

of an inspector. Rather CHP acknowledged, in its opening comments in PDA-6(R), that "some instances have resulted in inspections not being performed in as timely a manner as the CHP or industry would like * * * due to lack of adequate planning on the part of both the operator and the CHP." In its rebuttal comments, CHP stated that, with the "current [inspection] staff and the four POE facilities we can inspect nearly all out-of-state domiciled cargo tanks without any diversion or delays." It contended that the remaining delays encountered in performing inspections are reasonable, justified and not "unnecessary" based on the number of violations found—as CHP again contends in its petition for reconsideration.

RSPA's decision in PD-4(R) did not ignore safety, but rather followed the prior inconsistency rulings in which RSPA consistently found that the safe transportation of hazardous materials is advanced by 49 C.F.R. 177.853(a) which prohibits "unnecessary" delays. See the discussion at 58 FR 48939-41. The argument in CHP's petition for reconsideration that safety justifies delays does not provide any answer. Safety has been alleged as the basis of every non-Federal requirement that has been challenged, and considered by RSPA, since the former HMTA first provided for the preemption of "inconsistent" State and local requirements.

The only difference cited by CHP to distinguish the CT inspection program and the HWIC program applicable to carriers of hazardous waste is the availability of a 10-day temporary registration under the CT program only. Whether or not the procedures for temporary registration can eliminate delays, there is no information that they have eliminated delays. Moreover, NTTC asserts that temporary registration will not always prevent delays.

The CT and HWIC inspection programs appear to be otherwise similar, and the inspections under both are conducted by CHP. For that reason, RSPA must assume that waits experienced by transporters of hazardous waste (such as UPRR and CWTI) are representative of waits faced by an interstate carrier of flammable or combustible liquids, when that carrier is unable to obtain a temporary registration or plan its arrival to allow for inspection at a POE location.

In addition, CHP's admissions that it has not eliminated situations where loaded tanks must wait for an inspector to arrive to conduct an inspection make the specific number of days' wait cited

by UPRR and CWTI unnecessary for RSPA's decision.

The decision in PD-4(R) was a narrow one. As specifically noted there, RSPA encourages State and local governments to adopt and enforce the requirements in the HMR through inspections. 58 FR 48940-41. During fiscal 1994, DOT provided grants in excess of \$64 million to all States, and \$3.2 million to California, to carry out inspections under the Federal Motor Carrier Assistance Program. See generally 49 CFR Part 350 governing grants "to encourage each State to enforce uniform motor carrier safety and hazardous materials regulations for both interstate and intrastate motor carriers and drivers." 49 CFR 350.5.

Moreover, RSPA agreed with all parties that the time involved to conduct a tank inspection was reasonable, and not unnecessary, including any time waiting one's "turn" for an inspector already present. 58 FR at 48941. But RSPA found that forcing a tank to wait for the arrival of an inspector from another location was an "unnecessary" delay, and because California's CT program was not free from these kinds of delays it created an obstacle to the accomplishment and execution of the Federal hazardous material transportation law and the HMR. California "may not require an inspection as a condition of travelling on California's roads when the inspection cannot be conducted without delay because an inspector must come to the place of inspection from another location." *Id.* For that reason, RSPA found that the provision now codified at 49 U.S.C. 5125(a) preempted the inspection requirement in VC 34060 and 13 CCR 1192, as that requirement was being applied and enforced.

If and when California eliminates the unreasonable delays in its inspection program, that requirement will no longer be preempted. Nothing in CHP's petition for reconsideration, however, provides any basis for RSPA to change the decision in PD-4(R).

It is not possible to provide complete answers to CHP's three questions for clarification of the decision in PD-4(R), since preemption under the "obstacle" criterion depends upon the manner in which a non-Federal requirement is enforced and applied. (See also the statement in H.R. Rep. 101-444, 101st Cong., 2d Sess. 49, that Congress did not intend for DOT to be a "clearing house for obtaining advisory opinions with respect to legislative or regulatory ideas and notions prior to enactment.") However, the following responses can be made:

1. CHP has asked about requirements for "some proof of registration * * * directly on the packaging or carried in the vehicle." As specifically discussed in PD-4(R), unless otherwise authorized by Federal law, any non-Federal requirement for a "marking * * * of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material" is preempted unless it is "substantively the same as" the requirements in the Federal hazardous material transportation law and the HMR. 49 U.S.C. 5125(b)(1)(E). See 58 FR at 48936-37. A requirement to carry additional documentation on a vehicle transporting hazardous materials, beyond that required in the HMR, may create an obstacle to the accomplishment and execution of the Federal hazardous material transportation law and the HMR. See *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1581 (10th Cir. 1991).

2. CHP has asked about "some means of positively identifying the packaging" and noted that its concern is primarily with non-DOT specification packagings, since all DOT specification tanks subject to the CT program have a metal identification plate and, in some instances, a separate metal certification plate. As discussed in PD-4(R), any marking on the tank itself is a "marking * * * 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)(E); 58 FR 48937. To the extent that non-specification packagings do not already contain some unique identifying characteristic and California believes that they must in order to transport hazardous materials, California may submit a petition for rulemaking in accordance with 49 CFR part 106.

3. CHP has asked about the application of the decision in PD-4(R) to "tanks based in California." However, it does not indicate whether it assumes that these tanks remain completely within California or travel throughout the United States. Tanks that never leave California would not experience delays associated with entering the State or being rerouted around California. See PD-5(R), Massachusetts Requirement for an Audible Back-up Alarm, etc., 58 FR 62707, 62710 (Nov. 29, 1993). On the other hand, "tanks based in California" which are used in other States may well experience the same types of delays as "tanks based out of California."

V. Ruling

For the reasons stated above, the CHP petition for reconsideration is denied.