

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND

EMERGENCY

RESPONSE

Richard J. Barlow, Chair
Northeast Waste Management Officials' Association (NEWMOA)
129 Portland Street, Suite 601
Boston, MA 02114-2014

Dear Mr. Barlow:

I am pleased to respond to your May 23, 1996 letter, in which you support the State of New York Department of Environmental Conservation rulemaking petition regarding 40 CFR Part 263 relative to the transportation of hazardous waste. I also understand that you have serious concerns about the recent preemption determination by the U.S. Department of Transportation (DOT) which was published on December 6, 1995. (See 60 FR 62527). Specifically, you desire more regulatory oversight than is currently provided by the Resource Conservation and Recovery Act (RCRA) regulations for hazardous waste activities at transfer facilities.

As you know, the recent DOT preemption decision cited in your letter arose from a challenge lodged by the transporter industry against certain New York State regulations pertaining to activities at hazardous waste transfer facilities. Briefly, the State had enacted regulations which, among other things, prohibited certain load mixing activities at transfer facilities, and imposed secondary containment requirements in areas of these facilities reserved for off-vehicle storage. There is no federal counterpart to these state regulations in EPA's Part 263 regulations, and DOT's regulations do not impose similar restrictions. In the decision published in the Federal Register of December 6, 1995, DOT held that each of the challenged State regulations was preempted, because each was inconsistent with the uniform scheme of federal regulation which Congress intended for the control of interstate transportation of hazardous materials.

We are well aware of the long-standing interest of the States in the issues surrounding the regulation of hazardous waste transfer facilities. I also understand that unless and until there are revisions to the federal regulations governing transfer facilities, States which act alone to fill the perceived gaps in the federal RCRA transporter regulations (40 CFR Part 263) are likely to face similar challenges under the strong preemption authorities included by Congress in the 1990 amendments to the Hazardous Materials Transportation act (HMTA).

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While I understand the resource issues that States are facing when they are forced to defend the validity of their laws before DOT or the courts, I note that this predicament arises primarily from the manner in which the Congress has allocated responsibility among the federal agencies and the States in the transportation area. The Congress has spoken in fairly unequivocal terms in RCRA 3003(b) that RCRA requirements addressing transporters must be consistent with the HMTA and regulations issued thereunder. The HMTA in turn provides DOT with considerable authority to preempt inconsistent State laws, particularly in certain of the so-called "covered areas" of hazardous materials regulation affected by New York's contested requirements, or, in those instances where inconsistent State laws would pose an obstacle to accomplishing or cat-tying out the HMTA's scheme of regulation. See 49 U.S.C. '5125. These types of strong preemption authorities are quite foreign to RCRA, but they are introduced into the transporter area by the statutory directive in RCRA to maintain consistency with the DOT framework.

On March 1, 1996, the Office of Solid Waste (OSW) stated to Commissioner Zagata of New York that OSW could not at this time commit our scarce federal rulemaking resources to the transfer facility problem without diverting resources from what I believe to be greater priorities for the RCRA program as a whole. This is still true today. However, at such time as our resources and priorities permit, we will revisit the merits of committing resources to resolving the transfer facility concerns. I do, however, appreciate NEWMOA's interest in supporting such a rulemaking.

I would like to be able to respond more positively to your letter at this time, but I know that our state partners understand that in these times, we must allocate our resources and energies judiciously. Thank you for bringing these concerns and suggestions to my attention. We appreciate the efforts of NEWMOA and its state members for their strong support for improving the RCRA program

Sincerely,

Michael Shapiro, Director
Office of Solid Waste