

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration**

[Preemption Determination No. PD-4(R);
Docket No. PDA-6(R)]

California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids; Decision on Petition for Reconsideration

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

ACTION: Notice of decision on petition for reconsideration of administrative determination of preemption.

PETITIONER: California Highway Patrol (CHP).

STATE LAWS AFFECTED: California Vehicle Code (VC), Division 14.7 (sections 34000-34102), and California Code of Regulations (CCR), Title 13, Chapter 6, Article 3 (sections 1160-1168) and Article 6 (sections 1190-1197).

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODE AFFECTED: Highway.

SUMMARY: RSPA's Associate Administrator for Hazardous Materials Safety is denying CHP's petition for reconsideration of the determination that California's requirement for an annual inspection of cargo tanks and portable tanks used for highway transportation of flammable and combustible liquids was preempted by the former Hazardous Materials Transportation Act (HMTA) (since revised, codified and enacted without substantive change at 49 U.S.C. 5101 *et seq.*).

This decision constitutes RSPA's final action on the July 27, 1992 application for a preemption determination filed by Nalco Chemical Co. (Nalco). Any party who submitted comments in Docket No. PDA-6(R) (including the applicant) may seek judicial review within 60 days of this decision.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001, telephone 202-366-4400.

SUPPLEMENTARY INFORMATION:**I. Background**

The California Highway Patrol (CHP) administers a design, registration, and

inspection program applicable to cargo tanks and portable tanks on vehicles that transport flammable and combustible liquids on highways within California. See VC Div. 14.7 and § 34001. Excluded from the CHP's Cargo Tank (CT) program are, among others, a vehicle's own fuel tanks; tanks smaller than 120 gallons (or most tanks smaller than 500 gallons that meet DOT specifications); empty tanks (with less than 120 gallons of residue); and intermodal IM 101 and 102 portable tanks when the highway portion of an interstate shipment is less than 25 miles from an "ocean port or railroad loading or unloading terminal." VC 34003(a). See also the discussion in Preemption Determination (PD) No. 4(R), 58 FR 48933, 48934 (Sept. 20, 1993).

In July 1992, Nalco applied for a determination that the HMTA preempted major portions of California's CT program. Following notice of Nalco's application in the **Federal Register**, 57 FR 38081 (Aug. 21, 1992), and the receipt of written comments from all interested parties, RSPA issued its determination in PD-4(R) that the former HMTA:

(a) preempted California's requirement for an annual inspection of cargo tanks and portable tanks used for highway transportation of flammable and combustible liquids, as that requirement is applied and enforced, because any wait for the arrival of State inspectors from another location constitutes an "unnecessary" delay;

(b) did not preempt California's requirement for an annual registration, as applied and enforced, because there is no evidence that this requirement creates any delays separate from the wait for an inspection to be conducted;

(c) did not preempt California's statute authorizing design and construction standards for cargo tanks and portable tanks used to transport flammable and combustible liquids, because there is no evidence that California enforces design and construction requirements, with respect to tanks meeting DOT specifications, that are not substantively the same as requirements in the HMR; and

(d) preempted the following State marking requirements, when applied to DOT specification cargo tanks and portable tanks, because they are not substantively the same as requirements in the HMR: (1) That a metal identification plate be affixed to any tank for which such a plate is not required by the HMR (13 CCR 1195); (2) that a "CT number" be marked on the tank or on a metal identification plate on the tank (13 CCR 1194); and (3) that a certification label be affixed to the

tank and a registration certificate be carried in a waterproof holder permanently attached to portable tanks (VC 34044 and 13 CCR 1193).

RSPA did not decide whether the former HMTA preempted either: (a) California's registration fees, since no party contended that the fees are inequitable or used for purposes other than those related to the transportation of hazardous materials, or (b) the requirement that the remote secondary control for internal valves be clearly labeled (13 CCR 1197), in the absence of any evidence that Nalco or any other party submitting comments is directly affected by this requirement.

RSPA's determination did not address similar California registration, inspection and certification requirements applicable to vehicles and tanks used to transport hazardous wastes, but noted that these requirements are subject to the same Federal preemption provisions and the general principles discussed in PD-4(R). RSPA also noted that its determination did not consider or affect State motor vehicle inspection and registration requirements that apply to all commercial vehicles.

Within the 20-day time period provided in 49 CFR 107.211(a), CHP filed a petition for reconsideration of RSPA's decision in PD-4(R). CHP certified that it had mailed a copy of its petition to Nalco and all others who had submitted comments, in accordance with 49 CFR 107.211(c). Four parties responded to CHP's petition for reconsideration: Nalco, National Tank Truck Carriers, Inc. (NTTC), Chemical Waste Transportation Institute (CWTI), and the 3M Corporation (3M).

In Part II of the decision in PD-4(R), RSPA set forth the standards for making determinations of preemption under the former HMTA and the specific statutory provisions under which non-Federal requirements governing the transportation of hazardous materials are preempted. 58 FR at 48934-35. On July 5, 1994, President Clinton signed Public Law 103-272 which extensively revised, codified and enacted without substantive change numerous laws related to transportation. The former HMTA, 49 App. U.S.C. 1801 *et seq.*, has been repealed and replaced by 49 U.S.C. Chapter 51 (5101 *et seq.*), "Transportation of Hazardous Material," except as to "proceedings that were begun before July 5, 1994." Accordingly, the preemption provisions in former 49 App. U.S.C. 1804 and 1811, discussed in Part II of PD-4(R), remain applicable to RSPA's consideration of this petition for reconsideration. However, since Congress made no substantive change in