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.

Ålthough 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