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