

NTTC also states that the "reciprocity provisions" in the CT program are illusory, because "CHP failed to give but one example of another state joined by such provisions." According to NTTC, "the extension of reciprocity is discretionary. There are no readily-available criteria upon which a carrier (or even another state) can rely to determine whether or not an existing program is 'reciprocal' with California."

CWTI similarly argues that "reciprocity has not materialized." It asserts that CHP's discussion of "factual errors" and "changes to the CT program" miss the point of the decision in PD-4(R): "To the extent [that] CHP can demonstrate to RSPA that its CT program no longer causes 'unnecessary' delay, the CHP may begin to apply and enforce its requirements." CWTI contends that CHP has not eliminated unnecessary delay, even by hiring more inspectors:

The unavailability of inspectors, however, is only part of the unnecessary delay problem. Delay also results from the advance notification of hazardous materials shipments which must attend all inspections in order to arrange for the inspection and routing of vehicles and bulk packagings to inspection locations, as well as delays which may result from the logistics of obtaining, completing, and filing authorized documentation of vehicle/bulk packaging registration and fees.

CWTI likens delays for bad weather and holidays to "acts of God," and states the "key point" to be that "state program deficiencies evidenced by a lack of inspectors and/or inspection locations do not justify delay in the transportation of hazardous materials." Citing the legislative history and findings in the 1990 amendments to the former HMTA, CWTI argues that unnecessary delay inhibits safety, not just commerce. And it states that RSPA is the proper agency to balance what CHP asserts are competing goals of "safe transportation" and "expeditious delivery."

CWTI initially accepted statements in the petition for reconsideration that CHP "'routinely find(s) tanks that are not in compliance with the HMR,'" as short as one day after certification by a DOT-registered facility, but argued that this simply proves that "any inspection is as good as the point in time in which it is conducted," and "roadside inspections are vital to ensuring the safe transportation of hazardous materials." (In supplemental comments dated November 17, 1993, CWTI disagreed with CHP's statements of routinely finding tanks in violation of the HMR, based on data in the Federal Highway Administration's 1992 Annual Report.

These supplemental comments are not necessary for reaching a decision on CHP's petition for reconsideration.) CWTI asserted that, rather than proceeding with "unilateral state action," CHP should provide more specific data to support its concern that periodic inspections under DOT's regulations are inadequate.

CWTI finds CHP's statements concerning the absence of temporary registration under the HWIC Program is an admission that "the HWIC program causes 'unnecessary delay.'" It requests that "RSPA repeat in as strong of terms as possible its directive that the CHP desist applying and enforcing the HWIC program in a manner which is inconsistent with the principles contained in PD-4(R)." CWTI also states that RSPA correctly decided that 49 U.S.C. 5125(b) preempts California's marking requirements, and that CHP should have "participate[d] in the formulation of federal requirements for the marking/certification of cargo tanks used for the transportation of hazardous materials," in RSPA's rulemaking Docket No. HM-183. CWTI notes that RSPA reached no conclusion about the registration fees under the CT Program, and comments that the requirement that fees be equitable, in former 49 App. U.S.C. 1811(b) (reworded as "fair" in 49 U.S.C. 5125(g)), is generally violated when "fees remain unapportioned for carriers operating in interstate commerce."

Nalco, NTTC and CWTI all challenge CHP's implicit positions, in the questions, that it would be appropriate to require proof of registration to "be transported with the packaging (cargo or portable tank)" and "some means of positively identifying the packaging in order to verify its registration." NTTC states that all tanks have some means of identification; "[e]ven non specification cargo tanks have VIN numbers." Nalco agrees, stating that as part of the registration process, States gather information about the registrant and its equipment and can "provide it directly to their inspectors without having to decorate the interior or exterior of the vehicle for each jurisdiction for the inspectors' convenience." CWTI opposes what it calls CHP's "efforts to reassert a linkage between specific vehicles and registration." It alleges the "burden that would result if other states insisted on unique numbers and shipping paper requirements," and refers to recommendations of a working group on uniform forms and procedures for registration and permitting, under 49 U.S.C. 5119. According to CWTI, the working group has recommended State registration of hazardous materials

carriers, not specific vehicles or packagings.

Nalco and NTTC disagree with CHP's conclusion that an annual inspection may still be required for cargo tanks and portable tanks based in California. They consider that the decision in PD-4(R) applies to all tanks regulated by the HMR, and Nalco comments that, "in light of the anticipated rule in Docket No. HM-200," the small number of tanks presently not governed by the HMR "does not warrant the confusion that would be caused by a State program addressed only to these units."

IV. Discussion

As discussed in PD-4(R), Nalco's original challenge to California's inspection requirement, in 1990, was accompanied by an affidavit setting forth specific dates that "filled incoming tanks" were held waiting the arrival of a CHP inspector, "thereby delaying delivery to customers." 58 FR at 48938. Two parties submitting comments in the original proceeding (designated IRA-53) provided specific time periods for CHP's delays in inspecting tanks: Union Pacific cited waits of up to five days for inspections at its intermodal ramps (which CHP states referred only to tanks containing hazardous wastes), and CWTI stated that it had encountered "delays of two to three days for an inspection" of tanks used for hazardous wastes. 58 FR at 48939.

After the application in IRA-53 was returned to Nalco, and Nalco petitioned for an administrative determination of preemption pursuant to what is now 49 U.S.C. 5125(d), no party submitted further information as to the specific periods that cargo tanks and portable tanks used for flammable and combustible liquids were being delayed. Rather, Nalco stated that "improvements and pre-payment options have speeded the issuance of instructions to the field * * *, but unnecessary delays are still encountered * * * compounded by inspector[s]' schedules, vacations and sick leave." 48 FR at 48938. CHP acknowledged that some delays still exist, despite modifications such as reducing the number of tanks subject to inspection, increasing the number of inspectors, establishing inspection stations at four port-of-entry locations, and providing a 10-day temporary registration that allows a carrier to enter California and deliver its load before being inspected.

At no time, however, in its prior comments or in its petition for reconsideration, has CHP contended that it has eliminated situations where the transportation of a loaded tank must be interrupted and wait for the arrival