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 noncompliance." 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 EPAauthorized 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]