hazardous material," 49 U.S.C. 5125(b)(1)(B), and because it is an obstacle to the HMR. It notes that EPA does not preclude the commingling of hazardous waste by transporters, but merely specifies that a transporter who mixes wastes of different DOT shipping descriptions must comply with standards applicable to waste generators. It argues that States may not treat hazardous wastes differently than "fungible products such as coal, petroleum or acids" that may be repackaged during transportation.

CWTI points to EPA's March 1, 1990 letter, indicating that repackaging of hazardous waste, for transportation, does not constitute treatment for which a permit is required. It states that the absolute prohibition against repackaging restricts transporters from taking actions that actually promote safety, on the basis that it is safer to consolidate loads from cargo tanks to tank cars and to combine the contents of many individual packagings from multiple generators for shipment to a TSD facility.

Other commenters, including Dart Trucking Company and Price Trucking Company, complain that this restriction against repackaging results in additional truck travel, wasted fuel, increased emissions, and the inability to transfer wastes between trucks and railroads. AAR also states that:

It generally is in the public interest to permit truck to rail transfers of hazardous waste. Rail transportation is the best mode of transporting hazardous waste; railroads have a favorable incident rate and no 'imidnight dumping' problem. Furthermore, rail transportation of hazardous waste to a recycling facility often can be cheaper; heretofore, it has been public policy to make recycling economical.

AAR argues that, because the HMR only prohibit truck-to-rail transfers of certain flammable materials in limited circumstances, NYDEC's absolute ban on transferring hazardous waste is inconsistent with the HMR and therefore preempted.

The Hazardous Materials Advisory Council (HMAC) asserts that hazardous wastes do not have any additional risks that justify NYDEC's "discriminatory regulation" of hazardous wastes differently from other hazardous materials. Safety-Kleen also believes that "the same guidelines that are afforded to all non-waste hazardous materials" should be applied to hazardous waste transporters; it advises that it spends approximately \$500,000 per year to obtain NYDEC TSD permits "in order to commingle and repackage our mineral spirit solvents for ultimate

transport to our recycle centers" outside the State of New York.

CWTI argues that 49 CFR 177.834(h) is not applicable to transfer facilities. That section, applicable only to motor carriers, provides in part that

There must be no tampering with [a] container or the contents thereof nor any discharge of the contents of any container between point of origin and point of billed destination. Discharge of contents of any container, other than a cargo tank, must not be made prior to removal from the motor vehicle.

According to CWTI, this provision covers "illegal activity, such as stealing freight," and "discharges into the environment, not the movement of material between DOT-authorized packagings." Referring to an exchange of correspondence between the Federal Railroad Administration (FRA) and Envirosafe Services of America discussing the application of the HMR to the transfer of hazardous wastes "from gondolas to dump trucks," CWTI notes that FRA never indicated that those transfers were prohibited. NCH Corporation also argues that the "billed destination" may be an intermediate point, such as a transfer facility, and that 177.834(h)

is clearly intended to bar irresponsible handling or diversion of hazardous materials in transportation, not to prevent the orderly transfer of material from one DOT-approved container to another at a transfer facility.

* * The transfer of material from container to container in the ordinary course of business, with no release into the environment, is not a "discharge."

NYDEC acknowledges that "the RCRA uniform manifest system does allow the commingling of wastes" by transporters, while NYDEC's transfer and storage requirements "do not allow consolidation of loads by repackaging, mixing or pumping an any intermediate, non-TSD location short of the RCRA permitted 'billed destination' which the generator specifies." It argues that its prohibition against repackaging is 'consistent with and complimentary to" 177.834(h), since both its requirement and the HMR are "aimed at preventing a release of the hazardous material." NYDEC states that the term "billed destination" in 177.834(h) "plainly refers to the ultimate destination,' which is the TSD facility from the generator's perspective.

NYDEC further argues that the HMR do not authorize, "either explicitly or implicitly," the commingling of hazardous wastes by transporters, but that 177.834(h)

is obviously directed toward preventing unqualified persons from tampering with packaging and containers. This ensures that wastes are not commingled, eliminating the identification of the generator and potentially destroying the integrity of the container * * *

For this reason, NYDEC states that its repackaging prohibition is not an obstacle to accomplishing and carrying out the HMR, but rather furthers the "main objective of HMTA [which] is the safe transport of hazardous materials." According to NYDEC, added costs of doing business do not constitute an "obstacle"; it argues that an obstacle exists "only when the regulations in question require conduct that is prohibited by [49 U.S.C.] Chapter 51 or are incompatible with conduct required by Chapter 51. * * *"

California asserts, as does NYDEC, that the NYDEC "loading and unloading" requirement in 6 NYCRR 372.3(a)(7)(i) is not within the list of covered subjects in 49 U.S.C. 5125(b)(1). However, it further states that, if loading and unloading are covered subjects, the NYDEC repackaging prohibition is substantively the same as 177.834(h), because "[t]he two regulations contain the same goal of disallowing the tampering with and discharging of hazardous materials from containers before a transporter reached its destination."

Several of the State commenters contend that the NYDEC prohibition against repackaging is not preempted because it regulates a facility rather than transportation. Maine does

not believe that opening containers of hazardous waste, pouring, pumping, mixing, or commingling are within the realm of transport activities. Such activities constitute hazardous waste management activities and Maine decided long ago that these activities must be conducted at facilities which meet appropriate design standards and in accordance with procedures developed to protect public health, safety, and the environment. We further contend that transfer activities fall under the realm of a storage/management activity and not a transport activity.

Similarly, ASTSWMO stated that opening containers and commingling waste are "management activities," for which there should be "the safeguards of contingency plans, waste analysis plans, trained personnel, sampling, compatibility determinations, etc." The Public Utilities Commission of Ohio (PUCO) also states that,

in light of the fact that there are no Federal standards for hazardous waste facilities, CWTI bears a difficult burden to demonstrate that the NYDEC requirements, as applied or enforced, create an obstacle to the accomplishment and execution of [49 U.S.C. Chapter 51] and the Hazardous Materials Regulations. Generally, where there are Federal standards or regulations, additional