michelin Energy MXV4+ tires do not meet the labeling requirements mandated by Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New Pneumatic Tires.'' FMVSS No. 109 requires that each tire shall have permanently molded into or onto both sidewalls the generic name of each cord material used in the plies of the tire. (S4.3(d)).

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Michelin has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.''

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the application.

During the period of the 4th week of 2000 through the 9th week of 2001, the subject tires were produced and cured with erroneous marking. Instead of the required marking of the cord material of: Polyester, the tires were marked: Rayon. Of the total, approximately 162,500 tires may have been delivered to customers. The remaining tires have been identified in Michelin's warehouse.

Michelin states that all performance requirements of FMVSS 109 were met or exceeded and that this noncompliance is inconsequential as it relates to motor vehicle safety.

Interested persons are invited to submit written data, views, and arguments on the application described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation, Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. It is requested that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below. Comment closing date: (30 days after Publication Date).

(49 U.S.C. 301118, 301120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: August 6, 2001.

Stephen R. Kratzke,

Associate Administrator for Safety Performance Standards.

[FR Doc. 01–20015 Filed 8–8–01; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–01–10293 (PDA–28(R))]

Application by the Town of Smithtown, NY for a Preemption Determination as to Ordinance on Transportation of Liquefied Natural Gas

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

ACTION: Public Notice and Invitation to comment.

SUMMARY: Interested parties are invited to submit comments on an application by the Town of Smithtown, New York for an administrative determination whether Federal hazardous material transportation law preempts certain sections of the Town Code that require a permit for any motor vehicle used to deliver liquefied petroleum gas (LPG) within the Town and a ''certificate of fitness'' for any person who delivers LPG.

DATES: Comments received on or before September 24, 2001, and rebuttal comments received on or before November 7, 2001, will be considered before issuance of an administrative

ruling. 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. The application and all comments are also available on-line through the home page of DOT's Docket Management System, at ''http://dms.dot.gov.''

Comments must refer to Docket No. RSPA–01–10293 and may be submitted to the docket either in writing or electronically. Send three copies of each written comment to the Dockets Office at the above address. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. To submit comments electronically, log onto the Docket Management System website at http://dms.dot.gov, and click on ''Help,'' ''DMS Web Site,'' or ''DMS Frequently Asked Questions'' to obtain instructions for filing a document electronically.

A copy of each comment must also be sent to John B. Zollo, Esq., Town Attorney, 99 West Main Street, P.O. Box 575, Smithtown, NY 11787. A certification that a copy has been sent to him must also be included with the comment. (The following format is suggested: ''I certify that a copy of this comment have been sent to Mr. Zollo at the address specified in the **Federal Register**.'')

A list and subject mater index of hazardous materials preemption cases, including all inconsistency rulings and preemption determinations issued, are available through the home page of RSPA's Office of the Chief Counsel, at ''http://rspa-atty.dot.gov.'' A paper copy of this list and index will be provided at no cost upon request to the individual named in **FOR FURTHER INFORMATION CONTACT** below.

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

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

The Town of Smithtown (Town), New York has asked RSPA to determine whether Federal hazardous material transportation law preempts sections 164–108 and 164–109 of the Town Code, concerning Fire Prevention Division permits and ''certificates of fitness'' for the delivery of LPG within the Town.

In its application, the Town stated that ''Section 164–108 is essentially identical'' to provisions in Nassau County Ordinance No. 344–1979 that RSPA found are preempted with respect to trucks based outside Nassau County. PD–13(R), Nassau County, New York Ordinance on Transportation of Liquefied Petroleum Gas, 65 FR 60238 (Oct. 10, 2000) (decision on petition for reconsideration), judicial review pending, *Office of the Fire Marshal* v. *U.S. Dep't of Transportation,* Civil Action No. 00–7200 (E.D.N.Y.). In PD–13(R), RSPA found that, as enforced and applied to vehicles based outside Nassau County, that County's permit requirement is an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180, because the County does not appear to be able to schedule and conduct inspections of trucks (required for a permit) without causing unnecessary delays in the transportation of hazardous materials from locations outside the County. 65 FR at 60245.

The Town stated that the relevant provisions of Section 164–108 are as follows:

> A. No person, firm or corporation shall use or cause to be used any motor vehicle, tank truck, tank truck semitrailer 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 Fire Prevention Division. No permit shall be required under this section for any motor vehicle that is used for the transportation of LPG not operated or registered by an authorized dealer, in containers not larger than 10 gallons water capacity each (approximately 34 pounds' propane capacity) with an aggregate water capacity of 25 gallons (approximately 87 pounds) or when used in permanently mounted containers on the vehicle as motor fuel. This section shall not apply to any motor vehicle, tank truck, tank truck semitrailer or tank truck trailer traveling through the town and making no deliveries within the town.
>
> B. Permits shall be issued to a vehicle for the transportation of LPG only after a full safety inspection of the vehicle by the Fire Prevention Division and the Fire Marshal approves of the issuance of the permit.

The Town also stated that, ''[i]n practice,'' its inspection and permit requirement ''is distinguishable from the Nassau County Ordinance,'' because its inspections do not last ''several hours''; they ''are scheduled in advance and scheduling is flexible.'' In an affidavit submitted with the application, the Town's Chief Fire Marshal stated that ''Appointments are available on a monthly basis (with the exception of winter months at the request of the LPG companies) and are made one month prior to the expiration of the permit.'' The permit is valid for one year, and the fee is $150 for a new permit and $75 for a renewal.

The Town stated that the relevant provisions of section 164–109, concerning certificates of fitness, are the following:

> A. Certificate of fitness required. Any person filling containers at locations where LPG is sold and/or transferred from one vessel into another shall hold a valid certificate of fitness issued by the Fire Prevention Division. Such certificate is subject to revocation by the Fire Prevention Division at any time where the certificate holder displays evidence of noncompliance with the provisions of this chapter.
>
> E. The certificate of fitness shall be given full force and effect for a period of three years.
>
> I. Certificate of fitness issued. A certificate of fitness will be required of any person performing the following activities:
>
> (1) Filling containers permanently located at consumer sites from a cargo vehicle.
>
> (2) Selling LPG or transferring LPG from one vessel to another

The Town acknowledged that its certificate of fitness requirement applies to both persons who ''handle (fill and sell) LPG at commercial dispensing stations'' and ''operators of vehicles (bulk and rack type carriers) used for domestic delivery of LPG.'' The Town referred to RSPA's finding in PD–13(R) that Nassau County's certificate of fitness requirement is preempted insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG because it imposes more stringent training requirements than provided in the HMR. 63 FR 45283, 45288 (Aug. 25, 1998). The Town did not acknowledge that its own certificate of fitness requirement was found to be preempted with respect to motor vehicle drivers last year, in *People* v. *Parago Gas Corp.,* No. SMTO 398–99 (Dist. Ct. Suffolk Co., Mar. 20, 2000).

The Town stated that its certificate of fitness requirement ''is in no way duplicative of the training requirements'' in the HMR and that the Federal Motor Carrier Safety Regulations in 49 CFR parts 390–397 ''do not specifically address the safety provisions that are tested for a certificate of fitness.'' The Town stated that, to obtain a certificate of fitness, an applicant must pay $150, or $75 for renewal, and take ''a written examination that tests the applicant's knowledge of the required safety standards * * * in the Town's handbook'' as well as ''a practical test during which a fire marshal observes

the applicant performing the necessary operations.'' According to the application, these examinations ''are scheduled in advance, * * * given on several occasions in order to accommodate the applicant's schedule,'' and ''waived for applicants who possess a valid certificate of fitness from another jurisdiction.''

The text of the Town's application is set forth in Appendix A. The following exhibits to the application are not reproduced, but copies will be provided at no cost upon request to the person identified in **FOR FURTHER INFORMATION CONTACT:**

1. Sections 164–108 and 164–109 of the Code of the Town of Smithtown.
2. Application for LPG Certificate of Fitness form.
3. LPG–Certificate of Fitness Study Guide.
4. Affidavit of Richard L. McKay, Chief Fire Marshal.
5. Application for LPG Motor Vehicle Transportation Permit and Motor Vehicle Inspection for LPG Transportation Permit forms.

II. Federal Preemption

Section 5125 of Title 49 U.S.C. contains several preemption provisions that are relevant to this application. Subsection (a) provides that—in the absence of a waiver of preemption by DOT under section 5125(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 subdivison, 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 that RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Public Law 93–633 section 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); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151 (1978).

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning 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 wavier 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(1) 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. 5125 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.

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

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to RSPA to make determinations of preemption, except for those that concern highway routing, which have been delegated to the Federal Motor Carrier Safety Administration. 49 CFR 1.53(b).

Section 5125(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 will publish its determination in the **Federal Register**. *See* 49 CFR 107.209. 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, the Fifth Amendment or other provisions of the Consititution 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 or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(g)(1). 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 policies set forth in Executive Order No. 13132, entitled ''Federalism'' (64 FR 43255 (August 10, 1999). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, 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.

IV. Public Comments

All comments should address the issue whether Federal hazardous material transportation law preempts the Town's LPG permit and certificate requirements in sections 164–108 and 164–109 of the Town Code. 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 detailed in Part II, above.

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

Issued in Washington, DC, on August 6, 2001.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

Appendix A—Application by the Town of Smithtown for Preemption Determination as to Smithtown Town Code on Transportation of Liquefied Petroleum Gases

Submitted to: 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: Town of Smithtown, County of Suffolk, State of New York

Argument

The Town of Smithtown applies for an administrative determination that the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. 5101, et seq.) and its regulations, 49 CFR, 107.202: Standards for Determining Preemption, does not preempt Section 164–108 of the code of the Town of Smithtown, Fire Prevention, Transportation, Local Law No. 4–2000, and Section 164–109 of the Code of Town of Smithtown, Fire Prevention, Certificate of fitness, Local Law No. 4–2000.

Section 164–108/Transportation, Permits

The relevant sections of the Code of the Town of Smithtown (hereinafter, the Town Code) are sections 164–108 (A) and (B). The Town of Smithtown submits that the HMTA does not preempt section 164–108. Sections 164–108 (A) and (B) provides as follows:

A. No person, firm or corporation shall use or cause to be used any motor vehicle, tank truck, tank truck semitrailer 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 Fire Prevention Division. No permit shall be required under this section for any motor vehicle that is used for the transportation of LPG not operated or registered by an authorized dealer, in containers not larger than 10 gallons' water capacity each (approximately 34 pounds' propane capacity) with an aggregate water capacity of 25 gallons (approximately 87 pounds) 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 truck semitrailer, or tank truck trailer traveling through the town and making no deliveries within the town. (Exhibit 1).

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.

Town Code Section 164–108 is essentially identical to Section 6.7(A) and (B) of Nassau County ordinance No. 344–1979. In its preemption determination in PD–13(R), 63 FR 45283, the Research and Programs Administration (RSPA) determined that the Nassau County ordinance was to preempted by the HMTA. In doing so, the RSPA concluded that the Nassau County ordinance did not create an obstacle to the transportation of LPG. According to the RSPA, the time necessary to undergo an inspection and pay the permit fee did not create an unnecessary delay in the transportation of hazardous materials as long as ''the County does not cause the loaded truck to wait for a permit to be issued''. 63 FR at 45286.

On reconsideration, the RSPA considered evidence of significant delays occurring during inspections of trucks based outside the County. The RSPA then determined that the Nassau County Ordinance was preempted with respect to trucks based outside the County, but was not preempted with respect to trucks based in Nassau County. According to the RSPA. ''The city or county may not require a permit or inspection for trucks that are not based within the local jurisdiction if the truck must interrupt its transportation of propane for several hours or longer in order for an inspection to be conducted and a permit to be issued.'' (PD–13(R) Determination on reconsideration.) Still, the RSPA emphasized that the County has an interest the safe delivery and transportation of LPG, whether the transportation companies are based in the County or not. To be clear, the RSPA did not find that all inspections of this nature were preempted by the HMTA. Instead, the reconsideration decision finding that the Nassau County ordinance was preempted was based on the unreasonable delay incurred by the transporter outside the jurisdiction.

In practice, the Town Code is distinguishable from the Nassau County ordinance. Unlike the case in Nassau County, the Town of Smithtown does not conduct in inspections that last several hours. The inspections are scheduled in advance and scheduling is flexible. In addition, steps are implement that eliminate delay during the actual inspection. (see Exhibit #4) As a result, the town conducts its inspections without transporters having to wait longer than 30 minutes. (Exhibit #4)

Like the permit requirement in Nassau County, 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. Once the fees are obtained, they are used to offset the work performed by the Fire Prevention Division. (Exhibit $4) The permit fee is not applied to all trucks that transport the LPG within the Town of Smithtown, but only to those who deliver LPG within the Town. (Exhibit #4) The RSPA previously held that such fees are reasonable. (See Preemption Determination PD–13 (R) and 63 FR at 4587.

Therefore, absent evidence of a significant delay in the actual transportation of LPG, there is not basis for determination finding that the HMTA preempts Town Code Section 164–108.

Section 164–109 (A), (I), and (E)/Certificate of Fitness

The relevant sections of the Town Code regarding Certificate of Fitness are sections 164–109 (A), (I) and (E). (Exhibit 1). The Town of Smithtown submits that the HMTA does not preempt section 164–109. The Town Code at 164–109(A) states in part, ''Certificate of fitness required. Any person filling containers at locations where LPG is sold and/or transferred from one vessel into another shall hold a valid certificate of fitness issued by the Fire Prevention Division.'' Section 164–109(I) states in part, ''A certificate of fitness will be required of any person performing the following activities: (1) Filling containers permanently located at consumer sites from a cargo vehicle. (2) Selling LPG or transferring LPG from one vessel to another.'' Section 164–109(E) gives full force and effect to the certificate of fitness for three years.

It is important to note that the Town of Smithtown offers two types of certificates of fitness. A Type I certificate of fitness allows the holder to handle (fill and sell) LPG at commercial dispensing stations. A Type II certificate of fitness is for operators of vehicles (bulk and rack type carriers) used for domestic delivery of LPG. (see Exhibits 3 and 4). In other words, only the holder of a Type II certificate of fitness may engage in the delivery of LPG within the Town of Smithtown.

Investigation and Exam Requirements

Contrary to the RSPA's finding in 63 FR 45283 with respect to Nassau County's certificate of fitness requirement, the inspection and exam requirements of the

Town Code are consistent with 49 CFR 172.701 which proscribes only ''minimum training requirements for the transportation of hazardous materials.'' Section 164–109 is in no way duplicative of the training requirements proscribed by 49 CFR parts 172, 174, 175, 176, and 177. Furthermore, 49 CFR parts 390 through 397, referenced by 49 CFR 177.804, do not specifically address the safety provisions that are tested for a certificate of fitness under Town Code 164–109. (see Exhibit #5) The federal code of regulations deals primarily with the operation of the transferring vehicle itself, i.e. brakes, lights, windshield wipers, and rules of the road. (see 49 CFR 392) However, the Town Code deals primarily with the handling of LPG, i.e. transporting cylinders and delivering cylinders. (see Exhibit #5) Therefore, no conflict exists between the federal code of regulations and the Town Code.

Section 164–152 lists the applicable fee for the initial certificate of fitness at one hundred fifty dollars and the renewal fee at seventy-five dollars. The applicable fees are payable upon the commencement of the application process. The application itself is a brief from. (Exhibit 2). This is followed by a written examination that tests the applicant's knowledge of the required safety standards, as provided in the Town's handbook. (Exhibit 3). Next, the applicant takes a practical test during which a fire marshal observes the applicant performing the necessary operations. (see Exhibit 4).

The exams are scheduled in advance, and are given on several occasions in order to accommodate the applicant's schedule. Because § 164–109(H) eliminates the investigation phase for the renewal process, applicants applying to renew a certificate of fitness are not required to take the written and practical examinations. Also, examinations are waived for applicants who possess a valid certificate of fitness from another jurisdiction. (see Exhibit 4).

The effect of section 164–109 of the Town Code is to ensure that individuals engaged in the proscribed activity are capable of conducting this activity safely. The certification process generally occurs well in advance of the delivery of LPG and, as such, does not create a delay in delivery. (see Exhibit 4).

The Obstacle Test

Because the HMTA does not address certificates of fitness and certificates of fitness are not included among the enumerated covered subjects in section 49 U.S.C. 5125(b), the ''dual compliance test'' and the ''covered subject test'' do not apply here. Therefore, the issue here is whether the submitted statutes pass the ''obstacle test''.

Town Code section 164–109 passes the obstacle test, as it does not create a significant delay in the transportation of LPG so as to conflict with 49 CFR 177.853(a), which prohibits ''unnecessary delays'' in the transportation of hazardous materials. First, this requirement does not explicitly pertain to the transporters of LPG, only to those who engage in filling, selling, and transferring LPG. It is true that, in practice, a transporter who delivers LPG must obtain a Type II Certificate of Fitness; however, this requirement does not create an obstacle to cause a delay in LPG delivery. (see Exhibit 4)

For instance, in *New Hampshire* v. *Motor Transport Association, et. al.* v. *Flynn,* 751 F. 2d 43 (1st Cir. 1984), the U.S. Appeals Court considered whether a statute requiring transporters to obtain a license at a twenty-five dollar annual fee created an unnecessary delay in the transportation of hazardous materials. In that case, transporters seeking to obtain a licenses could only purchase the license during the week. The Court acknowledge that a delay in transportation would result for transporters who need to obtain a license for a weekend delivery. However, the court found that because transporters could anticipate this requirement, no significant delay should result. Therefore, the court held that the license requirement was not preempted by the HMTA.

Here, the extent to which sec. 164–109 is enforced against transporters of LPG is limited to those situations where the transporters of LPG were also engaged in the delivery of LPG. In theses situations, transporters can anticipate the need to schedule the certification process in advance. (See Exhibit 4). Therefore, the fact that transporters consequently become involved, should not be a basis for determining that section 164–109 creates an obstacle to the accomplishment of the federal law.

For the foregoing reasons, the HMTA does not preempt Town Code Sections 164–108 and 164–109.

Submitted by:
John B. Zollo,
Town Attorney, Town of Smithtown.
Jennifer Marin,
Assistant Town Attorney, 99 West Main Street, P.O. Box 575, Smithtown, New York 11787.

For Petitioner:
The Town of Smithtown,
99 West Main Street, P.O. Box 575, Smithtown, New York 11787.

[FR Doc. 01–20048 Filed 8–8–01; 8:45 am]
BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

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 Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury is soliciting comments concerning the Usual and Customary Business Records Relating to Denatured Spirits.

DATES: Written comments should be received on or before October 9, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Mary Wood, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8185.

SUPPLEMENTARY INFORMATION:

Title: Usual and Customary Business Records Relating to Denatured Spirits.

OMB Number: 1512–0337.

Recordkeeping Requirement ID Number: ATF REC 5150/1.

Abstract: Denatured spirits are used for nonbeverage industrial purposes in the manufacture of personal household products. The records are maintained at the premises of the regulated individual and are routinely inspected by ATF personnel during field tax compliance examinations. These examinations are necessary to verify that all specially denatured spirits can be accounted for and are being used only for purposes authorized by laws and regulations. By ensuring that spirits have not been diverted to beverage use, tax revenue and public safety are protected. There is no additional recordkeeping imposed on the respondent as these requirements are usual and customary business records.

Current Actions: There are no changes to this information collection and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 3,111.

Estimated Time Per Respondent: 0.

Estimated Total Annual Burden Hours: 1.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper