Research and Special Programs Administration

[Preemption Determination No. PD–12(R) (Docket No. PDA–13(R))]

New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Decision on petition for reconsideration of administrative determination of preemption.

PETITIONER: New York State Department of Environmental Conservation (NYDEC).

STATE LAWS AFFECTED: New York Codes, Rules and Regulations (NYCRR), Title 6, Section 372.3(a)(7).

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180.

MODES AFFECTED: Highway and Rail.

SUMMARY: In response to NYDEC's petition for reconsideration, RSPA is modifying its December 6, 1995 administrative determination concerning the requirement in 6 NYCRR 372.3(a)(7)(iii) for secondary containment at a transfer facility where hazardous wastes are transferred between vehicles or temporarily stored. RSPA had determined that this requirement was an obstacle to the accomplishment of the HMR's provisions on packaging and segregation. On reconsideration, RSPA now finds that there is insufficient information from which to determine whether this requirement, as enforced and applied, is an obstacle to the accomplishment and carrying out of Federal hazardous material transportation law and the HMR.

RSPA affirms its prior determination that Federal hazardous material transportation law preempts subsections (i) and (ii) of 6 NYCRR 372.3(a)(7) that (1) prohibit transporters from repackaging hazardous wastes ''incidental to transport,'' and (2) require an indication on the manifest of a transfer of hazardous wastes between vehicles of the same transporter.

This decision constitutes RSPA's final action on the September 1993 application for a preemption determination filed by the Chemical Waste Transportation Institute (CWTI). Any party who submitted comments in Docket No. PDA–13(R) (including the applicant) may seek judicial review within 60 days of this decision.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590–0001, telephone 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

In September 1993, CWTI applied for a determination that Federal hazardous material transportation law preempted nine specific NYDEC requirements. These requirements imposed conditions on the transfer and storage of hazardous wastes ''incidental to transport'' that, if complied with, exempted a transporter from having to obtain the separate permit required for hazardous waste treatment, storage and disposal (TSD) facilities.

In amendments that took effect in January 1995, NYDEC eliminated or modified six of the challenged requirements, including those allowing storage only at a facility owned by the transporter, limiting storage to five days, and requiring daily inspections and a log of shipments and receipts. Following these amendments, the only requirements originally challenged in CWTI's application that remained in effect were:

(1) A prohibition against ''consolidation or transfer of loads * * * by repackaging in, mixing, or pumping from one container or transport vehicle into another.'' 6 NYCRR 372.3(a)(7)(i).

(2) A requirement to indicate on the hazardous waste manifest any ''transfer of hazardous waste from one vehicle to another.'' 6 NYCRR 372.3(a)(7)(ii).

(3) A requirement that the transfer or storage area where containers of hazardous waste are transferred from one vehicle to another, or unloaded for temporary storage, ''must be designed to meet secondary containment requirements'' set forth in 6 NYCRR 373–2.9(f). 6 NYCRR 372.3(a)(7)(iii).

On December 6, 1995, RSPA published in the **Federal Register** its determination that Federal hazardous material transportation law preempts these three requirements. PD–12(R), New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation, 60 FR 62527. RSPA found that the repackaging prohibition is preempted because it is not substantively the same as provisions in the HMR concerning the packing, repacking, and handling of hazardous material, and that the manifest requirement is preempted because it is not substantively the same as the HMR's requirements for the preparation, contents, and use of shipping documents related to hazardous material. RSPA also concluded that the secondary containment requirement is preempted as an obstacle to the accomplishment and carrying out of the HMR's provisions on packaging and segregation. (RSPA did not address one additional restriction added in NYDEC's amendments that took effect in January 1995—that a transfer facility not be located on the site of a commercial TSD facility—because neither CWTI nor any other party discussed the effect of this restriction on hazardous waste transporters or argued that it is preempted by 49 U.S.C. 5125.)

In Part II of its decision, RSPA discussed the applicability of Federal hazardous material transportation law to the transportation of hazardous wastes and the standards for making determinations of preemption. 60 FR at 62529–62532. As explained there, unless DOT grants a waiver or there is specific authority in another Federal law, a State (or other non-Federal) requirement is preempted if:

—It is not possible to comply with both the State requirement and a requirement in the Federal hazardous material transportation law or regulations;

—The State requirement, as applied or enforced, is an ''obstacle'' to the accomplishing and carrying out of the Federal hazardous material transportation law or regulations; or

—The State requirement concerns a ''covered subject'' and is not ''substantively the same as'' a provision in the Federal hazardous material transportation law or regulations. Among the five covered subjects are (1) the ''packing, repacking [and] handling * * * of hazardous material,'' and (2) the ''preparation, execution, and use of shipping documents relating to hazardous material'' including requirements related to the contents of those documents.

See 49 U.S.C. 5125 (a) & (b). These preemption provisions stem from congressional findings that State and local laws which vary from Federal hazardous material transportation requirements can create ''the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting * * * regulatory requirements,'' and that

safety is advanced by ''consistency in laws and regulations governing the transportation of hazardous materials.'' Pub. L. 101–615 §§ 2(3) & 2(4), 104 Stat. 3244.

Within the 20-day time period provided in 49 CFR 107.211(a), NYDEC filed a petition for reconsideration of PD–12(R). NYDEC certified that it had mailed a copy of its petition to CWTI and all others who had submitted comments. Responses to NYDEC's petition for reconsideration were submitted by the Association of Waste Hazardous Materials Transporters (AWHMT), the Hazardous Materials Advisory Council (HMAC), and CWTI.[1]

II. Petition for Reconsideration

In its petition, NYDEC contends that its repackaging prohibition and its requirement for additional information on the manifest are not substantively different from requirements in the HMR. It states that its prohibition ''against commingling of wastes does in fact conform significantly to the federal prohibitions against transferring hazardous materials from one container to another.'' NYDEC claims to find consistency between its absolute prohibition against transferring wastes from one container to another and specific provisions in the HMR forbidding combinations of hazardous materials that cause unsafe conditions. It argues that the prohibition in 49 CFR 177.834(h) against tampering with containers of hazardous materials makes it ''clear'' that transporters are not to do ''anything that could undermine the integrity of the container * * * until it reaches its 'billed destination.' '' According to NYDEC, its repackaging prohibition and manifest requirement are both necessary to ''preserve the integrity of the generator accountability concept'' and are ''appropriate for the protection of public health and the environment, and preventing releases, the mixing of incompatible materials and deliberate 'cocktailing.' ''

NYDEC states that its requirement to indicate any transfer of hazardous waste from one vehicle to another is not significant because it is simply ''additional information that can neither be viewed as a significant alteration nor as a burden upon the transporter.'' It argues that the uniform hazardous waste manifest required by the HMR ''is not integral to transportation; it is simply paperwork'' and only EPA has the authority ''to determine issues that arise from the manifesting of hazardous waste * * *''

NYDEC also argues that its ''regulation pertaining to secondary containment is consistent with and complementary of the HMR * * *'' and does not create ''confusion'' or ''frustrate Congress' goal.'' It states that ''RSPA has not satisfied its burden of establishing that the New York Regulation poses an obstacle to the accomplishment and carrying out of the HMR,'' and points to EPA's containment requirements applicable to the storage of used oil and wastes containing polychlorinated biphenyls (PCBs) at transfer facilities.

More generally, NYDEC states that its regulations should not be found to be preempted because they advance safety in the transportation of hazardous wastes as well as ''generator accountability, a central * * * concept'' of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* According to NYDEC, its ''requirements at issue are expressly contemplated by RCRA.'' It declares that, because ''Congress did not intend to preempt states from enacting their own hazardous waste requirements pursuant to RCRA,'' RSPA lacks authority to find that New York's regulation are preempted. It asserts that only ''EPA, not DOT, is the appropriate venue for resolving'' whether States may impose additional, nonuniform requirements on transporters of hazardous waste. NYDEC also states that, ''in the absence of federal regulation, a federal statutory policy of national uniformity does not preclude state regulation,'' and asserts that RSPA has improperly applied the statutory standard to find ''preemption of the entire field'' of State regulations on hazardous waste transporters.

III. Discussion

A. Repackaging Prohibition

RSPA's December 1995 determination noted that ''the HMR do not contain any general prohibition against the transfer of hazardous material from one container to another, or the combination of commodities in the same packaging.'' 60 FR at 62534. RSPA further explained that the HMR's specific prohibitions against tampering with a container of hazardous materials, or combining hazardous materials that would cause an unsafe condition, are substantively different from New York's absolute prohibition against repackaging hazardous wastes. 60 FR at 62536.

NYDEC has never challenged the statement in CWTI's application that combining the contents of several smaller containers of hazardous waste into a bulk packaging achieves ''efficiencies in transportation that promote safety'' by reducing the overall risks that are generally associated with a greater number of smaller packagings. Nor did NYDEC respond to the comments discussed in the December 1995 determination that repackaging promotes safety when shipments of hazardous wastes are transferred between trucks and railroads. 60 FR at 62535. As RSPA noted, in 1980, EPA disclaimed any intention of discouraging intermodal (truck to rail) transfers of hazardous wastes. 60 FR at 62536. Yet, the restriction in 6 NYCRR 372.3(a)(7)(i) completely forbids transferring hazardous wastes from one bulk packaging to another (*e.g.*, between cargo tank motor vehicles and rail tank cars), and it also prevents the combining (or bulking) of identical wastes from the same generator (*e.g.*, transferring the contents of numerous 55-gallon drums into a single cargo tank). Safe transportation of hazardous wastes is not furthered by a repackaging prohibition that is substantively different from the HMR's requirements for packing, repacking, and handling hazardous materials.

The comments of NYDEC and other States also failed to support the claim that ''generator accountability'' would be frustrated without the requirements found preempted, including NYDEC's repackaging prohibition. Indeed, EPA's regulations specify that, when a transporter commingles wastes of different DOT shipping descriptions, it makes itself accountable for complying with all generator requirements. 40 CFR 263.10(c)(2).

Because this prohibition against the transfer or repackaging of hazardous wastes is not substantively the same as the HMR's requirements for ''the packing, repacking, [and] handling'' of hazardous material, 6 NYCRR 372.3(a)(7)(i) is preempted by 49 U.S.C. 5125(b)(1).

B. Manifest Entry for Transfer Between Vehicles

In its December 1995 determination, RSPA referred to EPA's development of a manifest system which would ''allow 'the regulated community to adapt its present practices, notably DOT's

[1] RSPA has considered CWTI's comments, even though submitted after the 20-day deadline, under a policy similar to that applied in rulemaking proceedings. *See* 49 CFR 106.23 (''Late filed comments are considered so far as practicable.'') CWTI states that it did not receive a copy of NYDEC's petition for reconsideration directly from NYDEC, and that bad weather further delayed its preparation of responding comments. Under all the circumstances, including the absence of any apparent prejudice to NYDEC, it is appropriate to consider the comments submitted by CWTI.

requirement for shipping papers, to accommodate the new EPA requirements.' '' 60 FR at 62538, quoting from 49 FR at 10490. EPA's requirements for a manifest, in 40 CFR Parts 262 and 263, specifically apply when hazardous wastes are being transported or offered for transportation. The HMR explicitly provide that the EPA hazardous waste manifest may be used as the DOT shipping paper (so long as the manifest contains the information required by DOT), 49 CFR 172.205(h), and shipping papers ''includ[e] hazardous waste manifests.'' 49 CFR 171.3(c)(3). RSPA has previously found that requirements affecting a hazardous waste manifest are ones that concern a ''covered subject'' in 49 U.S.C. 5125(b)(1). PD–2(R), Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest, 58 FR 11176, 11182 (Feb. 23, 1993). The hazardous waste manifest is clearly integral to transportation, contrary to NYDEC's assertions.

A *uniform* hazardous waste manifest was implemented in 1984 because of the burden caused by the ''proliferation of manifests [when] various States decided to develop and print their own forms.'' 49 FR 10490. Given the number of States and other jurisdictions that regulate hazardous waste, additional and conflicting requirements in this area are, by their very nature, more than an ''[e]ditorial or other similar *de minimis*'' change, 49 CFR 107.202(d), and sufficient to create confusion and reduce safety in the transportation of hazardous materials. For this reason, RSPA disagrees with NYDEC's conclusory statements that its requirement to indicate a transfer of hazardous waste between vehicles is not a ''significant alteration nor a burden upon the transporter.''

Because the requirement to indicate on the manifest any transfer of hazardous waste from one vehicle to another is not substantively the same as the HMR's requirements for ''the preparation, execution and use of documents related to hazardous material and requirements related to the * * * contents * * * of those documents,'' 6 NYCRR 372.3(a)(7)(ii) is preempted by 49 U.S.C. 5125(b)(1).

C. Secondary Containment

In its December 1995 determination, RSPA analyzed NYDEC's requirement for secondary containment under the obstacle test in 49 U.S.C. 5125(a)(2). It noted that the HMR focus on the suitability of the container to contain hazardous material during transportation and proper handling practices; the HMR do not contain any requirements concerning the physical design or construction of fixed facilities where transporters may exchange hazardous materials between vehicles, including intermodal operations. 60 FR at 62539. RSPA also rejected NYDEC's arguments that its requirement for secondary containment at a fixed transfer facility is not a ''transportation issue.'' RSPA explained that ''transportation-related loading, unloading, and storage of hazardous materials (are) within the scope of Federal hazardous material transportation law, including the preemption provisions in 49 U.S.C. 5125.'' *Id.* at 62541. Based largely on its earlier decision in IR–28, San Jose, California; Restrictions on Storage of Hazardous Materials, 55 FR 8884, 8893 (Mar. 8, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), RSPA found that NYDEC's ''secondary containment requirement creates confusion as to requirements in the HMR and increases the likelihood of noncompliance with the HMR.'' *Id.* at 62542.

In response to NYDEC's petition, RSPA has reexamined the grounds for its decision in IR–28, and it has reviewed CWTI's application and all the comments submitted. The specific San Jose storage requirements found preempted in IR–28 were broader than NYDEC's secondary containment requirement, because San Jose applied both a subjective secondary containment standard and provisions for separation (or segregation) of different classes of hazardous materials. State or local segregation requirements that differ from those in the HMR, at 49 CFR 177.848, affect the handling of every container of hazardous material at a transfer facility; they invariably create confusion and complicate compliance with the Federal requirements. Moreover, no one disputed the effect of the San Jose storage requirements which, according to the applicant in IR–28,

> Would force it to transfer its hazardous materials operations to its Oakland facility, thereby causing transportation of larger quantities of hazardous materials for greater distances, as well as greater stockpiling of hazardous materials by businesses in San Jose which could not be as quickly served as they presently are.

55 FR at 8889. Thus, it may be too broad to read IR–28 as finding that any non-Federal requirement for secondary containment at a transfer facility is unnecessary and an obstacle to the accomplishment and carrying out of the HMR.

RSPA agrees with CWTI that packaging standards are fundamental to the HMR; a rule of general applicability is that any packaging used for transporting hazardous waste (or other hazardous material) must be ''designed, constructed, maintained, filled, its contents so limited, and closed, so that *under conditions normally incident to transportation* * * * there will be no identifiable * * * release of hazardous materials.'' 49 CFR 173.24(b)(1) (emphasis supplied). Nonetheless, some releases do occur, from mishandling of packages or other circumstances. Moreover, New York's secondary containment requirement must be considered applicable to situations when containers are being opened as part of consolidation or bulking operations, because the prohibition against repackaging in 6 NYCRR 372.3(a)(7)(i) has been found to be preempted. The opening of containers and transfer of their contents was not considered in IR–28.

CWTI appears to acknowledge that some containment measures are desirable; it states that, ''in practice, industry conducts activities associated with loading, unloading and storage of waste hazardous materials in transportation on impervious surfaces.'' This limits the issue to whether the specific conditions mandated by NYDEC are an obstacle to the HMR. Although CWTI argues that ''sloping and spill/runoff containment are unnecessary,'' and increase the ''likelihood of shipment delay,'' there is insufficient evidence that New York's particular secondary containment requirement, considered separately from the preempted prohibition against repackaging, actually causes delays or diversions in shipments of hazardous waste.

Some motor carriers stated only generally that they did not transfer hazardous wastes from one vehicle to another, or store them temporarily at a transfer facility, because of the existence of the NYDEC requirements (including those repealed or modified in January 1995). *See* the affidavits of officers of Autumn Industries, Inc. and J.B. Hunt Special Commodities, Inc., filed with CWTI's March 11, 1994 comments. Others, such as Dart Trucking Company and Nortru, Inc., stated that they did not conduct transfer operations because they did not own a transfer facility within the State of New York (although Dart did mention that NYDEC's secondary containment requirement kept it from transferring containers of hazardous waste between vehicles). The Association of American Railroads concluded that NYDEC was not applying its ''storage requirements'' to rail yards, because ''[a] rail car moving

from origin to destination cannot be in a 'containment system' having 'sufficient capacity to contain 10 percent of the volume of containers or the volume of the largest container, whichever is greater.' ''

On reconsideration, these limited comments do not support a finding that NYDEC's secondary containment requirement, as applied and enforced, causes the unnecessary delays in transportation of hazardous materials and creates the very ''potential for unreasonable hazards in other jurisdictions,'' about which Congress expressed its concerns. *See* 60 FR 62530 (quoting Pub. L. sec. 2(3), 104 Stat. 3244). In the absence of more specific evidence of the effects of this requirement on the transportation of hazardous waste, including the repackaging and consolidation of wastes, there is not sufficient information to make a finding that this requirement is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law and the HMR. For this reason, RSPA withdraws that part of the December 1995 determination that Federal hazardous material transportation law preempts 6 NYCRR 372.3(a)(7)(iii).

D. RSPA's ''Authority'' To Issue Preemption Determinations

RSPA has already considered, and specifically rejected, arguments that it has no authority to find that NYDEC's regulations are preempted. 60 FR at 62532, 62533–34. As AWHMT points out in its comments, EPA has stated that the rules and regulations of EPA and DOT with respect to the standards for transporters of hazardous waste are ''interrelated.'' EPA Final Rule, Standards Applicable to Transporters of Hazardous Waste, 45 FR 12737, 12738 (Feb. 26, 1980). RCRA itself mandates that EPA's regulations on hazardous waste transporters must be consistent with the HMR, 42 U.S.C. 6923(b), and the two agencies ''worked together to develop standards for transporters of hazardous waste in order to avoid conflicting requirements.'' 40 CFR 263.10, note. Accordingly, except for bulk shipments by water, a hazardous waste transporter who obtains an EPA identification number and fulfills any clean-up responsibilities will be in compliance with EPA's transporter rules if it ''meets all applicable requirements of'' the HMR. *Id.* To further ensure compatibility, EPA also requires that a generator who transports hazardous waste off-site (or offers hazardous waste for transportation) must comply with DOT's requirements on packaging, labeling, marking, and placarding. 40 CFR 262.30, 262.31, 262.32, 262.33.

EPA has explicitly stated that it does not consider issues of preemption under 49 U.S.C. 5125 when it approves a State hazardous waste program. *See* the discussion in PD–12(R), 60 FR at 62534. Accordingly, RSPA cannot accept NYDEC's assertion that its challenged requirements ''are expressly contemplated by RCRA.'' Moreover, NYDEC's requirement for a transporter to indicate on the manifest any transfer of hazardous waste (between the same transporter's own vehicles) appears inconsistent with EPA's regulation that: ''No State, however, may impose enforcement sanctions on a transporter during transportation of the shipment for failure of the [manifest] form to include preprinted information or optional State information items.'' 40 CFR 271.10(h)(3). EPA has also explained that ''States through which hazardous waste shipments pass are not allowed to place additional information requirements on the transporter as a condition of transportation.'' EPA Final Rule, Hazardous Waste Management System, 49 FR 10490, 10495 (Mar. 20, 1984).

RSPA also disagrees with NYDEC's overall conclusion that the decision in PD–12(R) sacrifices safety ''in the name of uniformity.'' As HMAC points out, uniformity of hazardous materials regulations and safety are not conflicting goals. Rather, Congress has specifically found that, ''consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable.'' *Id.* (quoting Pub. L. 101–615 sec. 2(4)). AWHMT represents that 19 different States, including New York, enforce hazardous waste transfer facility requirements that differ from, or add to, the Federal standards. Local governments and Indian tribes often impose their own requirements, all in the name of safety. *E.g.*, IR–32, Montevallo, Alabama, Ordinance on Hazardous Waste Transportation, 55 FR 36738 (Sept. 6, 1990); *Public Serv. Co. of Colorado* v. *Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994) (tribal ordinance regulating shipment of spent nuclear fuel). However, these separate non-Federal requirements do not advance overall safety when they require shippers and carriers to ascertain, understand, and comply with additional conditions applicable in the many jurisdictions through which a hazardous materials shipment may be transported. Less safety, rather than more, is the result when shippers and carriers then fail to comply with the HMR, choose longer routes to avoid a jurisdiction with additional requirements, or do both.

IV. Ruling

For the reasons set forth above, NYDEC's petition for reconsideration is denied with respect to 6 NYCRR 372(a)(7) (i) and (ii). This decision incorporates and reaffirms the determination that Federal hazardous material transportation law preempts subsection 372.3(a)(7)(i), prohibiting the repackaging of hazardous wastes, because it concerns the packing, repacking and handling of hazardous materials and is not substantively the same as the HMR, and subsection 372.3(a)(7)(ii), requiring an indication on the manifest of a transfer of hazardous wastes between vehicles, because it concerns the preparation, use and contents of shipping documents related to hazardous material and is not substantively the same as the HMR. 49 U.S.C. 5125(b)(1) (B) and (C).

NYDEC's petition for reconsideration is granted with respect to 6 NYCRR 372(a)(7)(iii). Because there is insufficient information that this requirement, as enforced and applied, is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law and the HMR, RSPA makes no determination whether 49 U.S.C. 5125(a)(2) preempts NYDEC's requirement for secondary containment at a transfer facility where hazardous wastes are stored or transferred.

V. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes RSPA's final agency action on CWTI's application for a determination of preemption as to the NYDEC transfer and storage requirements in 6 NYCRR 372.3(a)(7). Any party to this proceeding ''may bring a civil action in an appropriate district court of the United States for judicial review of [this] decision * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

Issued in Washington, DC, on March 26, 1997.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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