

passing 49 U.S.C Chapter 51, this decision will cite to the preemption criteria as presently set forth in 49 U.S.C. 5125.

II. Petition for Reconsideration

CHP's petition seeks reconsideration of the decision in PD-4(R) that 49 U.S.C. 5125(a) preempts California's requirement for an annual inspection of cargo tanks and portable tanks used to transport flammable and combustible liquids. It does not contest RSPA's determination that 49 U.S.C. 5125(b) preempts certain requirements for marking these tanks, although CHP states that it "will petition RSPA for a waiver of preemption" as to the requirement for a "metal identification plate on a non-spec cargo tank (13 CCR 1195)." With respect to the annual inspection requirement, CHP asks for "correction of [three alleged] factual errors," and it asks three questions for "written clarification of the application of the preemption [determination]."

First, CHP contends that there was no "current substantive evidence that significant delays were still being experienced." According to CHP, the comments by Union Pacific Railroad Co. (UPRR) and CWTI concerned the separate (but similar) requirements imposed on transporters of hazardous waste, under California's Hazardous Waste Vehicle and Container Inspection and Certification Program (HWIC), rather than the delays currently being experienced under the CT Program. CHP refers to the availability of temporary registration under the CT program, which supposedly eliminates the delays experienced in the HWIC Program. And it reiterates that it "has more than doubled the number of inspectors statewide since UPRR's comments were made * * * and invited Nalco to update [its] experience."

CHP charges that comments by both Nalco and 3M are "invalid," on the ground that these comments did not consider changes made to the CT Program between 1990 and 1993. CHP alleges that the Hazardous Materials Advisory Council (HMAC) and NTTC did not provide substantial or substantive evidence of a burden on commerce or an obstacle to compliance with the Federal hazardous material transportation law and the HMR. CHP also argues that comments "about the proliferation of other states' programs failed to address the addition of 34120 and 34121 VC which authorized reciprocity with CT Programs by other States and the Federal Government."

Second, CHP asserts that RSPA has improperly interpreted 49 CFR 177.853(a) to prohibit "safety related

delays, including compliance with mandatory inspection programs [which] are legitimate reasons for delay." It argues that the intent of this regulation "was to balance safe transportation of hazardous materials with the need for their expeditious delivery," and that RSPA's determination "implies that delays for any reason (other than as specifically authorized)"—including bad weather, road hazards, driver rest periods, and holidays—are "unnecessary." CHP also argues that 177.853(a) should not apply to any delays after delivery of the tank's contents, since that is the "point of 'final discharge at destination.'"

Third, CHP states that RSPA also may not clearly understand—and that HMAC and NTTC failed to investigate or address—California's

Temporary registration process that allows the carrier to simply forward the registration fees via a telegraphic money order and carry a copy as temporary cargo tank registration for up to 10 days (see 13 CCR 1190.1(b)) as proof of registration.

CHP asserts that a carrier's ability to "obtain a temporary cargo tank registration for any out-of-state based cargo tank 24 hours a day, 365 days a year" avoids delays, because the temporary registration allows the tank to enter the State, be unloaded, and then be presented for inspection. CHP continues that a 1992 amendment to the inspection requirement "allows the carriers to freely move a tank that contains only residue throughout the State without current registration," so the carrier is subject to citation only if it reloads the tank with a flammable or combustible liquid after failing to be inspected within 10 days of entering California.

Besides these alleged errors, CHP asks RSPA to answer the following questions to clarify the ruling in PD-4(R):

1. Given the fact that the HMTUSA allows the State the authority to require a cargo tank registration program (separate from the inspection program), can the State require some form of proof of registration be carried with the packaging (cargo or portable tank) either directly on the packaging or carried in the vehicle (or vehicle combination)?

2. Based on the fact that HMTA allows the State to operate a registration program, can the State require some means of positively identifying the packaging in order to verify its registration (keeping in mind that nearly all bulk packagings have some type of unique identifier)? Please note that non-specification (DOT) packagings which require no identification are the central issue.

3. Is our understanding of the ruling correct in that the mandatory inspection and certification is only preempted for tanks based out of California (i.e., the State is not preempted from requiring a mandatory

inspection of tanks based in California as the operators of these tanks have adequate opportunity to have the tanks inspected prior (up to 60 days prior) to the expiration of the previous registration/certification)?

III. Comments Responding to the Petition for Reconsideration

Three parties submitted comments opposing CHP's petition for reconsideration: Nalco, NTTC, and CWTI. In addition, 3M stated that it now uses portable tanks that are no longer covered by the CHP inspection requirement (although it incurred costs "in reverting to drum shipments and back to portable tanks once the amendment became effective"), and thus was withdrawing its earlier comments.

As it had earlier, Nalco acknowledges "improvements in California's registration and inspection processing," but contends that "delays continue to be encountered, both in this program and in the immediately parallel program on wastes." It asserts that CHP's "focus is misplaced," because the "primary issue is not the minutes or hours of delay as they affect a particular tank on a particular day but, rather, whether the delay is 'unnecessary' as that term is used in the regulations." Nalco contends that RSPA has not misinterpreted 49 CFR 177.853(a) because "[e]xpeditious delivery is a safety issue, not a commercial one."

NTTC disagrees that any of the parties had "confused" the requirements of California's HWIC and CT Programs or that there was any error from an alleged failure to respond to the changes in the CT Program which CHP implemented between 1990 and 1993. NTTC quotes the language at 58 FR 48933 stating that PD-4(R) "does not address" the HWIC Program, and it asserts that RSPA properly considered "the fact patterns as presented in the original petitions."

NTTC contends that temporary registration will not prevent delays. It states that, even if a carrier's headquarters "telegraphs a money order to CHP," the truck may depart before confirmation of registration, and "geography and time zone differences assure that the driver will not have a copy of the documentation." NTTC also presents situations in which delays would exceed the 10-day period permitted for inspection, under a temporary registration:

Truck deliveries may be made during weekends or at hours when inspectors are not available. Inspectors take holidays, they call in sick or they may be redispached to more pressing duties. Surely the state is not asserting that a vehicle "hang around" until such contingencies are resolved?