the procurement of, any goods or services from the sanctioned persons; and

(B) Import Sanction. — The importation into the United States of products produced by Anatoliy Kuntsevich shall be prohibited.

Sanctions on the individual described above may apply to firms or other entities with which that individual is associated. Questions as to whether a particular transaction is affected by the sanctions should be referred to the contact listed above. The sanctions shall commence on November 17, 1995. They will remain in place for at least one year and until further notice.

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: November 27, 1995.

Dric D. Newsom,

Assistant Secretary of State for Political-Military Affairs, Acting.

[FR Doc. 29720 Filed 12–5–95; 8:45 am]

BILLING CODE 4710–25–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Security Advisory Committee

AGENCY: Federal Aviation Administration.

ACTION: Notice of Aviation Security Advisory Committee Renewal.

SUMMARY: Notice is hereby given of the renewal of the Aviation Security Advisory Committee.

The Federal Aviation Administrator is the sponsor of the Committee, which consists of 23 member organizations selected by FAA as representative of the overall viewpoint of all aviation users and the objectives of the committee. The committee is a joint Government-aviation industry initiative to improve the efficiency and effectiveness of the aviation security system. The committee provides independent expert advice on the nature and the direction in which FAA may wish to proceed to solve these complex and dynamic problems. The functions of the committee are solely advisory.

The Secretary of Transportation has determined that the information and use of the Aviation Security Advisory Committee are necessary in the public interest in connection with the performance of duties imposed on FAA by law. Meetings of the committee will be open to the public.

Issued in Washington, DC, on November 30, 1995.

E. Ross Hamory,

Executive Director, Aviation Security Advisory Committee.

[FR Doc. 95–29702 Filed 12–5–95; 8:45 am]

BILLING CODE 4910–13–M

Availability of Draft Environmental Impact Statement and Public Hearing; LaGuardia Airport East End Roadway Improvements Project

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice to hold a public hearing on a draft environmental impact statement.

SUMMARY: The New York Airports District Office of the Federal Aviation Administration (FAA) announces that the FAA, acting as ''Lead Agency'' and the New York State Department of Transportation (DOT), acting as a ''joint lead agency'' have completed the preparation of a Draft Environmental Impact Statement (DEIS) assessing modifications to the roadways serving LaGuardia Airport that have been proposed by the Port Authority of New York and New Jersey. In addition, it is the intent of this notice to inform the public that the FAA and New York State Department of Transportation (DOT) will be conducting a Public Meeting to accept comments on the Draft EIS. The Public Meeting will be held:

Date: January 10, 1996
Time: 4:30 pm to 9:30 pm
Location: LaGuardia Marriott Hotel, 105–05 Ditmars Boulevard, East Elmhurst, Queens, New York

Persons interested in contributing comments on the DEIS are invited to provide them orally at the Public Meeting. In addition, written comments may be submitted to Mr. Philip Brito at the location identified below. Written comments must be received by Mr. Brito, on or before, the end of the formal comment period on February 14, 1996. Comments received after the close of the comment period, but prior to FAA's environmental finding, will be considered by the FAA to the extent practicable. The FAA will issue a Final Environmental Impact Statement that includes corrections, clarifications, and responses to comments on the DEIS.

Copies of the Draft Environmental Impact Statement are available for review at the following locations:

John Dent, Branch Manager, East Elmhurst Public Library, 95–06 Astoria Boulevard, East Elmhurst, NY 11369

Orest Tuka, Branch Manager, Jackson Heights Public Library 35–51 81st Street, Jackson Heights, NY

Andrew Jackson, Branch Manager, Langston Hughes Public Library, 102–09 Northern Boulevard, Corona, NY 11368

Diane Vitale, Branch Manager, Corona Public Library, 38–23 104th Street, Corona, NY 11368

Gary Strong, Director, Queens Borough Public Library, 89–11 Merrick Boulevard, Jamaica, NY 11432

Lynne Pickard, Manager, Environmental Needs Division, Office of Airport Planning and Programming, FAA, APP–600, 800 Independence SW, Washington, DC 20591

Queens Community Board #3, District Manager Mary Sarro, 34–33 Junction Boulevard, Jackson Heights, NY 11372

New York City Department of City Planning, Director Joseph B. Rose, 22 Reade Street, New York, NY 10007

Robert Grotell, Deputy Director, Mayor's Office of Environmental Coordination, 52 Chambers Street, Room 315, New York, NY 10007

Queens Borough President's Office, Mr. Bruce Ley, 120–55 Queens Boulevard, Kew Gardens, NY 11424

FOR FURTHER INFORMATION CONTACT: Philip Brito, Federal Aviation Administration, New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, NY 11530, Phone: 516–227–3800.

Philip Brito,

Manager, New York Airports District Office.

[FR Doc. 95–29703 Filed 12–5–95; 8:45 am]

BILLING CODE 5000–04–M

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

[Preemption Determination No. PD–12(R); Docket No PDA–13(R)]

New York Department of Environmental Conservation; Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation

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

ACTION: Administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

APPLICANT: Chemical Waste Transportation Institute.

STATE LAWS AFFECTED: New York Codes, Rules and Regulations (NYCRR), Title 6, Section 372.3(a)(7).

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.

MODES AFFECTED: Highway and Rail.

SUMMARY: Federal hazardous material transportation law preempts 6 NYCRR 372.3(a)(7) which restricts hazardous waste transporters' activities at transfer facilities by (1) prohibiting the repackaging of hazardous wastes; (2) requiring an indication on the manifest of a transfer of hazardous wastes between vehicles; and (3) requiring secondary containment for any storage or transfer of hazardous wastes. This decision considers these requirements in the context of highway transportation of hazardous wastes, including transfers between motor and rail carriers. On their face, these requirements apply to all modes of transportation.

The first two requirements are preempted by 49 U.S.C. 5125(b)(1) because they are not substantively the same as provisions in the HMR concerning (1) the packing, repacking, and handling of hazardous material, and (2) the preparation, contents, and use of shipping documents related to hazardous material. The requirement for secondary containment is preempted because it is an obstacle to the accomplishment and carrying out of the HMR's provisions on packaging and segregation. 49 U.S.C. 5125(a)(2).

No party, including the applicant, has requested a determination that Federal law preempts the requirement in 6 NYCRR 373–1.1(d)(1)(xv), also incorporated by reference in 372.3(a)(6), that storage of hazardous wastes incidental to transport may take place only at a transfer facility that is not located on the site of a commercial hazardous waste treatment, storage or disposal facility. Accordingly, no decision is reached with respect to that requirement.

This determination does not consider the definitions of ''Storage Incidental to Transport'' and ''Transfer Incidental to Transport,'' in 6 NYCRR 364.1(c)(12) and (14), because these definitions do not appear to apply to the NYCRR transfer and storage requirements nor impose any requirements or restrictions on transporters of hazardous wastes.

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

A. Application for Preemption Determination

In September 1993, the Chemical Waste Transportation Institute (CWTI) applied for a determination that the former Hazardous Materials Transportation Act (HMTA) preempted certain requirements of the New York State Department of Environmental Conservation (NYDEC) applicable to the transfer and storage of hazardous wastes incidental to transportation (generally referred to in this determination as ''NYDEC transfer and storage requirements'').

In general terms, these requirements impose conditions on the transfer and storage of hazardous wastes ''incidental to transport'' that, if complied with, exempt the transporter from having to obtain the separate permit required for treatment, storage and disposal (TSD) facilities. As discussed more fully below, CWTI contends that these NYDEC transfer and storage requirements are preempted because they are not ''substantively the same as'' requirements in the HMR governing (1) the packing, repacking and handling of hazardous materials and (2) the content and use of the manifest which serves as a shipping paper accompanying a shipment of hazardous waste. CWTI also contends that most of the NYDEC transfer and storage requirements constitute an obstacle to the accomplishment and execution of the HMTA and the HMR, because they interfere with, or are not necessary for, the safe and efficient transportation of hazardous waste.

On their face, the NYDEC transfer and storage requirements apply to all modes of transportation. However, CWTI's application and all the comments addressed these requirements only in the context of highway transportation of hazardous wastes, including transfers between motor and rail carriers.

The text of CWTI's application was published in the Federal Register on October 15, 1993, and interested parties were invited to submit comments. 58 FR 53614. The period for public comments was extended when several States initially requested additional time to submit comments, and NYDEC advised it was proposing revisions to its regulations that have eliminated many of the specific requirements challenged by CWTI. 58 FR 65226 (Dec. 13, 1993). Additional time was then allowed for interested parties to comment on these proposed revisions to the NYDEC transfer and storage requirements, including whether requirements proposed to be repealed were being enforced. 59 FR 4312 (Jan. 31, 1994). Later, RSPA reopened the comment period to invite further comments on the effect of preemption on ''States' ability to appropriately regulate transporters of hazardous waste under RCRA,'' as raised in a June 27, 1994 letter to RSPA from the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). 59 FR 40081 (Aug. 5, 1994). The comment period closed September 23, 1994.

Extensive comments were received from NYDEC, ASTSWMO, transporters of hazardous wastes, industry organizations, and the following States: California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Montana, Ohio, and Pennsylvania. Further comments were submitted by CWTI.

B. Transfer Facilities and EPA's Regulations

Hazardous wastes, like many other commodities, are seldom transported in a single vehicle from origin to destination. In issuing a 1980 amendment to its hazardous waste regulations, the Environmental Protection Agency (EPA) noted that

> Many transporters own or operate transfer facilities (sometimes called ''break-bulk'' facilities) as part of their transportation activities. At these facilities, for example, shipments may be consolidated into larger units or shipments may be transferred to different vehicles for redirecting or rerouting. Shipments generally are held at these facilities for short periods of time. The length of time may vary due to such factors as scheduling and weather, but because these facilities are intended to facilitate transportation activities, rather than storage, the time is typically as short as practicable.

Interim final amendments and request for comments, Hazardous Waste Management System, etc., 45 FR 86966 (Dec. 31, 1980)

Commenters on CWTI's application described as a common practice the transfer of hazardous wastes between vehicles, including transferring the contents of one container into another. For example, NCH Corporation referred to transporters who pick up hazardous waste in drums from relatively small generators and then consolidate them

> into loads that are large enough to be accepted by the permitted recycler or waste treatment facility. Transferring the drummed waste upon delivery to the transfer facility into a tanker truck * * * eliminates the labor-intensive and wasteful unloading, reloading, and management of multiple drums of waste that would otherwise be necessary.

According to the Association of American Railroads (AAR):

> It is a common transportation practice for hazardous waste to be transferred from truck to rail. For example, contaminated soil has been trucked from hazardous waste sites to rail sidings for rail delivery to treatment or disposal facilities. Hazardous waste liquids are trucked to sidings for pumping into tank

cars and subsequent delivery to consignees for burying or recycling.

EPA's regulations provide that a transporter who mixes hazardous wastes of ''different DOT shipping descriptions by placing them in a single container'' must comply with the standards applicable to generators. 40 CFR 263.10(c)(2). Transporters who simply hold hazardous wastes ''for a short period of time in the course of transportation,'' 45 FR 86966, are exempted from EPA's requirements applicable to TSD facilities. Section 263.12 of 40 CFR states that:

> A transporter who stores manifested shipments of hazardous waste in containers meeting the requirements of § 262.30 [specifying packagings that meet DOT regulations] at a transfer facility for a period of ten days or less is not subject to regulation under parts 270, 264, 265, and 268 of this chapter with respect to the storage of those wastes.

C. NYDEC Transfer and Storage Requirements

In contrast, New York subjects transfer facilities to all the requirements governing TSD facilities, including permits, unless the hazardous waste transporter limits its activities at the transfer facilities as follows:

- *Transfer* of hazardous wastes by a transporter ''incidental to transport'' is permitted by 6 NYCRR 372.3(a)(7) only if ''(i) no consolidation or transfer of loads occurs either by repackaging in, mixing, or pumping from one container or transport vehicle into another[;] (ii) transfer of hazardous waste from one vehicle to another is indicated on the Manifest as Second Transporter''; and (iii) the transfer or storage areas where sealed containers are transferred from one vehicle to another, or unloaded for temporary storage, are ''designed to meet secondary containment requirements'' set forth in 6 NYCRR 373–2.9(f).
- *Storage* of hazardous wastes by a transporter ''incidental to transport,'' is allowed by 6 NYCRR 372.3(a)(6) for ten calendar days only if conditions specified in 6 NYCRR 373–1.1(d)(1)(xv) are met. The latter section is contained in New York's Hazardous Waste Treatment, Storage and Disposal Facility Permitting Requirements. It allows the transporter an exemption from the requirement to obtain a TSD permit when it stores manifested shipments of hazardous waste in DOT-authorized packagings for ten calendar days or less, ''provided that the transfer facility is not located on the site of any commercial hazardous waste treatment, storage or disposal facility subject to permitting'' by NYDEC.

Violations of NYDEC's regulations are punishable by civil and criminal penalties. In addition, a transporter's permit may be revoked or suspended, and the violator may be enjoined from continuing to violate the regulations. N.Y. Envtl. Conserv. Law. 71–2703.

CWTI does not challenge the condition in § 373–1.1(d)(1)(xv) that storage of hazardous wastes at a transfer facility must be in DOT-authorized containers. While CWTI's application also argued for preemption of several other restrictions in § 373–1.1(d)(1)(xv), concerning the storage of hazardous wastes at transfer facilities (such as daily inspections, a log of receipts and shipments, and facility ownership), these other restrictions have been (1) combined with similar requirements in § 372.3(a), (2) eliminated, or (3) modified for consistency with EPA's regulations. These amendments took effect on January 14, 1995 (60 days after NYCRR filed amendments to 6 NYCRR with the New York Secretary of State on November 15, 1994). N.Y.S. Register, p.14 (Nov. 30, 1994).

The only restriction added by NYDEC's November 1994 amendments to the transfer and storage requirements is the condition that a transfer facility not be located on the site of a commercial TSD facility. CWTI refers to this additional restriction in its March 11, 1994 comments, but neither it nor any other party has discussed the effect of this condition on hazardous waste transporters or argued that this condition is preempted by 49 U.S.C. 5125.

In its application, CWTI also contends that the following definitions in 6 NYCRR 364.1(c), defining terms used in Part 364 (governing Waste Transporter Permits), are also preempted:

> (12) ''Storage Incidental to Transport'' means any on-vehicle storage which occurs enroute from the point of initial waste pickup to the point of final delivery for purposes such as, but not limited to, overnight on-the-road stops, stops for meals, fuel, and driver comfort, stops at the transporter's facility for weekends immediately prior to shipment, or on-vehicle storage not to exceed five days at the transporter's facility for the express purpose of consolidating loads (where such loads are not removed from their original packages or containers) for delivery to an authorized treatment, storage or disposal facility.
>
> (14) ''Transfer Incidental to Transport'' means any transfer of waste material associated with storage incidental to transport where such material is not unpackaged, mixed or pumped from one container or truck into another.

However, these definitions do not appear to impose any requirements or restrictions on transporters of hazardous wastes. Moreover, NYDEC has stated that these definitions do not apply to the transfer and storage requirements in 6 NYCRR Part 372 and 373. And CWTI has not indicated that the scope of requirements in Part 364, governing permits for transporters of hazardous wastes, is improperly broadened by these definitions to the extent that transporter permit requirements are preempted by 49 U.S.C. 5125. Accordingly, this determination does not consider these two definitions.

The next part of this decision summarizes the regulation of hazardous wastes as hazardous materials under the HMR, the criteria for Federal preemption of non-Federal requirements applicable to the transportation of hazardous materials, and RSPA's procedures for issuing administrative determinations of preemption. Part III addresses in detail NYDEC's three restrictions on transfer facilities that have been challenged by CWTI's application and remain in effect following the 1994 amendments to the transfer and storage requirements: (1) The prohibition against repackaging, (2) the requirement to indicate on the manifest any transfer of hazardous waste between vehicles, and (3) the requirement for secondary containment for any storage or transfer of sealed containers.

II. Federal Hazardous Materials Transportation Law

A. Scope of Federal Law and Application to Hazardous Wastes

The HMTA was enacted in 1975 to give the Department of Transportation greater authority ''to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.'' Pub. L. 93–633 § 102, 88 Stat. 2156, amended by Pub. L. 103–272 and codified as revised in 49 U.S.C. 5101. The HMTA ''replace[d] a patchwork of state and federal laws and regulations * * * with a scheme of uniform, national regulations.'' *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted ''without substantive change'' by Public Law 103–272, 108 Stat. 745. The Federal law governing the transportation of hazardous material is now found in 49 U.S.C. Chapter 51. Although the HMTA remains applicable to proceedings begun before July 5, 1994, this determination will cite to the preemption criteria presently set forth

in 49 U.S.C. 5125, because Congress made no substantive change.

The HMR, now issued under the 49 U.S.C. 5103(b)(1) mandate that the Secretary of Transportation ''prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce,'' predate the HMTA. They had their origins in the Explosives and Combustibles Act of 1908, 35 Stat. 554 (chap. 234), and many of the provisions governing motor vehicles carrying hazardous materials were originally issued by the Interstate Commerce Commission under former § 204 of the Interstate Commerce Act. After DOT assumed responsibility for the regulation of hazardous materials, the HMR were continued, but renumbered. 32 FR 5606 (Apr. 5, 1967).

To encourage the nationwide application of uniform requirements, DOT has long encouraged States to adopt and enforce the HMR as State law. Grants are available, under the Motor Carrier Safety Assistance Program (MCSAP) of the Federal Highway Administration (FHWA), to States that enforce the ''highway related portions'' of the HMR ''or compatible State rules, regulations, standards, and orders applicable to motor carrier safety, including highway transportation of hazardous materials.'' 49 CFR 350.9(a). New York has adopted the HMR ''as the standard for classification, description, packaging, marking, labeling, preparing, handling and transporting all hazardous materials,'' 17 NYCRR 507.4(a)(1)(i), and these incorporated provisions of 49 CFR ''apply to all transportation within or through the State of New York.'' 17 NYCRR 507.7.

Under the MCSAP program, in the year ending September 30, 1995, New York was awarded almost $3.5 million in grants for enforcement of the HMR and the Federal Motor Carrier Safety Regulations, 49 CFR Parts 350–399. As a condition of receiving MCSAP grant funds in fiscal 1996, New York has certified that it has adopted highway hazardous materials safety rules and regulations that are substantially similar to and consistent with the HMR.

All hazardous wastes are designated ''hazardous substances'' under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601(14)(C), and, as such, hazardous wastes were explicitly required to be ''listed and regulated as * * * hazardous material[s] under the Hazardous Materials Transportation Act.'' 42 U.S.C. 9656(a). *See also* 49 CFR 171.8 (the term ''hazardous material'' includes hazardous wastes.) The HMR apply to the transportation of hazardous wastes by intrastate, interstate and foreign carriers. 49 CFR 171.1(a).

Under the HMR, all hazardous materials (including hazardous wastes) are classified according to their hazard characteristics (flammable, corrosive, etc.) and must be packaged for transportation in containers that meet prescribed design specifications or performance-oriented standards. A package containing hazardous materials must be marked and labeled, and the vehicle or freight container placarded, according to the HMR's requirements. The package also must be accompanied by a shipping paper that properly describes the hazardous material. An EPA manifest (meeting the requirements of 40 CFR part 262) must be prepared for any shipment of hazardous waste, and, if it contains all the information required by DOT, the manifest may be used as the DOT shipping paper. 49 CFR 172.205(a), (h).

In enacting RCRA in 1976, Congress provided that EPA's regulations on transporters of hazardous waste must be consistent with the requirements of the HMTA and the HMR. 42 U.S.C. 6923(b). Accordingly, the EPA regulations on transporters of hazardous wastes adopted in 1980 contain a note to explain that:

> EPA and DOT worked together to develop standards for transporters of hazardous waste in order to avoid conflicting requirements. Except for transporters of bulk shipments of hazardous waste by water, a transporter who meets all applicable requirements of 49 CFR parts 171 through 179 and the requirements of 40 CFR 263.11 [concerning an EPA identification number] and 263.31 [concerning cleanup of releases of hazardous wastes] will be deemed in compliance with this part. 40 CFR 263.10, Note.

B. Federal Preemption

A statutory provision for Federal preemption was central to the HMTA. In 1974, 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). More recently, a Federal Court of Appeals found that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments which expanded the preemption provisions. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991). 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.

Pub. L.101–615 § 2, 104 Stat. 3244.

Following the 1990 amendments and the subsequent 1994 codification of the Federal law governing the transportation of hazardous material, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e), ''a requirement of a State, political subdivision of a State, or Indian tribe'' is explicitly preempted (unless it is authorized by another Federal law) if

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
>
> (2) the requirement of the State, political subdivision, 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.

49 U.S.C. 5125(a). These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria which RSPA had applied in issuing inconsistency rulings prior to the 1990 amendments to the HMTA. While advisory in nature, these inconsistency rulings were ''an alternative to litigation for a determination of the relationship of Federal and State or local requirements'' and also a possible ''basis for an application * * * [for] a waiver of preemption.'' Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, etc. 44 FR 75566, 75567 (Dec. 20, 1979). 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 Co.,* 435 U.S. 151 (1978).

In the 1990 amendments to the HMTA, Congress also confirmed that there is no room for differences from Federal requirements in certain key

matters involving the transportation of hazardous material. As now codified, a non-Federal requirement ''about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter,'' is preempted unless it is authorized by another Federal law or DOT grants a waiver 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.

49 U.S.C. 5125(b)(1). RSPA has defined ''substantively the same'' to mean ''conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d).

Since 1984, the HMR have also included the provision in 49 CFR 171.3(c) that:

With regard to hazardous waste subject to [the HMR], any requirement of a state or its political subdivision is inconsistent with [the HMR] if it applies because that material is a waste material and applies differently from or in addition to the requirements of [the HMR] concerning:
(1) Packaging, marking, labeling, or placarding;
(2) Format or contents of discharge reports (except immediate reports for emergency response); and
(3) Format or contents of shipping papers, including hazardous waste manifests.

This standard (which has been incorporated by reference in New York's transportation regulations) followed the original preemption provision in the HMTA that, unless DOT granted a waiver,

any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter [the HMTA], or in a regulation issued under this chapter [the HMR], is preempted.

Pub. L. 93–633 § 112(a), 88 Stat. 2161. New York's regulations specifically recognize that ''any requirement of the State or political subdivision thereof which is inconsistent with Federal law or regulations in the field is preempted,'' and refer to procedures under which DOT can issue a waiver of preemption. 17 NYCRR 507.1(b).

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. This administrative determination replaced RSPA's process for issuing inconsistency rulings. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing which have been delegated to FHWA. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the Federal Register. *Id*. Following the receipt and consideration of written comments, RSPA publishes its determination in the Federal Register. *See* 49 C.F.R. 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 C.F.R. 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 of the Constitution 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. 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 policy set forth in Executive Order No. 12,612, entitled ''Federalism'' (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, 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.

Although cases cited by NYDEC and other commenters note the general presumption against preemption, RSPA must consider CWTI's application under the express preemption standards of 49 U.S.C. 5125. For that reason, the issue is not whether ''there is a clearly demonstrated compelling need for preemption,'' as NYDEC asserts, but rather whether the non-Federal requirements, such as the NYDEC transfer and storage requirements, fit the criteria in 49 U.S.C. 5125 for preemption.

The Massachusetts Department of Environmental Protection's Division of Hazardous Materials appears to object to RSPA's procedure for issuing preemption determinations. Massachusetts asserts that RSPA's decision ''must be made on the basis of adjudicatory facts, not legislative-type facts.'' It states that ''DOT/RSPA has no authority for law-making with respect to preemption, only law-applying,'' and that RSPA ''must make findings of fact in an adjudicative-type proceeding, and then apply the facts to Congress' preemption standard.'' However, RSPA disagrees with the position of Massachusetts that a formal, fact-finding process under the Administrative Procedure Act is required. As RSPA has stated, before it issues a determination of preemption, each interested party, including the jurisdiction whose requirements are challenged

has been afforded (1) notice and an opportunity to submit any comments it wished; (2) the opportunity to petition for reconsideration; and (3) the right to judicial review. Due process does not require more. Nor is the Administrative Procedure Act applicable here, since the HMTA does not require RSPA to make a determination of preemption ''on the record after opportunity for an agency hearing.'' 5 U.S.C. 554(a). *See Wong Yang Sun* v. *McGrath*, 339 U.S. 33 (1950), and *Gardner* v. *United States*, 239 F.2d 234, 238 (5th Cir. 1956).

Preemption Determination (PD) No. 1, State Bonding Requirements for Vehicles Carrying Hazardous Wastes, decision on petitions for reconsideration, 58 FR 32418, 32420 (June 9, 1993), affirming initial decision, 57 FR 58848 (Dec. 11, 1992), judicial review dismissed, *Massachusetts* v. *United States Dep't of Transp.*, Civil Action No. 93–1581(HHG) (D.D.C. Apr. 7, 1995), appeal pending, No. 95–5175 (D.C. Cir.).

On August 26, 1994, 49 U.S.C. 5125(d)(1) was amended to require that DOT must issue its decision on an application for a determination of preemption within 180 days after publication in the Federal Register of receipt of the application, or DOT must publish a statement of ''the reason why the * * * decision on the application is delayed, along with an estimate of the additional time before the decision is made.'' Pub. L. 103–311 § 120(b), 108

Stat. 1681. Notice of CWTI's application was first published in the Federal Register on October 15, 1993. However, for the reasons explained above, the comment period was twice extended, later reopened, and finally closed on September 23, 1994. NYDEC's amendments to its transfer and storage requirements were not finalized until November 15, 1994, and did not become effective until January 14, 1995. These facts made it impracticable to issue this decision within 180 days of the Federal Register notice of CWTI's application.

III. Discussion

A. CWTI's Standing to Apply for a Preemption Determination

NYDEC and other States opposing CWTI's application assert that CWTI lacks ''standing'' to challenge the NYDEC transfer and storage requirements. NYDEC states that, based on CWTI's own statements, none of CWTI's members have been ''adversely affected'' or ''aggrieved by the challenged regulations.'' According to NYDEC, ''no [CWTI] member has demonstrated any actual harm (such as lost *profits* or penalties for failure to comply).'' NYDEC also asserts that, ''[s]ince the secondary containment requirement is a facility safety standard, and not a transportation issue, it is inapplicable to CWTI,'' and none of CWTI's members ''have been impaired by the application or enforcement of this requirement in their operations.''

The Pennsylvania Department of Environmental Resources and the Montana Department of Health and Environmental Sciences both contend that CWTI has failed to show that the NYDEC transfer and storage requirements have been ''applied or enforced'' against transporters of hazardous waste in New York. Massachusetts simply states that ''CWTI has failed to state an injury for which relief pursuant to HMTA § 1811(a) [now 49 U.S.C. 5125 (a) and (b)] can be granted.''

In response, CWTI submitted affidavits by two of its members stating that they do not engage in certain activities within the State of New York because of, as set forth in one affidavit, ''the severity of the New York Department of Environmental Conservation regulations and the severity of the penalty for non-compliance.'' In other comments, private companies indicate they have been complying with the NYDEC transfer and storage requirements. For example, Chemical Waste Management, Inc. attributes the lack of enforcement actions against it to its ''conformance with those standards, which in part is based on our belief that New York would exercise its enforcement prerogative on companies not in compliance.'' Safety-Kleen states that it has obtained permits, that it would not need in the absence of the NYDEC transfer and storage requirements, in order to permit it to ''commingle and repackage our mineral spirits solvents for ultimate transport to our recycle centers.''

Section 5125(d) authorizes any person who is ''directly affected'' by a non-Federal requirement to apply for a determination of preemption. That standard is a simple one; being ''affected'' means only that the requirement applies to the applicant. The plain words of the statute do not require showing that one is ''adversely affected,'' ''aggrieved,'' or has suffered ''injury'' or ''actual harm.'' Issues of enforcement (and how the non-Federal requirement is actually applied) are relevant to whether or not there is an ''obstacle'' to executing and carrying out the Federal law and regulations governing the transportation of hazardous materials. But these issues do not bear on whether the applicant is within the scope of those persons entitled to use the administrative procedure set forth in § 5125(d) for obtaining a preemption determination, *i.e.*, whether the non-Federal requirement applies to the applicant.

Moreover, the question of whether NYDEC's secondary containment requirement is a ''facility'' or ''transportation'' requirement cannot be determinative of whether a person to whom that requirement applies has ''standing'' to ask for a determination of preemption. Where loading, unloading or storage occurs incidental to ''the movement of property'' in commerce, that activity is within the scope of Federal law governing the transportation of hazardous material and the HMR. *See* 49 U.S.C. 5102(12) (definition of ''transportation''). Requirements affecting transportation facilities, and transporters' activities at those facilities, are subject to Federal preemption. *See* IR–28, San Jose, California; Restrictions on Storage of Hazardous Materials, 55 FR 8884, 8889–90 (Mar. 8, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992). Similar requirements affecting a consignee's facility and its handling of hazardous materials at that facility, after transportation has ended, are ''beyond the scope of the HMTA,'' as codified at 49 U.S.C. 5101 *et seq. Id.; see also* PD–8(R)—PD–11(R), California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials, 60 FR 8774, 8777–78 (Feb. 15, 1995) (petitions for reconsideration pending).

CWTI has provided sufficient information to establish that the NYDEC transfer and storage requirements, including the requirement for secondary containment, do apply to its members. Accordingly, it is ''directly affected'' by those requirements and entitled to submit this application.

B. Claims That RCRA Authorizes the NYDEC Requirements

NYDEC and many of the States that submitted comments on CWTI's application argue that the NYDEC transfer and storage requirements are authorized by the provision in RCRA that:

> Nothing in this title [42 U.S.C. § 6921 *et seq.*] shall be construed to prohibit any State or political subdivision from imposing any requirements, including those for site selection, which are more stringent than those imposed by [EPA] regulations.

42 U.S.C. § 6929 (RCRA § 3009).

NYDEC states that this provision ''explicitly invites state requirements that are 'more stringent'' than Federal ones, and that ''a preemption determination will effectively repeal a basic tenet upon which RCRA is based.'' Maryland and Pennsylvania concur that ''RCRA expressly contemplates that state laws will be different and specialized to each state's concerns. States are only preempted by RCRA if state law is less stringent than RCRA.''

Maryland and Pennsylvania further contend that DOT has ''no authority * * * to administer or interpret RCRA. Therefore, DOT's construction or interpretation of RCRA is entitled to no weight or deference at all.'' The Colorado Hazardous Waste Commission similarly states that ''RSPA has no expertise in the field of hazardous waste, [and] it should recognize the limits of its jurisdiction and defer to the State of New York in this matter.''

The Maine Department of Environmental Protection asserts that more stringent requirements in an EPA-authorized State hazardous waste program take precedence over ''HMTA's transportation rules,'' and that ''the preemption criteria under HMTA does not extend into hazardous waste transfer activities.'' Massachusetts mentions the ''special regulatory status of hazardous waste'' and also contends that ''Congress left the states with their authority to enact requirements governing generation, transportation, storage, treatment and disposal which are more stringent than RCRA.'' Montana states that a 1982 EPA memorandum ''expressed [the]

interpretation that provisions of an authorized State program which are more stringent than the Federal counterparts become a part of the requirements of RCRA, and fully enforceable by the EPA.''

The California Department of Toxic Substances Control similarly asserts that ''RCRA stands as the minimum standards which States must follow, and Congress did not intend to preempt states from promulgating their own requirements pursuant to RCRA.'' It argues that NYDEC's ''loading and unloading requirements'' are authorized by both RCRA § 3009 and ''EPA's statutory obligation [in RCRA § 3003, 42 U.S.C. § 6923] to promulgate regulations which are necessary to protect human health and the environment in the transportation of hazardous waste.'' ASTSWMO also indicates that RCRA empowers States ''to create regulatory systems which are more stringent than federal rules,'' and that ''these State rules have been closely analyzed by the USEPA for consistency with federal statute and regulations, * * *''

In contrast to the States' arguments, CWTI points to EPA's own statements that it does not examine State hazardous waste transportation requirements for consistency with Federal hazardous material transportation law. CWTI cites EPA's final determination on California's hazardous waste program, 57 FR 32726, 32728 (July 23, 1992), where EPA found that ''preemption issues under other Federal laws * * * do not affect the State's RCRA authorization,'' and an August 17, 1994 letter signed by the Director of EPA's Office of Solid Waste stating that:

> A possible issue of preemption under HMTA would not affect the programs's eligibility for RCRA authorization where the preemption concern is unrelated to RCRA authorities. * * * Thus, EPA still believes that the RCRA authorization decisions provide no basis for shielding state regulations touching upon hazardous materials transport from possible preemption challenges raised under the HMTA.

CWTI also argues that the ''more stringent than'' language in 42 U.S.C. 6929 simply prevents RCRA itself from prohibiting additional State requirements, so that the ''more stringent than language'' is not sufficient to specifically authorize the NYDEC transfer and storage requirements. According to CWTI, the ''more stringent than'' language does not prevent *other* Federal statutes from preempting State hazardous waste requirements.

Moreover, CWTI finds that this language applies only to sites of TSD facilities. It quotes a statement by Senator Bumpers, the sponsor of the 1980 amendment that added the ''more stringent than'' language to RCRA, that the purpose of that language was to ''permit States to establish standards more stringent than Federal standards with regard to the selection of sites for the disposal of hazardous waste material.'' 125 Cong. Rec. 13,247 (1979).

CWTI contends that State requirements on hazardous waste transporters must not be in conflict with the Federal hazardous material transportation law and the HMR, because RCRA requires that (1) EPA's regulations on transporters must be ''consistent with'' DOT's requirements, 42 U.S.C. 6923(b), and (2) State hazardous waste programs must be ''equivalent to'' and ''consistent with'' EPA's program. 42 U.S.C. 6926(b). CWTI refers to 40 CFR 263.12, under which a transporter ''who stores manifested shipments of hazardous waste in containers meeting [DOT packaging] requirements'' for no more than 10 days at a transfer facility need not meet other storage facility requirements. For the position that there is no restriction on transporters mixing wastes having the same DOT shipping description, CWTI cites the provision in 40 CFR 263.10 that a transporter who ''[m]ixes hazardous wastes of different DOT shipping descriptions by placing them in to a single container'' must comply with the standards applicable to generators. CWTI quotes the preamble to later amendments to 40 CFR Part 263, where EPA stated that the ''amendments do not place any new requirements on transporters repackaging waste from one container to another (e.g., consolidation of wastes from smaller to larger containers) or on transporters who mix hazardous wastes at transfer facilities.'' 45 FR 86967 (Dec. 31, 1980). Included with CWTI's application is a March 1, 1990 letter signed by the Director of EPA's Office of Solid Waste stating:

> The bulking of characteristic hazardous waste shipments to achieve efficient transportation may result in incidental reduction of the hazards associated with that waste mixture. However, this incidental reduction may not meet the definition of treatment (as defined under 40 CFR Section 260.10) because it is not designed to render the waste nonhazardous or less hazardous. Accordingly, such activity may not require a RCRA permit.

The opposing arguments by the States and CWTI clearly focus the issue of the relationship between Federal preemption under 49 U.S.C. 5125 and State requirements on hazardous waste transporters, under EPA-authorized programs. This same issue was addressed in two of RSPA's prior determinations concerning transporters of hazardous waste: PD–1(R), above, 57 FR 58848, 58854–55, and PD–2(R), Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest, 58 FR 11176, 11183 (Feb. 23, 1993). Further comments were specifically invited on this issue in the August 5, 1994 Federal Register notice, which reopened the comment period in response to ASTSWMO's request for an opportunity to discuss ''the effect of RSPA [preemption] activities upon States' ability to appropriately regulate transporters of hazardous waste under RCRA.'' 59 FR 40081.

NYDEC's assertion that ''the regulation of intrastate transportation of hazardous materials is a matter of peculiarly local concern'' is not consistent with: (1) Congress's direction that hazardous wastes must be ''listed and regulated as hazardous material[s]'' under the former HMTA, 42 U.S.C. 9656(a); (2) its finding that uniform requirements ''are necessary and desirable'' for the safe transportation of hazardous materials, Pub. L. 101–615 § 2, 104 Stat. 3244; (3) the mandate that DOT ''prescribe regulations for the safe transportation of hazardous material in interstate, intrastate, and foreign commerce,'' 49 U.S.C. 5103(b)(1); and (4) New York's own adoption of the HMR as State law.

As already noted, the HMR presently apply to all intrastate and interstate transportation of hazardous wastes, 49 C.F.R. 171.1(a), and RSPA has proposed to expand the HMR's coverage to intrastate motor carriers of all hazardous material. *See* Notice of Proposed Rulemaking in Docket No. HM–200, Hazardous Materials in Intrastate Commerce, 58 FR 36920 (July 9, 1993), correction, 58 FR 38111 (July 15, 1993). (At present, the HMR do not apply to intrastate motor carriers of hazardous material other than hazardous wastes, hazardous substances, marine pollutants, and flammable cryogenics in cargo and portable tanks, 49 CFR 171.1(a).)

Moreover, since the early 1900's, the HMR have applied to wastes that were hazardous in transportation. In 1976, Congress recognized this fact when it enacted RCRA and specifically directed that regulations on hazardous waste transporters must be consistent with the HMR; that requirement, in 42 U.S.C. 6923(b), remains unchanged. Under these circumstances, RSPA cannot agree that there is a ''special'' status for State regulations on hazardous waste transporters, removing them from preemption under 49 U.S.C. 5125, nor that a declaration that the NYDEC transfer and storage requirements are

preempted ''will effectively repeal a basic tenet upon which RCRA is based.''

RSPA has, in fact, looked to EPA's own interpretation of RCRA, as requested by some of the State commenters. In its authorization of California's hazardous waste program, EPA stated that permit requirements for waste transportation ''facilities not regulated under RCRA would be viewed as 'broader in scope' and, therefore, not part of the authorized program,'' and that any such requirements could be challenged in an application to DOT ''which has jurisdiction over such matters.'' 57 FR at 32728. Accordingly, preemption issues under Federal hazardous material transportation law

> do not affect the State's RCRA authorization. * * * EPA does not believe that an individual State's authorization application is the appropriate forum to resolve problems which clearly affect a large number of States. * * * [A] process is already in place intended to address the problem pursuant to the [HMTA].

Id. In October 29, 1992 and August 17, 1994 letters, EPA has reaffirmed this position.

EPA has consistently maintained that its approval of a State's hazardous waste program does not preclude preemption by 49 U.S.C. 5125 of that State's requirements—regardless of whether the latter are deemed ''broader in scope'' or ''more stringent'' than Federal RCRA requirements. Section 3009 of RCRA, which allows States to impose ''more stringent'' requirements than those established by EPA, must be read consistently with Federal hazardous materials transportation law.

A fundamental rule of construction is that two separate statutes should be construed in a manner which is consistent and gives effect to both. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). In this case, Congress clearly intended RCRA to be implemented consistently with the HMTA. The legislative history of RCRA shows that EPA and DOT are to work together to maintain consistent standards for hazardous waste transporters which assure handling of the waste in a manner that (1) protects human health and the environment, and (2) does not interfere with transportation. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 6, 27, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6244, 6265.

To carry out that intention, in section 3003(b) of RCRA (42 U.S.C. 6923(B)), Congress encouraged EPA to consult with DOT, and it required EPA to promulgate hazardous waste transportation regulations in consultation with DOT and consistent with the HMTA and the HMR. In 1980, Congress added section 2002(a)(6) to RCRA that the EPA Administrator may delegate to DOT inspection and enforcement functions relating to the transportation of hazardous waste, ''where such delegation would avoid unnecessary duplication of activity and would carry out the objectives of this Act *and of the Hazardous Materials Transportation Act.*'' 42 U.S.C. 6912(a)(6) (emphasis added).

EPA's reading of the two statutes gives full effect to both. Under that construction, EPA-authorized State requirements governing hazardous waste transporters that are more stringent than EPA's own regulations are preempted when those requirements fail to meet the standards of 49 U.S.C. 5125. This properly places the power to make hazardous materials transportation preemption decisions with DOT, the agency charged by Congress to administer the Federal hazardous material transportation law.

There is no basis for the position of NYDEC and other States that any State can avoid preemption of its hazardous waste transporter requirements simply by obtaining authorization under RCRA. Similarly unfounded is the assertion by ASTSWMO that EPA actually does (or must) analyze State hazardous waste transportation requirements ''for consistency with Federal statute and regulations * * *'' during the authorization process. Congress could not have intended that EPA (rather than DOT) assume the burden of determining whether State requirements are consistent with Federal hazardous material transportation law and the HMR.

State requirements affecting transporters of hazardous waste are not ''authorized by another law of the United States,'' within the meaning of 49 U.S.C. 5125, simply because they are contained in an EPA-authorized State hazardous waste program. *See* PD–1, above, 57 FR at 58855. The statement in 40 CFR 271.1(i), that nothing in EPA's State-authorization regulations ''precludes a State from'' adopting or enforcing more stringent requirements, is not authorization in an enabling sense. That does not constitute specific authorization of these State requirements, as is necessary to preclude preemption. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

C. NYDEC Transfer and Storage Requirements

1. Repackaging Prohibition

Section 372.3(a)(7)(i) allows a transporter to transfer hazardous wastes incidental to transport provided that

> no consolidation or transfer of loads occurs either by repackaging in, mixing, or pumping from one container or transport vehicle into another.

The HMR contain numerous requirements covering loading, unloading, and handling hazardous waste during transportation. *See* generally 49 CFR 173.1–173.40, Part 174 (railroads), and Part 177 (motor carriers). However, the HMR do not contain any general prohibition against the transfer of hazardous material from one container to another, or the combination of commodities within the same packaging. For example, 49 CFR 173.21(e) forbids mixing of two materials in the same packaging or container when it ''is likely to cause a dangerous evolution of heat, or flammable or poisonous gases or vapors, or to produce corrosive materials.'' In another section, the HMR provide that

> Two or more materials may not be loaded or accepted for transportation in the same cargo tank motor vehicle if, as a result of any mixture of the materials, an unsafe condition would occur, such as an explosion, fire, excessive increase in pressure or heat, or the release of toxic vapors.

49 CFR 173.33(a)(2). And 49 CFR 173.10(e) forbids loading certain flammable materials from tank trucks or drums into tank cars on the carrier's property. As mentioned earlier, EPA's regulations provide that a hazardous waste transporter must also follow the requirements applicable to generators if it ''[m]ixes hazardous wastes of different DOT shipping descriptions by placing them into a single container.'' 40 CFR 263.10(c).

With regard to motor carriers only, the HMR prohibit the transfer of a Class 3 (flammable liquid) material between containers or vehicles ''on any public highway, street, or road, except in case of emergency.'' 49 CFR 177.856(d). (The HMR also contain segregation requirements, applicable to rail and motor carriers, limiting which hazardous materials may be ''loaded, transported, or stored together.'' 49 CFR 174.81(f), 177.848(d).)

CWTI asserts that NYDEC's prohibition against repackaging containers of hazardous waste is preempted because it is not substantively the same as the provisions in the HMR concerning ''the packing, repacking, [and] handling * * * of

hazardous material,'' 49 U.S.C. 5125(b)(1)(B), and because it is an obstacle to the HMR. It notes that EPA does not preclude the commingling of hazardous waste by transporters, but merely specifies that a transporter who mixes wastes of different DOT shipping descriptions must comply with standards applicable to waste generators. It argues that States may not treat hazardous wastes differently than ''fungible products such as coal, petroleum or acids'' that may be repackaged during transportation.

CWTI points to EPA's March 1, 1990 letter, indicating that repackaging of hazardous waste, for transportation, does not constitute treatment for which a permit is required. It states that the absolute prohibition against repackaging restricts transporters from taking actions that actually promote safety, on the basis that it is safer to consolidate loads from cargo tanks to tank cars and to combine the contents of many individual packagings from multiple generators for shipment to a TSD facility.

Other commenters, including Dart Trucking Company and Price Trucking Company, complain that this restriction against repackaging results in additional truck travel, wasted fuel, increased emissions, and the inability to transfer wastes between trucks and railroads. AAR also states that:

> It generally is in the public interest to permit truck to rail transfers of hazardous waste. Rail transportation is the best mode of transporting hazardous waste; railroads have a favorable incident rate and no ''midnight dumping'' problem. Furthermore, rail transportation of hazardous waste to a recycling facility often can be cheaper; heretofore, it has been public policy to make recycling economical.

AAR argues that, because the HMR only prohibit truck-to-rail transfers of certain flammable materials in limited circumstances, NYDEC's absolute ban on transferring hazardous waste is inconsistent with the HMR and therefore preempted.

The Hazardous Materials Advisory Council (HMAC) asserts that hazardous wastes do not have any additional risks that justify NYDEC's ''discriminatory regulation'' of hazardous wastes differently from other hazardous materials. Safety-Kleen also believes that ''the same guidelines that are afforded to all non-waste hazardous materials'' should be applied to hazardous waste transporters; it advises that it spends approximately $500,000 per year to obtain NYDEC TSD permits ''in order to commingle and repackage our mineral spirit solvents for ultimate transport to our recycle centers'' outside the State of New York.

CWTI argues that 49 CFR 177.834(h) is not applicable to transfer facilities. That section, applicable only to motor carriers, provides in part that

> There must be no tampering with [a] container or the contents thereof nor any discharge of the contents of any container between point of origin and point of billed destination. Discharge of contents of any container, other than a cargo tank, must not be made prior to removal from the motor vehicle.

According to CWTI, this provision covers ''illegal activity, such as stealing freight,'' and ''discharges into the environment, not the movement of material between DOT-authorized packagings.'' Referring to an exchange of correspondence between the Federal Railroad Administration (FRA) and Envirosafe Services of America discussing the application of the HMR to the transfer of hazardous wastes ''from gondolas to dump trucks,'' CWTI notes that FRA never indicated that those transfers were prohibited. NCH Corporation also argues that the ''billed destination'' may be an intermediate point, such as a transfer facility, and that 177.834(h)

> is clearly intended to bar irresponsible handling or diversion of hazardous materials in transportation, not to prevent the orderly transfer of material from one DOT-approved container to another at a transfer facility. * * * The transfer of material from container to container in the ordinary course of business, with no release into the environment, is not a ''discharge.''

NYDEC acknowledges that ''the RCRA uniform manifest system does allow the commingling of wastes'' by transporters, while NYDEC's transfer and storage requirements ''do not allow consolidation of loads by repackaging, mixing or pumping an any intermediate, non-TSD location short of the RCRA permitted 'billed destination' which the generator specifies.'' It argues that its prohibition against repackaging is ''consistent with and complimentary to'' 177.834(h), since both its requirement and the HMR are ''aimed at preventing a release of the hazardous material.'' NYDEC states that the term ''billed destination'' in 177.834(h) ''plainly refers to the ultimate destination,'' which is the TSD facility from the generator's perspective.

NYDEC further argues that the HMR do not authorize, ''either explicitly or implicitly,'' the commingling of hazardous wastes by transporters, but that 177.834(h)

> is obviously directed toward preventing unqualified persons from tampering with packaging and containers. This ensures that wastes are not commingled, eliminating the identification of the generator and potentially destroying the integrity of the container * * *

For this reason, NYDEC states that its repackaging prohibition is not an obstacle to accomplishing and carrying out the HMR, but rather furthers the ''main objective of HMTA [which] is the safe transport of hazardous materials.'' According to NYDEC, added costs of doing business do not constitute an ''obstacle''; it argues that an obstacle exists ''only when the regulations in question require conduct that is prohibited by [49 U.S.C.] Chapter 51 or are incompatible with conduct required by Chapter 51. * * *''

California asserts, as does NYDEC, that the NYDEC ''loading and unloading'' requirement in 6 NYCRR 372.3(a)(7)(i) is not within the list of covered subjects in 49 U.S.C. 5125(b)(1). However, it further states that, if loading and unloading are covered subjects, the NYDEC repackaging prohibition is substantively the same as 177.834(h), because ''[t]he two regulations contain the same goal of disallowing the tampering with and discharging of hazardous materials from containers before a transporter reached its destination.''

Several of the State commenters contend that the NYDEC prohibition against repackaging is not preempted because it regulates a facility rather than transportation. Maine does

> not believe that opening containers of hazardous waste, pouring, pumping, mixing, or commingling are within the realm of transport activities. Such activities constitute hazardous waste management activities and Maine decided long ago that these activities must be conducted at facilities which meet appropriate design standards and in accordance with procedures developed to protect public health, safety, and the environment. We further contend that transfer activities fall under the realm of a storage/management activity and not a transport activity.

Similarly, ASTSWMO stated that opening containers and commingling waste are ''management activities,'' for which there should be ''the safeguards of contingency plans, waste analysis plans, trained personnel, sampling, compatibility determinations, etc.'' The Public Utilities Commission of Ohio (PUCO) also states that,

> in light of the fact that there are no Federal standards for hazardous waste facilities, CWTI bears a difficult burden to demonstrate that the NYDEC requirements, as applied or enforced, create an obstacle to the accomplishment and execution of [49 U.S.C. Chapter 51] and the Hazardous Materials Regulations. Generally, where there are Federal standards or regulations, additional

state regulations may run the risk of confusing the regulated industry. With respect to hazardous waste transfer facilities, there are no Federal standards or regulations; therefore, the NYDEC regulations create no risk of confusing the regulated industry.

Both ASTSWMO and PUCO urge RSPA not to find preemption. ASTSWMO believes that ''these non-transport issues'' should be addressed by EPA in a rulemaking process, rather than by RSPA in a preemption determination. PUCO sees the ''need for uniform national standards for hazardous waste transfer facilities'' beyond current EPA and DOT requirements, and it asks that RSPA withhold any ruling on CWTI's application until those uniform standards are established. It recommends as a model the procedures being followed under 49 U.S.C. 5119 for establishing uniform State forms and procedures for registration and permitting of hazardous material transporters.

CWTI and other commenters have explained that NYDEC's prohibition against repackaging hazardous wastes prevents transporters from transferring the contents of many drums into a cargo tank, from transferring the contents of several cargo tanks into a tank car (or from dump trucks into a gondola or hopper car), and from transferring the contents from rail cars into trucks. EPA has disclaimed any ''intention of discouraging rail transportation of hazardous wastes,'' and stated that 1980 amendments to its regulations specifically allow ''intermodal transportation involving railroads without the need for a manifest accompanying the waste during the rail portion of the shipment.'' Transportation of Hazardous Waste by Rail, 45 FR 86970, 86971 (Dec. 31, 1980). Intermodal shipments of hazardous wastes in bulk cannot take place without the ''repackaging, mixing, or pumping'' prohibited by NYDEC's section 372.3(a)(7)(i).

By its very terms, this prohibition involves ''repackaging,'' and is not substantively the same as the HMR's requirements for ''the packing, repacking, [and] handling * * * of hazardous material.'' 49 U.S.C. 5125(b)(1)(B). The prohibited repackaging activities fall within the scope of ''repacking'' and ''handling,'' specifically because they involve ''loading'' and ''unloading.'' DOT has never interpreted 49 CFR 177.834(h) as a general prohibition against transferring hazardous materials from one approved container to another. This is confirmed by the limited prohibition, covering only flammable liquids, against transfer from one container or vehicle to another on a ''public highway, street, or road,'' subject to an exception with prescribed procedures for emergency situations. 49 CFR 177.856(d).

There is also no indication that New York State (which has adopted both 177.834(h) and 177.856(d) as State law) has interpreted the former section to restrict either (1) combining the contents of several packages of fungible commodities or (2) transferring materials between modes of transportation. Section 177.834(h) must also be understood in light of the historical practice, recognized in EPA's March 1, 1990 letter interpretation, that transporters may consolidate or mix hazardous wastes of the same DOT shipping description without thereby engaging in ''treatment'' (for which a permit is required) or becoming subject to the regulations applying to hazardous waste generators.

NYDEC's attempt to characterize the repackaging prohibition in 6 NYCRR 372.3(a)(7)(i) as a ''facility'' requirement also cannot insulate it from preemption. That prohibition applies to the ''repackaging'' and ''handling'' of hazardous materials in transportation, and it is not substantively the same as

the requirements in the HMR. For that reason, 49 U.S.C. 5125(b)(1)(B) preempts 6 NYCRR 372.3(a)(7)(1). In addition, NYDEC's prohibition against repackaging containers of hazardous waste appears to be inconsistent with the HMR because it applies solely to waste material ''and applies differently from or in addition to'' the HMR's requirements concerning the packaging of hazardous materials. 49 CFR 171.3(c)(1).

2. Manifest Entry for Transfer Between Vehicles

Section 372.3(a)(7)(ii) allows a transporter to transfer hazardous wastes incidental to transport provided that

transfer of hazardous waste from one vehicle to another is indicated on the Manifest as Second Transporter.

The HMR require that a hazardous waste manifest be prepared in accordance with EPA's regulations in 40 CFR 262.20 and be ''signed, carried, and given'' as specified in 49 CFR 172.205. A manifest which contains all the information required by DOT may be used as the DOT shipping paper. 49 CFR 172.205(h). Procedures for use of the manifest when wastes are shipped by railroad, including transfers between rail and non-rail carriers, are specifically set forth in 40 CFR 263.20(f), and allow a shipping paper to accompany the shipment (rather than the manifest).

EPA's Uniform Hazardous Waste Manifest form is shown in the Appendix to 40 CFR Part 262. Among the information required are the company name and EPA identification number for the first and second (if necessary) transporters. (If more than two transporters will be used to transport the waste, a continuation sheet must be used to ''list the transporters in the order they will be transporting the waste. * * * Every transporter used between the generator and the [TSD] designated facility must be listed.'') In a shaded portion, for information ''not required by Federal law,'' are spaces for the State identification number and telephone number of any transporter. In these spaces, NYDEC requires ''State of registration and motor vehicle license plate number of waste carrying portion of vehicle used to transport'' plus ''[t]elephone number of authorized agent.'' 6 NYCRR Part 372, Appendix 30. On the lower portion of the form are spaces for the transporter(s) to acknowledge receipt of the hazardous waste, by name, signature, and date.

RSPA has found that any State requirement that ''significantly alter[s] the information supplied on the manifest,'' is preempted. PD–2(R), above, 58 FR at 11183 (preempting Illinois requirement to round quantities of hazardous waste to the nearest whole numbers, while the uniform manifest form specifying entry of the ''total quantity'' of hazardous waste may require the use of fractions or decimals, depending on the unit of measure).

Neither EPA's regulations nor the HMR contain any requirement for a single transporter to indicate, by license plate number or otherwise, which vehicle is used to carry the hazardous waste, or that waste has been transferred from one vehicle to another.

CWTI argues that NYDEC's requirement to indicate on the manifest when waste is transferred from one vehicle to another is not substantively the same as the HMR's requirements for ''the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.'' 49 U.S.C. 5125(b)(1)(C). It asserts that a EPA negotiated rulemaking committee ''specifically considered and rejected an effort to require notation by license plate number'' when vehicles of the same transporter were changed.

AAR states that rail cars are usually transferred between carriers ''without face-to-face contact,'' and ''shipping paper information may be exchanged between carriers electronically.'' According to AAR, railroads are

excepted from the signature requirements, ''including shipments which ultimately are transferred between the rail and truck modes,'' citing 40 CFR 263.20(f) and 49 CFR 172.205(f).

NYDEC did not specifically address the requirement in 6 NYCRR 372.3(a)(7)(ii) that the manifest show any transfer of hazardous waste from one vehicle to another owned by the same transporter. Its written comments indicate this requirement was among those being eliminated, but this requirement was retained in the amendments filed November 15, 1994.

In coordinated, but separate, rulemakings in March 1984, EPA and DOT summarized the development of a uniform hazardous waste manifest form. EPA, Hazardous Waste Management System, 49 FR 10490; RSPA Docket No. 145D, Hazardous Waste Manifest; Shipping Papers, 49 FR 10507 (Mar. 20, 1984). As EPA indicated, when it established the manifest system in 1980, it decided to allow ''the regulated community to adapt its present practices, notably DOT's requirements for shipping papers, to accommodate the new EPA requirements.'' 49 FR 10490 (footnote omitted). Accordingly, EPA specified only ''the required information that must accompany the waste,'' and did not require a particular format. *Id*.

The lack of a standard form soon resulted in a ''proliferation of manifests as various States decided to develop and print their own forms,'' burdening both generators and transporters. *Id*. Based on recommendations by ASTSWMO and HMAC, and the consideration of approximately 300 comments to the two agencies, EPA and DOT amended their separate regulations to require use of a uniform manifest, effective in September 1984. At the time, they indicated that, ''[u]nder limited circumstances, States may impose [additional] information or management requirements,''—but only on the waste generator. 49 FR at 10492. As stated by EPA:

> States are prohibited from applying enforcement sanctions on the transporter during the transportation of hazardous waste for any failure of the form to show optional State information entries. States may hold transporters responsible only for ensuring that the information included in the federally-required portions of the Uniform Manifest form accompanies the shipment.

Id. DOT's preamble similarly stated that, ''no State may require a carrier to provide information with or on the manifest which is in addition to that authorized by the uniform manifest system.'' 49 FR 10508. Both agencies noted that States could require generators to send other information ''under separate cover,'' 49 FR at 10492,'' or ''directly to the appropriate agency of [the] State * * * [c]onsidering that the conventional means of transmitting data by mail, wire, telephone and other means are very reliable and readily available.'' 49 FR at 10506.

Neither RCRA nor EPA's regulations authorize a State to require on the manifest an indication that hazardous wastes have been transferred between vehicles owned or operated by the same transporter. The manifest must contain only the transporter's ''company name'' and EPA identification number. 40 CFR Part 262, Appendix. The HMR also contain no requirement to identify a shipment with a particular vehicle. For this reason, the requirement in 6 NYCRR 372(a)(7)(ii) that the transporter indicate, on the manifest, any ''transfer of hazardous waste from one vehicle to another,'' is preempted because it is not ''substantively the same as'' the HMR's requirements for ''the preparation, execution, and use of shipping

documents related to hazardous material and requirements related to the number, contents, and placement of those documents.'' 49 U.S.C. 5125(b)(1)(C). In addition, NYDEC's requirement for indicating the second vehicle on the manifest appears to be inconsistent with the HMR because it applies solely to waste material ''and applies differently from or in addition to'' the HMR's requirements concerning the ''contents of shipping papers, including hazardous waste manifests.'' 49 CFR 171.3(c)(3).

3. Secondary containment

Section 372.3(a)(7)(iii) allows a transporter to transfer hazardous wastes incidental to transport provided that

if consolidation of loads takes place by moving containers from one transport vehicle to another or containers are removed from transport vehicles prior to being reloaded, the transfer or storage area must be designed to meet secondary containment requirements in accordance with subdivision 373–2.9(f) of this Title.

The containment system specified in section 373–2.9(f) includes requirements for an impervious base, drainage (unless containers are elevated), capacity limits, prevention of run-on into the containment system, and timely removal of spills or accumulated precipitation—except that containers of wastes that do not contain free liquids (other than certain acute hazardous wastes) need only be stored where there is drainage or the containers are elevated or otherwise protected from contact with accumulated liquid.

The HMR do not contain any requirements concerning the physical design or construction of fixed facilities where transporters may exchange hazardous materials between vehicles, including intermodal operations. Rather, the HMR focus on the suitability of the container and proper handling activities. Accordingly, 49 CFR 173.24(b) requires that:

Each package used for the shipment of hazardous materials under this subchapter shall be designed, constructed, maintained, filled, its contents so limited, and closed, so that under conditions normally incident to transportation—(1) * * * there will be no identifiable (without the use of instruments) release of hazardous materials to the environment; [and] (2) The effectiveness of the package will not be substantially reduced; for example, impact resistance, strength, packaging compatibility, etc. must be maintained for the minimum and maximum temperatures encountered during transportation.

Cargo tanks and tank cars must be built to specifications and periodically retested and reinspected. *See* 49 CFR 180.407 (cargo tanks), 180.509 (tank cars). Specific procedures, and attendance requirements, apply to the unloading of both tank cars and cargo tanks. 49 CFR 174.67 (tank cars), 177.834 (cargo tanks). Separation and segregation requirements also exist to prevent mixing of incompatible materials. 49 CFR 174.81 (rail cars), 177.848 (motor vehicles).

CWTI contends that NYDEC's requirement for secondary containment is ''a direct challenge to the integrity of DOT packaging standards.'' According to CWTI, the HMR were based on ''the premise that packagings can be built to contain hazards under conditions normal to transportation.'' It states additional requirements in the HMR supplement this central premise: segregation and separation requirements, prohibitions on certain types of materials transported, and requirements for immediate notification of any spills, the clean up of any discharge, and financial responsibility for environmental restoration. CWTI also refers to the requirement in 49 CFR Part 130 for shippers and transporters of petroleum oils (including hazardous wastes containing these oils) in containers larger than 3,500 gallons to prepare response plans.

CWTI states that normal industry practice is to perform loading, unloading, and storage of hazardous wastes ''on impervious surfaces,'' but that ''requirements for sloping and spill/run-off containment are unnecessary.'' It

further asserts that both DOT and EPA have determined that there is no need for secondary containment requirements at hazardous waste transfer facilities, alluding to the absence of any such requirements in both agency's regulations. CWTI places special significance on EPA's failure to impose additional requirements after it specifically requested comments in the preamble to its December 31, 1980 rulemaking. With respect to a change to 40 CFR 263.12, EPA stated:

> The amendments provide that the hazardous wastes being held at transfer facilities must be in containers (including tank cars and cargo tanks) which meet DOT specifications for packaging under 49 CFR 173, 178 and 179. This provision should ensure that the hazardous waste remains properly packaged during this phase of transportation. Although the Agency believes that this requirement should provide adequate protection of human health and the environment during the short period that hazardous wastes are held at a transfer facility, we solicit comments on whether additional requirements should be imposed, such as contingency plans, personnel training, and inspections. Comments are specifically requested on which, if any, of the [TSD facility] Part 265 requirements should be placed on transporters who hold shipments of hazardous waste for ten days or less.

Interim final amendments and request for comments, Hazardous Waste Management System, etc., 45 FR 86966, 86967 (Dec. 31, 1980).

NYDEC argues that the focus of Federal hazardous materials transportation law is ''explicitly limited to 'transportation' issues,'' while its requirements for secondary containment are ''facility requirements which establish minimum safety standards for transfer facilities, and, contrary to CWTI's assertion, are not intended to be a challenge to the integrity of DOT packaging standards.'' NYDEC also contends that these ''facility standards, rather than impairing the transportation of hazardous materials, serve to advance what DOT has described as the 'manifest purpose of the HMTA' by promoting 'safety in the transportation of hazardous materials.' '' (Quoting from IR–2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, 44 FR 75566, 75571 (Dec. 20, 1979), decision on appeal, 45 FR 71881 (Oct. 30, 1980).)

According to NYDEC, the secondary containment requirement ''advances HMTA's goal of safety in the transportation of hazardous materials by ensuring that hazardous materials which may inadvertently escape from leaking or ruptured containers do not enter the environment, where they are likely to present a risk to human health or the environment.'' Maine similarly asserts that:

> Absorbent pads and drip pans do not provide the same measure of security that is present at a permitted facility. Facility standards such as impervious surfaces combined with slopes and spill containment provide an extra measure of environmental protection that cannot be achieved by allowing this activity to be regulated under HMTA as a transportation activity.

The Connecticut Department of Environmental Protection also believes that DOT packaging standards alone will not ''guarantee that hazardous materials will not leak or otherwise be released from their package.'' It cites two incidents ''involving containers that failed while in the course of transportation,'' but acknowledges that ''both shippers utilized containers that did not meet DOT specification/standards and/or met DOT standards/specification but were still improperly packed * * * '' It further states that shippers often put hazardous wastes into ''used containers since the material has negative value,'' and that human errors cause releases from containers that meet DOT's specifications or standards.

Connecticut notes that EPA requires secondary containment for TSD facilities, and claims that ''wastes are more likely to be repacked at transfer facilities rather than virgin materials.'' It also comments that transfers actually take place ''both on and off impervious surfaces and with or without secondary containment,'' and that remedial measures are not sufficient when ''the damage has already been done.'' PUCO states that the existing industry practice to load, unload and store hazardous wastes on impervious surfaces:

> Demonstrates the need for a national uniform standard to ensure that all hazardous waste transporters are engaging in these activities in a safe, efficient manner. The need for, and the type of, secondary containment mechanism can be established through the rulemaking process.

As already discussed in connection with NYDEC's arguments on ''standing,'' subpart III.A. above, the definition of ''transportation'' in 49 U.S.C. 5102(12) brings transportation-related loading, unloading and storage of hazardous materials within the scope of Federal hazardous materials transportation law, including the preemption provisions in 49 U.S.C. 5125. There is no difference in this regard where these transportation-related activities take place, and non-Federal requirements are not somehow immunized from preemption simply because they purport to apply to what the transporter does at a ''facility.'' As noted in *Consolidated Rail Corp.* v. *Bayonne,* 724 F. Supp. 320, 330 (D.N.J. 1989), the ''extent of federal regulation in the area of the transportation, loading, unloading and storage of hazardous materials is comprehensive'' (holding that the HMTA preempted a city limitation on the number of loaded or unloaded butane rail cars permitted on a storage and blending facility).

Two prior inconsistency rulings confirm that non-Federal requirements that purport to regulate ''facilities'' are subject to preemption when those requirements affect the transportation-related loading, unloading and storage of hazardous materials. In the first, RSPA found that a prohibition against holding hazardous materials for more than 48 hours at a railroad yard without a permit was found to be inconsistent with the HMR which allow retention for up to 120 hours, if there are intervening weekends and holidays. IR–19, Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials, 52 FR 24404, 24406, 24409 (June 30, 1987), decision on appeal, 53 FR 11600 (Apr. 7, 1988). In subsequent litigation, the Ninth Circuit considered the same requirement and reversed a lower court holding that the HMR did not address the ''storage of hazardous materials.'' *Southern Pac. Trans. Co.* v. *Public Serv. Comm'n,* above, 909 F.2d at 356.

In the other ruling, RSPA considered San Jose, California's requirements for secondary containment and segregation of hazardous materials at a motor carrier's transfer facility. IR–28, above. In arguments similar to those presented by NYDEC and other States, the city argued that its ordinance ''regulates storage only and that it does not regulate transportation nor purport to do so.'' 55 FR at 8887. However, RSPA found that San Jose's ''requirements *per se* present consistency problems when they are applied to storage of hazardous materials incidental to their transportation.'' 55 FR at 8893.

> State or local imposition of containment or segregation requirements for the storage of hazardous materials incidental to the transportation thereof different from, or additional to those in [49 CFR] § 177.848(f) of the HMR create confusion concerning such requirements and the likelihood of noncompliance with § 177.848(f). Since such state or local requirements, therefore, are obstacles to the execution of an HMR provision, they are inconsistent with the HMR * * *

Id.

In the same fashion, NYDEC fails to achieve its asserted goal of promoting

safety in the transportation of hazardous materials because its secondary containment requirement creates confusion as to requirements in the HMR and increases the likelihood of noncompliance with the HMR. To the extent that States perceive the need for a uniform national standard requiring secondary containment at transfer facilities, the appropriate course is to petition RSPA to add this requirement to the HMR in accordance with 49 CFR 106.31. The secondary containment requirement in 6 NYCRR 372.3(a)(7)(iii) is preempted by 49 U.S.C. 5125(a)(2).

IV. Ruling

For the reasons set forth above, Federal hazardous material transportation law preempts NYDEC's transfer and storage requirements at 6 NYCRR 372.3(a)(7). Subsection (i), prohibiting the repackaging of hazardous wastes, concerns the packing, repacking and handling of hazardous materials, and it is not substantively the same as the HMR. 49 CFR 5125(b)(1)(B). Subsection (ii), requiring an indication on the manifest of a transfer of hazardous wastes between vehicles, concerns the preparation, use and contents of shipping documents related to hazardous material, and it is not substantively the same as the HMR. 49 U.S.C. 5125(b)(1)(C). Subsection (iii) of 6 NYCRR 372.3(a)(7), requiring secondary containment for the transfer or storage of hazardous wastes at transfer facilities, is preempted because it is an obstacle to the accomplishment and carrying out of the HMR's provisions on packaging and segregation. 49 U.S.C. 5125(a)(2).

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), ''[a]ny person aggrieved'' by this decision may file a petition for reconsideration within 20 days of service of this decision. Any party to this proceeding may seek review of RSPA's decision ''in an appropriate district court of the United States * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after service if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of service, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, D.C. on November 30, 1995.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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