state regulations may run the risk of confusing the regulated industry. With respect to hazardous waste transfer facilities, there are no Federal standards or regulations; therefore, the NYDEC regulations create no risk of confusing the regulated industry.

Both ASTSWMO and PUCO urge RSPA not to find preemption. ASTSWMO believes that "these non-transport issues" should be addressed by EPA in a rulemaking process, rather than by RSPA in a preemption determination. PUCO sees the "need for uniform national standards for hazardous waste transfer facilities" beyond current EPA and DOT requirements, and it asks that RSPA withhold any ruling on CWTI's application until those uniform standards are established. It recommends as a model the procedures being followed under 49 U.S.C. 5119 for establishing uniform State forms and procedures for registration and permitting of hazardous material transporters.

CWTI and other commenters have explained that NYDEC's prohibition against repackaging hazardous wastes prevents transporters from transferring the contents of many drums into a cargo tank, from transferring the contents of several cargo tanks into a tank car (or from dump trucks into a gondola or hopper car), and from transferring the

contents from rail cars into trucks. EPA has disclaimed any "intention of discouraging rail transportation of hazardous wastes," and stated that 1980 amendments to its regulations specifically allow "intermodal transportation involving railroads without the need for a manifest accompanying the waste during the rail portion of the shipment.' . Transportation of Hazardous Waste by Rail, 45 FR 86970, 86971 (Dec. 31, 1980). Intermodal shipments of hazardous wastes in bulk cannot take place without the "repackaging, mixing, or pumping" prohibited by NYDEC's section 372.3(a)(7)(i).

By its very terms, this prohibition involves "repackaging," and is not substantively the same as the HMR's requirements for "the packing, repacking, [and] handling * * * of hazardous material." 49 U.S.C. 5125(b)(1)(B). The prohibited repackaging activities fall within the scope of "repacking" and "handling," specifically because they involve "loading" and "unloading." DOT has never interpreted 49 CFR 177.834(h) as a general prohibition against transferring hazardous materials from one approved container to another. This is confirmed by the limited prohibition,

covering only flammable liquids, against transfer from one container or vehicle to another on a "public highway, street, or road," subject to an exception with prescribed procedures for emergency situations. 49 CFR 177.856(d).

There is also no indication that New York State (which has adopted both 177.834(h) and 177.856(d) as State law) has interpreted the former section to restrict either (1) combining the contents of several packages of fungible commodities or (2) transferring materials between modes of transportation. Section 177.834(h) must also be understood in light of the historical practice, recognized in EPA's March 1, 1990 letter interpretation, that transporters may consolidate or mix hazardous wastes of the same DOT shipping description without thereby engaging in "treatment" (for which a permit is required) or becoming subject to the regulations applying to hazardous waste generators.

NYDEC's attempt to characterize the repackaging prohibition in 6 NYCRR 372.3(a)(7)(i) as a "facility" requirement also cannot insulate it from preemption. That prohibition applies to the "repackaging" and "handling" of hazardous materials in transportation, and it is not substantively the same as