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