

(1) Hazardous materials stored at an offeror's facility prior to a carrier taking possession of the hazardous material for movement in transportation in commerce.

(2) Hazardous materials being unloaded from a transport vehicle or bulk packaging following delivery to the consignee and after departure of the carrier from the consignee facility, including unloading into a manufacturing process.

(3) Hazardous materials stored at a consignee facility after delivery.

(4) Hazardous materials temporarily stored at a transfer facility for repackaging.

*Resource Conservation and Recovery Act (RCRA).* RCRA requires EPA to issue regulations to ensure the proper management of hazardous waste from its point of generation to its ultimate disposal—"cradle to grave." The regulations establish a step-by-step approach to monitor and control hazardous wastes at every point in the waste cycle. The regulated community in this system includes those who generate, recycle, transport, treat, store, and dispose of hazardous wastes.

The federal and state jurisdictional issues arising under hazardous waste transportation law can be quite complex. At a threshold level, EPA and DOT have joint statutory responsibilities for developing the regulations that apply to hazardous waste transportation and to the pre-transportation functions that are usually conducted by hazardous waste generators. EPA and DOT are required by law to consult on the development of hazardous waste transportation regulations, and as a result, the two agencies' regulations in this area are inter-related. EPA has incorporated DOT's pre-transportation requirements into its hazardous waste generator regulations (*see* 40 CFR Part 262, Subpart C); *i.e.*, generators that send waste off-site for treatment, storage, or disposal must comply with all applicable requirements of the HMR, including the requirements for packaging, marking, and labeling materials. In addition, generators are required to prepare, and transporters are required to carry, the Uniform Hazardous Waste Manifest for their off-site shipments. The HMR incorporate the Uniform Hazardous Waste Manifest requirements for hazardous waste shipments and permit such a manifest to be used to meet HMR requirements for shipping papers provided it contains all the information required under Subpart C of Part 172 of the HMR.

In the event of a release during transportation, transporters must comply with EPA requirements for

hazardous waste spill cleanup.

Hazardous wastes stored incidental to movement in commerce as that term is defined in this final rule—that is, between the time that a carrier takes possession of the hazardous waste until the hazardous waste is delivered to the destination indicated on the hazardous waste manifest—must be stored in accordance with EPA requirements for hazardous waste storage, including time limits on such storage. Similarly, in the event that a carrier discovers a leaking hazardous materials package and the offeror directs the carrier to dispose of the material, the carrier is subject to all applicable EPA and DOT requirements for transporting, storing, and disposing of the material. The EPA regulations establish a comprehensive set of requirements that include administrative controls and facility standards aimed at controlling the management of hazardous wastes at every point in the waste cycle.

As is typical of many EPA environmental programs, RCRA hazardous waste programs are implemented primarily by authorized state agencies. While the RCRA statute generally allows authorized state programs to include additional or more stringent requirements than those established under EPA's regulations (*see* RCRA § 3009), the authority of RCRA authorized state programs to enact requirements that are more stringent than federal requirements is limited in the area of hazardous waste transportation. This follows from the fact that RCRA § 3003(b) requires that hazardous waste transporter regulations adopted by EPA under RCRA Subtitle C must be consistent with the requirements of the federal hazmat law and the HMR. RCRA state program requirements for hazardous waste transportation must also be consistent with federal hazmat law and regulations issued thereunder, or they may be subject to preemption. Usually, authorized state programs adopt hazardous waste transportation regulations that essentially mimic the federal hazardous waste pre-transportation and transportation regulations adopted by EPA. However, when state program regulations on hazardous waste transportation exceed those developed by EPA, there is at least the potential for these additional state law requirements to raise issues of consistency with hazardous materials law and the HMR, and thus give rise to preemption concerns.

The Federal/state jurisdictional issues that arise under hazardous waste law can become quite complex when RCRA authorized states adopt different or

more stringent hazardous waste program requirements affecting facilities where transportation related activities are conducted. These issues have been raised most prominently in recent years at hazardous waste "transfer facilities." Transfer facilities consist of dedicated, temporary storage facilities that are operated by or for hazardous waste transporter companies. Under EPA standards (*see* 40 CFR 263.12 and § 260.10), hazardous wastes may be stored at transfer facilities without a RCRA permit for up to 10 days in DOT approved packages, as long as the waste shipment remains under an active manifest, and the storage occurs in the normal course of transportation. Typically, such facilities handle transfers of waste containers between vehicles, intermodal transfers, through shipments, and consolidation of wastes in the normal course of transportation.

By their nature, hazardous waste transfer facilities involve hazardous materials activities subject to the HMR (loading, unloading, handling, repackaging, storage incidental to movement), as well as hazardous waste storage and transportation related activities subject to RCRA. Several RCRA authorized states have enacted additional regulatory controls that exceed the minimal requirements specified in EPA's transfer facility regulation. This additional layer of state environmental regulation under RCRA has given rise to issues and litigation surrounding the states' authority to impose additional requirements at transfer facilities, and how these state requirements relate to this Department's jurisdiction over hazardous materials under the hazardous materials laws and the HMR.

The types of additional controls imposed on RCRA transfer facilities by authorized states may run the gamut from licensing requirements similar to those imposed on hazardous waste storage facilities, to facility design and operation criteria that may include berm or curb specifications, secondary containment requirements, floor material specifications for container storage areas, aisle space or setback requirements, waste compatibility standards, container inspection requirements, and requirements for spill prevention or mitigation equipment at loading docks and transfer areas. In addition, states have imposed requirements for personnel training in hazardous waste management, contingency planning, and closure planning and financial assurance requirements to ensure that wastes are properly removed and facilities and sites are properly decontaminated when