

for “transfer facilities” (*i.e.*, storage in the normal course of transportation, storage in DOT approved packages, and storage not exceeding 10 days), then the storage and related transfer activities are allowed under RCRA regulations, and the transfer facility qualifies for the exemption from RCRA permitting.

The transfer facility permitting exemption described in EPA regulations is available to RCRA transfer facilities regardless of whether they conduct through-shipment transfers, intermodal container transfers, consolidation activities, or repackaging activities. Nothing in today’s rule discussing storage of hazardous materials at transfer facilities and repackaging activities is intended to affect in any way whether a hazardous waste transfer facility is eligible for the permitting exemption for 10-day storage at RCRA transfer facilities regulated under 40 CFR 263.12.

Moreover, since a RCRA transfer facility cannot be the destination facility on the hazardous waste manifest, the discussion in today’s rule—indicating that transportation under the HMR ends upon delivery of hazardous materials to a transfer facility to which materials have been consigned for repackaging—is simply not applicable to RCRA transfer facilities. This rule’s policy on consignment of materials to a transfer facility is limited to those instances where the consignment to the facility for repackaging is indicated specifically on the shipping paper or other documentation, *i.e.*, where the facility that will engage in repackaging is shown by the shipping paper to be the destination for that movement. A RCRA transfer facility conducting repackaging activities for hazardous waste shipments will not appear as the destination to which a hazardous waste shipment is being consigned. Therefore, our interpretation addressing consignments for repackaging is not applicable to a RCRA transfer facility. Instead, the more general policy on storage incidental to movement under the HMR applies continuously to the holding of hazardous wastes at RCRA transfer facilities. In other words, for the entire period of time that hazardous wastes are transported to, arrive at, and are held by a RCRA transfer facility, transportation under the HMR continues until the hazardous waste is delivered to the permitted facility named as the destination facility on the hazardous waste manifest.

However, our interpretation that transportation under the HMR ends upon delivery to a consignment facility conducting repackaging applies fully to a RCRA permitted facility that receives

a hazardous waste shipment as the destination facility on a hazardous waste manifest, and then conducts repackaging activities. Many waste management firms with RCRA permits have integrated transportation and waste treatment, storage, and disposal operations. It is not uncommon for such a waste management firm to pick up small waste shipments from numerous generator sites, and then transport them to one of its permitted sites for storage and consolidation or repackaging. The permitted storage facility is listed on the manifest as the destination facility for the waste shipment, and so cannot be considered to be a “transfer facility” under RCRA regulations. However, if such a facility receives a waste shipment that is consigned to it under the manifest for repackaging, this shipment would fall within the policy in today’s rule on consignments for repackaging. Transportation under the HMR would end upon delivery to the destination facility on the manifest. The repackaging of the waste would then give rise to the start of pre-transportation functions aimed at preparing the repackaged waste shipment for its transportation to another destination facility under a new hazardous waste manifest.

E. State/Local Requirements and Preemption

One of the primary purposes of Federal hazmat law is to assure a nationally uniform set of regulations applicable to the transportation of hazardous materials in commerce. Thus, the preemption provisions of Federal hazmat law generally preclude non-Federal governments from imposing requirements applicable to hazardous materials transportation if:

(1) Complying with the non-Federal regulation and complying with Federal hazmat law or the HMR or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible (dual compliance test; 49 U.S.C. 5125(a)(1)); or

(2) The non-Federal requirement is an obstacle to carrying out Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (obstacle test; 49 U.S.C. 5125(a)(2)).

Further, Federal hazmat law preempts a non-Federal requirement applicable to any one of several specified covered subjects if it is not substantively the same as Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security

(covered subjects test; 49 U.S.C. 5125(b)).

The HMR are not minimum requirements that other jurisdictions may exceed if local conditions warrant; rather, the HMR are national standards and must be uniformly applied across jurisdictional lines. However, another Federal law may authorize non-Federal requirements. 49 U.S.C. 5125(a) and (b). Also, RSPA may waive preemption of a non-Federal requirement if it: (1) provides the public with at least as much protection as requirements of Federal hazmat law and the HMR, and (2) does not impose an unreasonable burden on commerce. 49 U.S.C. 5125(e).

Commenters generally support the strong preemption provisions in Federal hazmat law and credit preemption of inconsistent state and local hazardous materials transportation requirements for contributing to the strong hazardous materials transportation safety record. As discussed above in this preamble, many commenters are concerned that the NPRM undermines national regulatory uniformity and opens the door to inconsistent and conflicting regulation of hazardous materials by state, local, and tribal governments. We do not agree that the NPRM’s proposals for defining the parameters of the applicability of the HMR undermine the preemption provisions of Federal hazmat law. As noted several times herein and in the preamble to the NPRM, the proposals are generally consistent with current provisions in the HMR and with current policies outlined in letters of interpretation, preemption determinations, and other administrative decisions. The fact that numerous commenters are apparently unfamiliar with these current requirements merely highlights the need to clarify the applicability of the HMR in the HMR itself, which is the precise purpose of this final rule. This final rule clarifies for the regulated industry and for state, local, and tribal governments those areas where non-Federal regulation is likely to be preempted and those areas where non-Federal agencies may impose regulations.

Several commenters suggest revisions to the language proposed in the NPRM in § 171.1(f) to clarify where and to what functions non-Federal requirements may apply. For example, one commenter suggests that this section reference the preemption standards in subsection C of 49 CFR part 107 rather than repeat the standard in the HMR. We believe that such repetition in the HMR is helpful; however, we have revised this section to indicate that procedures for preemption