**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