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## OHIO HAZARDOUS MATERIAL TRANSPORTATION ACT: AN OVERVIEW

by

DAVID J. LELAND\* AND STEVEN D. LESSER\*\*

On June 24, 1988, in Miamisburg, Ohio, Governor Richard F. Celeste signed into law H.B. 428, (known as Ohio's Hazardous Material Transportation Act, hereinafter referred to as the Act) a comprehensive legislative initiative regulating the transportation of hazardous materials. The signing of the Act was the culmination of a two year effort to solve a problem that Ohioians, and the nation as a whole, became aware of in July, 1986 in Miamisburg, Ohio. The new law provides for: a registration system with a graduated fee structure, prenotification and route assessments for "ultra-hazardous" materials, and a civil forfeiture system with penalties of up to \$10,000 for hazardous material and safety violations.

At 4:25 p.m. on July 8, 1986, fourteen cars of a CSX System railroad, Western Division train carrying thirty-five loads, nine empties and 3,728 tons derailed enroute from Walbridge, Ohio to Cincinnati, Ohio. Traveling at a speed of approximately forty-four miles per hour, the twenty-fourth through the thirty-eighth cars derailed. A load of white phosphorus in the thirtieth car ignited and burned, resulting in the evacuation of 35,000 to 50,000 people from the area, the largest evacuation ever caused by an accident in the transportation of hazardous materials.<sup>1</sup> This fire and phosphorus cloud continued until July 12, 1986. On July 9, 1986, Governor Richard F. Celeste reconvened the Ohio Hazardous Substance Emergency Team (OHSET).<sup>2</sup> OHSET had earlier in the year successfully opposed a plan which the United States Army proposed to transport large amounts of mustard gas and other munitions through Ohio by rail.<sup>3</sup>

The Governor charged OHSET to investigate the facts surrounding the Miamisburg derailment and determine necessary or appropriate legal or ad-

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<sup>1</sup>Ohio Hazardous Substance Emergency Team, Report to Governor Richard F. Celeste at 1 (1986).

<sup>2</sup>*Id.* OHSET consisted of State agencies with related jurisdiction (Ohio Environmental Protection Agency, Ohio Disaster Services Agency, Highway Safety, Department of Health, State Fire Marshal, Ohio Department of Transportation, Attorney General) with the Public Utilities Commission of Ohio as the lead agency. *Id.*

<sup>3</sup>"On July 1, 1986, the Army announced it was recommending its supply of mustard gas and other munitions be disposed of on-site rather than by transportation through Ohio." *Id.* See Chemical Stockpile Disposal Program, U.S. Dept. of the Army, Draft Programmatic Environmental Impact Statement, xv (1986).

ministrative action, compile information on the number, types, quantities and routes of hazardous materials shipment through Ohio, and offer recommendations for any necessary changes in laws, regulations, or procedures on the local, state and federal levels.

OHSET conducted its activities through data compilation and public hearing. The result was a report presented to Governor Celeste on October 30, 1986. This report became the blueprint for H.B. 428.

Through its investigation, OHSET determined that the derailment at Miamisburg was only unique for the size of the evacuation. Ohio was second in the nation in incidents involving transportation modes and hazardous materials.<sup>4</sup> While over 1.5 billion tons of hazardous materials were transported by land, sea and air in the United States in 1982,<sup>5</sup> no state or federal agency had in place a system that could track the number, types, quantities or routes of these shipments. The basic regulatory structure, which industry had primarily developed over the past one hundred years, was put in place before the public became aware of the dangers of these toxic substances and before the need became apparent to formulate complex measures to protect the safety of all citizens.<sup>6</sup> Ohio found itself, like most other states, unable through its system of regulation, to acquire basic information on the transportation of hazardous materials.<sup>7</sup> The OHSET recommendation, that a registration program for all hazardous material haulers be implemented,<sup>8</sup> became embodied in the Act.<sup>9</sup> Now all haulers of hazardous materials of placardable quantities<sup>10</sup> are required to provide information to the State of Ohio through a registration program.<sup>11</sup> While the mode and contents of the registration procedure are subject to administrative rule-making,<sup>12</sup> the bill grants the Public Utilities Commission the ability to gather comprehensive data on transportation flows.<sup>13</sup>

A second problem identified in the OHSET report was the need for better emergency response training. Nationally, the most likely person to be the first responder to a chemical spill will be one of the nation's one million untrained voluntary firefighters,<sup>14</sup> who must know the specific chemical hazard he is dealing with before any containment can be attempted.<sup>15</sup> Nationally, the chances are

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<sup>4</sup>Office of Technology Assessment, U.S. Congress, *Transportation of Hazardous Materials* 82 (1986).

<sup>5</sup>*Id.* at 3.

<sup>6</sup>*Id.* at 4.

<sup>7</sup>*Id.* at 5.

<sup>8</sup>Ohio Hazardous Substance Emergency Team, *supra* note 1, at 28 House Bill 428 was introduced by Representative C.J. McClain (D-Dayton) on April 22, 1987.

<sup>9</sup>OHIO REV. CODE ANN. § 4905.80(A) (Anderson 1988).

<sup>10</sup>49 C.F.R. § 172.504 (1986).

<sup>11</sup>OHIO REV. CODE ANN. § 4905.80(B) (Anderson 1988).

<sup>12</sup>*Id.* at § 4905.80(D).

<sup>13</sup>*Id.* at § 4905.80.

<sup>14</sup>*Transportation of Hazardous Materials, supra* note 4, at 5.

one in four that the individual who is called upon to respond to such an incident has sufficient training.<sup>16</sup> While not a total cure of this problem, the Act provides for a system of fee collection<sup>17</sup> and disbursement<sup>18</sup> so that there will be an additional fund available to train those persons who are called upon to respond to chemical incidents or spills in Ohio.

Probably the most controversial provision of the Act pertains to the prenotification and route assessment requirements placed on a few haulers of "ultra-hazardous" materials. The Act identifies certain hazardous materials<sup>19</sup> and allows the state, after an administrative hearing process, to choose those materials from the statutory list, and make the carriers of those materials subject to a system of shipment-by-shipment prenotification and/or route assessments.<sup>20</sup> In this way, local communities can gather sufficient information, and take appropriate preventive steps, to avoid a major catastrophe in the transportation of these "ultra-hazardous" materials.

Finally, the Act incorporates a recommendation from the OHSET report regarding the enforcement of hazardous material regulations. The OHSET report concluded that the state had insufficient enforcement tools to secure compliance in the commercial motor carrier industry. With the average fine in Ohio's local jurisdictions for a violation being under seventy dollars,<sup>21</sup> there was insufficient deterrent to those who would violate the regulations governing the transportation of hazardous materials.<sup>22</sup> The Act now provides for a system of civil forfeiture with assessments of up to \$10,000 per day, per violation.<sup>23</sup> It also recognizes the impact the interrelation between container, contents and carrying vehicle has on general safety<sup>24</sup> by providing civil forfeiture procedures for safety violations.<sup>25</sup>

#### REGISTRATION

As delineated in the Act, a carrier may register either before it begins any shipment of placardable material through the state or within fourteen days after the company's initial shipment.<sup>26</sup> A carrier that regularly transports hazardous materials may calculate its tonnage of hazardous material shipments for the preceding calendar year and pre-register. Otherwise, a carrier may pre-register by

<sup>16</sup>*Id.*

<sup>17</sup>OHIO REV. CODE ANN. § 4905.80(C)(Anderson 1988).

<sup>18</sup>*Id.* at § 4905.80(F).

<sup>19</sup>*Id.* at § 4905.81(A).

<sup>20</sup>*Id.* at § 4905.81(A)-(D).

<sup>21</sup>Leland, Decker, & Lesser, *Ohio Transportation Regulation: Back to the Future*, 2 Proceedings of the Fifth National Association of Regulatory Utility Commissioners Biennial Regulatory Information Conference 1522 (1986).

<sup>22</sup>49 C.F.R. § 171-179 (1986).

<sup>23</sup>OHIO REV. CODE ANN. § 4905.83(A) (Anderson 1988).

<sup>24</sup>Transportation of Hazardous Materials, *supra* note 4, at 4.

<sup>25</sup>49 C.F.R. §§ 383, 390-397 (1986).

<sup>26</sup>OHIO REV. CODE ANN. § 4905.80(A) (Anderson 1988).

telephone and complete its registration within the fourteen day period.<sup>27</sup> The Commission must develop the registration form.<sup>28</sup> This registration system was designed to be consistent with the Hazardous Material Transportation Act (HMTA). Under the HMTA, any requirement of a state or political subdivision that is inconsistent with the HMTA or the Hazardous Materials Regulations (HMR)<sup>29</sup> is preempted.<sup>30</sup> Although only advisory, inconsistency rulings by the Office of Hazardous Materials Transportation (OHMT) of the U.S. Department of Transportation (DOT) under 49 C.F.R. Part 107, provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision.<sup>31</sup> Where the state or local regulation is found to be inconsistent, that community may apply to the Administrator of the Research and Special Program Administration of DOT for a waiver of preemption.<sup>32</sup>

These inconsistency proceedings are conducted pursuant to the HMTA, thus only the question of statutory preemption is considered.<sup>33</sup> State or local regulations may be found statutorily preempted under a different statute or the Commerce Clause by a Federal Court, but these issues will not be considered in the OHMT inconsistency ruling process.<sup>34</sup>

OHMT incorporated into its procedures<sup>35</sup> the following criteria for its consistency determinations:

- (1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and
- (2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.<sup>36</sup>

OHMT uses the first criteria to analyze those state or local regulations that may cause Federal requirements to be violated, or vice versa. The second criteria is utilized to consider the state or local regulations in regard to the requirements of

<sup>27</sup>*Id.* at § 4905.80(A), (D) (2).

<sup>28</sup>*Id.* at § 4905.80(D).

<sup>29</sup>49 C.F.R. § 171-179 (1986).

<sup>30</sup>49 U.S.C.A. 1801, 1811(a) (West 1975). Under the preemption doctrine, once the federal government regulates in an area, state and local enactments are preempted if one of three conditions exist. First, Congress may explicitly state its intention to preempt the states from acting (*Brown v. Hotel and Restaurant Bartenders Int'l Union*, 104 S. Ct. 3179, 3185-86). Second, the federal regulatory scheme may be so pervasive that courts infer that Congress intended to leave no room for state regulatory action in the area. (*Shaw v. Delta Airlines*, 458 U.S. 141, 153 (1983)). Third, the federal interest may be so dominant that preemptory intent may be presumed. *Id.*

<sup>31</sup>Connecticut Statute and Regulations Governing Transportation of Radioactive Materials, 52 Fed. Reg. 37,072 (1987).

<sup>32</sup>49 U.S.C.A. § 1811(b) (West 1986); 49 C.F.R. 107.215-107.225 (1987).

<sup>33</sup>City of New York Regulations Governing Transportation of Hazardous Materials, 52 Fed. Reg. 46,574 (1987).

<sup>34</sup>*Id.*

<sup>35</sup>49 C.F.R. § 107.209(c) (1987).

<sup>36</sup>52 Fed. Reg. 46,574.

<sup>37</sup>*Id.*  
<http://ideaexchange.uakron.edu/akronlawreview/vol22/iss2/4>

the HMTA and the HMR, the intent of Congress, and the manner in which Congress' intent has been implemented through OHMT's regulatory program.<sup>37</sup> State permit systems have been found inconsistent only when they prohibit or delay transportation activities.<sup>38</sup> Telephone pre-registration is the key element to consistency because the courts have found certain over-the-phone permits to be consistent.<sup>39</sup> This registration can be accomplished without being a burden on interstate commerce and involves neither a delay nor a denial of any transportation through the state.<sup>40</sup> The penalty for failure to register is determined under the civil forfeiture provisions.<sup>41</sup> Through this registration procedure, Ohio will for the first time have an effective method of tracking all hazardous material carriers.

The registration fee structure allows carriers that rarely transport hazardous materials to merely pay the administrative cost of registration.<sup>42</sup> Those carriers that transport larger volumes, 100,000 pounds or more, pay fifty dollars and those that transport 1,000,000 pounds or more, pay \$250.00.<sup>43</sup> This fee is paid annually through the registration process. The proceeds are to be deposited in a newly created Hazardous Materials Transportation Fund (hereafter Fund).<sup>44</sup> The Commission may not use more than ten percent of the Fund for administration and enforcement of this Act and other related regulations.<sup>45</sup> Cleveland State University will receive fifty percent of the Fund for an existing program for the management of hazardous material releases.<sup>46</sup> This new money will allow expansion of the program, including training seminars on a regional or local basis. The Commission shall expend the remainder of the money in the Fund, in grant form, to other educational institutions, state agencies and political subdivisions for training programs.<sup>47</sup>

In regard to the size of the Fund, the Legislative Budget Office calculated that \$460,000 would be collected annually.<sup>48</sup> If the Fund either overcollects or undercollects this estimate, legislation adjusting the fee schedule may be expected. This Fund will key into the Commission's information gathering process and allow governmental units that are on a transportation corridor of hazardous materials to receive the necessary training to manage any release of those materials.

One of the most far reaching sections of the Act is Section 4905.80(G) which

<sup>38</sup>Southern Pacific Transportation Company, 52 Fed. 24,404, 24,407 (1986).

<sup>39</sup>National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270 (2nd Cir. 1982) (Upholding New York ordinance with over-the-phone permits as "consistent" with HMTA, 49 U.S.C.A. § 1801 *et seq.*, and therefore not preempted).

<sup>40</sup>49 U.S.C.A. § 1811 (West 1975).

<sup>41</sup>OHIO REV. CODE ANN. § 4905.83(A) (Anderson 1988).

<sup>42</sup>*Id.* at § 4905.80(c)(1).

<sup>43</sup>*Id.* at § 4905.80(c)(2),(3).

<sup>44</sup>*Id.* at § 4905.80(C).

<sup>45</sup>*Id.* at § 4905.80(F)(1).

<sup>46</sup>*Id.* at § 4905.80(F)(2).

<sup>47</sup>*Id.* at § 4905.80(F)(3).

permits the Commission to solicit from transporters of hazardous materials information regarding the specific materials or classes of materials, their volumes and routes.<sup>49</sup> This will allow the Commission to eventually establish a data bank of information concerning hazardous material transportation similar to that being created for fixed facilities under Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>50</sup>

However, the Commission's ability to solicit this information differs greatly from SARA.<sup>51</sup> The Title III system incorporates filing deadlines for fixed facilities to supply all data required under that provision.<sup>52</sup> The Act requires the Commission to request information by separate Order and provide prior notice to all affected transporters and a thirty day period to comment on the proposed Order. The Commission is required to consider the ability of transporters to provide the information and the availability of the information from alternate sources.<sup>53</sup> Further, the information requests are limited to those involving regular and recurring shipments, which are defined in the Act as "transportation of a particular material over a particular route at least once during a calendar year."<sup>54</sup> Fuels that are flammable liquids, combustible liquids or flammable gasses are excluded from this section of the Act unless the fuel contains more than five percent by weight of an ultra hazardous material.<sup>55</sup> While the limitations on the information gathering process may hinder the collection of data on hazardous material transportation carriers, the Commission will still be able to provide local communities with current information through this section for planning and response purposes.

The Act's registration and information solicitation system results from the lack of any existing data bases for hazardous material flow information. The Office of Technology Assessment (OTA) found that there is no current source that can provide shipment information with the specificity desired by state and local jurisdictions.<sup>56</sup> The Governor directed OHSET to report on the type, quantity and frequency of shipment of hazardous materials and the Public Utilities Commission's survey was incomplete and insufficient. The OHSET report therefore concluded that a mandatory response to specific flow requests is needed to develop the necessary data base<sup>57</sup> to be used by the state and local governments for emergency response planning and training. A more efficient utilization of the Fund and other funding sources will be realized if planning and training are based on

<sup>49</sup>OHIO REV. CODE ANN. § 4905(G) (Anderson 1988).

<sup>50</sup>*Superfund Amendments and Reauthorization Act of 1986* (SARA) Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>OHIO REV. CODE ANN. § 4905(G) (Anderson 1988).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at § 4905.80(G).

<sup>56</sup>Transportation of Hazardous Materials, *supra* note 4, at 23.

<sup>57</sup>Ohio Hazardous Substance Emergency Team, *supra* note 1, at 27.

specific and current flow information.<sup>58</sup> The fire chief who is first on the scene may thus be armed with the training and knowledge to contain the release of exotic chemicals.<sup>59</sup>

The state and political subdivision may also use the data for further research, regulations and enforcement actions. The analysis of the data base may result in modification of the Act to deal with certain transportation routes and materials.<sup>60</sup> In addition, state and local communities may use the data for accident reduction by setting priorities for road repair and construction, and for targeting enforcement actions.<sup>61</sup>

Because the Act is particularly intrusive into everyday operations of the chemical and transportation industries, the "trade secrets" provisions were necessary to keep proprietary information confidential. The registration<sup>62</sup> and information-gathering<sup>63</sup> provisions of the Act will enable the Commission to collect vast amounts of detailed information on every aspect of the transportation of hazardous materials. This potentially includes information on the specific chemical composition of hazardous materials, the quantities transported, and the routes along which the materials are transported.<sup>64</sup> Because Ohio law generally requires that all records of the Public Utilities Commission be public records,<sup>65</sup> the "trade secrets" provisions are necessary to balance both emergency response personnel's informational needs for planning and the public's right to know what hazardous materials are being transported through their communities with the industry's interest in keeping confidential business information from disclosure.

The Act mandates that any information collected by the Commission under the registration<sup>66</sup> or information-gathering procedures<sup>67</sup> or collected by the Emergency Management Agency under the prenotification provisions<sup>68</sup> can be disclosed only to authorized Commission personnel, other state agency employees, or certain local government officials for emergency response planning.<sup>69</sup> The Act specifically states that, "No information submitted to the Commission [under the Act] . . . constitutes public records."<sup>70</sup>

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<sup>58</sup>Transportation of Hazardous Materials, *supra* note 4, at 20, 24.

<sup>59</sup>See *infra* note 117.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>OHIO REV. CODE ANN. § 4905.80(A) (Anderson 1988).

<sup>63</sup>*Id.* at § 4905.80(G).

<sup>64</sup>*Id.*

<sup>65</sup>OHIO REV. CODE ANN. §§ 4901.12, 4905.07 (Anderson 1977).

<sup>66</sup>OHIO REV. CODE ANN. § 4905.80(A) (Anderson 1988).

<sup>67</sup>*Id.* at § 4905.80(G).

<sup>68</sup>*Id.* at § 4905.81(C).

<sup>69</sup>*Id.* at § 4905.80(E).

<sup>70</sup>*Id.* at § 4905.81(H)(7).



This provision excepts the information from the Ohio public records law.<sup>71</sup> The Act, however, does permit the public disclosure of generic or aggregate information including the hazard class of materials, as long as confidential business information of individual shippers cannot be extrapolated from the statistics.<sup>72</sup>

The Act requires state agencies whose employees will receive this information to "establish administrative procedures and other safeguards to prevent the disclosure of the information to any unauthorized person."<sup>73</sup> These administrative procedures and safeguards must be "substantially consistent" with the federal regulations adopted under the SARA.<sup>74</sup> Public Utilities Commission employees generally are authorized to receive information submitted to the Commission under the registration<sup>75</sup> and information gathering<sup>76</sup> provisions. Emergency Management Agency employees are authorized by the Act to receive information submitted under the prenotification provisions.<sup>77</sup> Information may also be disclosed to employees of other state agencies<sup>78</sup> in order to conduct the investigation mandated by the Act at § 4905.81(A). Moreover, information may be disclosed to local government officials, including fire chiefs and chiefs of police, if certain conditions are fulfilled.<sup>79</sup>

Although the information collected under the Act is excepted from the Ohio public records law,<sup>80</sup> the Commission may disclose that information in certain cir-

<sup>71</sup>OHIO REV. CODE ANN. § 149.43 (Anderson 1977).

<sup>72</sup>OHIO REV. CODE ANN. § 4905.80(H)(7) (Anderson 1988).

<sup>73</sup>*Id.* at § 4905.80(A)(1).

<sup>74</sup>SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1748 (1986).

<sup>75</sup>OHIO REV. CODE ANN. § 4905.80(A) (Anderson 1988).

<sup>76</sup>*Id.* at § 4905.80(G).

<sup>77</sup>*Id.* at § 4905.80(C).

<sup>78</sup>Environmental Protection Agency, Department of Highway Safety, Department of Health, Department of Transportation, Emergency Management Agency, and State Fire Marshal, as well as the industry representatives on the investigatory committee in order to conduct the investigation mandated by the Act at § 4905.81(A). Moreover, information may be disclosed to local government officials, including fire chiefs and chiefs of police, if certain conditions are fulfilled.

<sup>79</sup>Information may be disclosed to local emergency response personnel if they meet the following five part test:

- (a) The office has responsibility for chemical emergency response planning;
- (b) Aggregated or generic information that will not result in disclosure of the information is insufficient to allow the official to develop adequate emergency response plans for the material;
- (c) The information disclosed pertains solely to transportation within or through the local emergency planning district established under section 301 of the "Superfund Amendments and Reauthorization Act of 1986," 100 Stat. 1729, 42 U.S.C.A. 11001, as amended, within which the official has jurisdiction;
- (d) The official has signed a nondisclosure and confidentiality agreement in a form established by the Commission;
- (e) The local government agency by or for which the official is employed has instituted administrative procedures and safeguards to ensure the nondisclosure of the trade secret and confidential business information to any unauthorized person. The procedures and safeguards shall be substantially consistent with regulations adopted under Title III of the "Superfund Amendments and Reauthorization Act of 1986," 100 Stat. 1729, 42 U.S.C.A. 11001, as amended.

OHIO REV. CODE ANN. § 4905.80(H)(2)(a)-(e).

cumstances. Following a request for information collected under the Act, the Commission must give notice to the shipper, or other owner of the information to be disclosed, that the agency intends to disclose the information. The notice must include the information to be disclosed and notice that the owner of the information may submit a claim for protection as a trade secret or confidential business information. The owner then has sixty days after transmission of the notice to apply for protection as a trade secret. After this sixty day period has expired, the agency may disclose the information if the owner has not submitted a claim for trade secret protection.<sup>81</sup>

A claimant may be entitled to trade secret protection for a variety of information because of the scope and detailed nature of the information which may be required to be submitted to the Public Utilities Commission or the Emergency Management Agency under the registration,<sup>82</sup> information-gathering,<sup>83</sup> and prenotification<sup>84</sup> provisions. The statute describes the types of information which may be entitled to trade secret protection.<sup>85</sup> This provision for a wide scope of information which can potentially be protected as a trade secret is unlike the provisions for trade secrets in SARA<sup>86</sup> which provides only for the non-disclosure of specific chemical identity.<sup>87</sup>

The Commission must adopt rules governing procedures for determining whether information is entitled to protection as a trade secret.<sup>88</sup> The Act mandates that these rules be "substantially consistent" with federal regulations for the determination of trade secret claims promulgated under Title III of SARA.<sup>89</sup>

The application for trade secret protection by the claimant must contain the information for which the claimant is claiming trade secret protection and a sworn statement with seven certifications by the claimant. These certifications are to be the basis for the Commission's decision whether to grant trade secret protection.<sup>90</sup> They will ensure that the information claimed to be a trade secret is con-

<sup>81</sup>OHIO REV. CODE ANN. § 4905.81(H)(3) (Anderson 1988).

<sup>82</sup>*Id.* at § 4905.80(A).

<sup>83</sup>*Id.* at § 4905(G).

<sup>84</sup>*Id.* at § 4905.81(C).

<sup>85</sup>Information which may be subject to the trade secret provisions include: The identities of persons offering for transportation or receiving a material for which the Commission has so disclosed the hazard classification, the identities of the transporters of the material, the quantities of the material transported, or the routes used for transporting the material. OHIO REV. CODE ANN. § 4905.80(H)(7).

<sup>86</sup>SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1747 (1986).

<sup>87</sup>*Id.*

<sup>88</sup>OHIO REV. CODE ANN. § 4905.81(H)(4) (Anderson 1988).

<sup>89</sup>SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1748 (1986).

<sup>90</sup>The claimant must certify that the information is entitled to protection as a trade secret, including an explanation of the reasons why the information is claimed to be entitled to that protection. OHIO REV. CODE ANN. § 4905.81(H)(3)(a) (Anderson 1988). The claimant must certify that the information is considered confidential within the business and is not "widely distributed" among employees. *Id.* at § 4905.81(H)(3)(b). The claimant must certify that the information has not been disclosed to members of the public nor to any

fidential within the business and has not been disclosed to the public or to a government entity without a confidentiality agreement.

Under the Act, the Commission may request additional evidence of the need for trade secret protection from the claimant provided that the information is reasonably necessary to make the appropriate determination.<sup>91</sup> The statute further provides that failure to submit additional evidence is a sufficient basis for the Commission to deny the claim.<sup>92</sup> If the Commission determines that information is not entitled to trade secret protection, the Act prohibits disclosure until "a final nonappealable order has been rendered."<sup>93</sup> Appeals from Commission decisions on trade secret protection are subject to appeal to the Franklin County Court of Common Pleas.<sup>94</sup>

The Act provides a penalty for the disclosure of information in violation of the trade secret provisions. A person who purposely discloses information is subject to a fine of up to twenty thousand dollars and imprisonment of up to one year for each disclosure.<sup>95</sup> A person who negligently "discloses, or permits to be disclosed" information is liable to the owner of the information for civil damages caused by the disclosure.<sup>96</sup>

#### CATASTROPHE PREVENTION

The most controversial sections of the Act are those that provide for prenotification and route assessments. The Act delineates four categories of hazardous materials<sup>97</sup> which, because of their nature, are considered ultra-hazardous and are thereby made subject to special safety regulations. The Act requires an exami-

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under the provisions of the Superfund Amendments and Reauthorization Act of 1986. *Id.* at § 4905.81(H)(3)(c). It must be certified that the information is not required to be disclosed or otherwise made available to the public under any federal or state law *Id.* at § 4905.81(H)(3)(d). The owner of the information must certify that reasonable measures to protect the confidentiality of the information have been and will continue to be implemented, including a description of these measures. *Id.* at § 4905.81(H)(3)(e). Moreover the claimant must certify that "disclosure of the information is likely to cause substantial harm to the competitive position of the owner of the information" *Id.* at § 4905.81(H)(3)(f). Finally, the claimant must certify that the chemical composition of the material is not readily discoverable through reverse engineering if the information in question concerns chemical identity or specific chemical composition *Id.* at § 4905.81(H)(3)(g).

<sup>91</sup>OHIO REV. CODE ANN. § 4905.81(A)(4) (Anderson 1988).

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at § 4905.81(H)(5).

<sup>95</sup>*Id.* at § 4905.81(A)(8).

<sup>96</sup>*Id.*

<sup>97</sup> (1) Materials that are classified as explosive A under regulations adopted under the "Hazardous Materials Transportation Act," 88 Stat. 2156 (1975), 49 U.S.C.A. 1801, as amended, except ammonium nitrate; (2) Materials that are classified as poisons A under regulations adopted under the "Hazardous Materials Transportation Act," 88 Stat. 2156 (1975), 49 U.S.C.A. 1801, as amended; (3) Materials that are classified as extremely hazardous substances under, and that have a threshold planning quantity of ten pounds or less in accordance with, regulations adopted under Title III of the Stat. 1729, 42 U.S.C.A. 11001, as amended; (4) Biological and chemical warfare agents. As used in division (A) (4) of this section, "Biological Warfare Agent" means any etiologic agent, as defined in 49 C.F.R. 173.386, or any pathogenic organism, or its toxins, that infects animals or plants when contained in a projectile, shell, bomb, or grenade, with or without any ignition element, bursting charge, detonation fuse, or explosive

nation of the listed materials<sup>98</sup> and a determination of which materials “in the event of an accident or release during transportation constitute an extraordinary risk of catastrophic injury to public health or safety or the environment.”<sup>99</sup> The determination must include analysis of statutory criteria that relate to the potential of the substance causing a catastrophic event, the likelihood of such an event, the volume in which the material is carried and the frequency of its transportation.<sup>100</sup>

Once these determinations have been made, the Act provides for the following additional catastrophe prevention modes.

### *Prenotification*

Prenotification may be required by the Act for certain materials carried along certain routes. However, the only materials that are subject to prenotification are those materials which (1) result from the aforementioned catastrophe prevention determinations and (2) meet the criteria prescribed in the statute.<sup>101</sup>

After it has been determined that a material should be subject to the prenotification requirements, an elaborate scheme of shipment-by-shipment prenotification is devised in the Act.<sup>102</sup> The Act attempts to balance communities’ right-to-know about ultra-hazardous shipments with the realities of the transportation industry. The exemption of the twenty-four hour shipments is a recognition that immediate delivery shipments cannot be subject to prenotification without causing an undue delay on their transport. The twenty-four hour to seventy-two hour shipments requiring only telephone prenotification is a realistic method of having the Act’s regulations coincide with the need of industry to move products without delay.

The method of prenotification is modeled on the High Level Radioactive Material notification system and requires the shipper to make the contact with Emergency Management Agency.<sup>103</sup>

### *Route assessments*

The list established under Section B is further utilized for route assessments.<sup>104</sup> This section requires a rulemaking to determine which of those listed materials should be subject to a route assessment when transported. Those

component, or when otherwise packaged as part of a weapon of war, and “Chemical Warfare Agent” means any set of chemicals that, when combined, produce a poison A when that poison A or set of chemicals is contained in a projectile, shell, bomb, or grenade, with or without any ignition element, bursting charge, detonation fuse, or explosive component.

OHIO REV. CODE ANN. § 4905.81(A)(1)-(4) (Anderson 1988).

<sup>98</sup>*Id.* at § 4905.81(A).

<sup>99</sup>*Id.* at § 4905.81(B).

<sup>100</sup>*Id.* at § 4905.81(B)(1)-(4).

<sup>101</sup>*Id.* at § 4905.81(C)(1)(a)-(j).

<sup>102</sup>*Id.* at § 4905.8(C)(2)(a).

<sup>103</sup>10 C.F.R. § 71.97 (1987).

<sup>104</sup>OHIO REV. CODE ANN. § 4905.81(E) (Anderson 1988).

designated materials cannot be transported in Ohio without an assessment of the route being made in accordance with Federal Regulations and the statutory criteria contained in the Act.<sup>105</sup> The transporter must retain the assessment for one year for audit purposes and must keep the assessment with the hazardous materials unless it agrees to submit the assessment upon request. A designation of the route determined by the assessment must accompany the shipment and any deviation from the route is a violation.<sup>106</sup>

Instead of the cumbersome bureaucracy that would be created if the state were to designate routes, route assessments allow carriers to maintain control of their business operations and at the same time insure that proper consideration be given to health, safety and environmental concerns.

However, opponents of the Act have stated that this system of catastrophe prevention, i.e., prenotification and route assessment, is what they find most objectionable.<sup>107</sup> Their argument is that these additional requirements are a burden on commerce and are inconsistent with the national regulatory framework prescribed by the HMTA.<sup>108</sup> State regulators argue that the simplicity of the prenotification system and the relatively small number of ultra hazardous materials must be compared to the extraordinary risk these materials present to the public. In this context, the regulations do not place an undue burden on commerce. Further, because the Act specifically mandates that implementation be consistent with the HMTA,<sup>109</sup> state regulators argue that by placing these restrictions on only a few materials, they have lessened the burden on commerce that would have been present if all hazardous materials would have been subject to these additional regulations. Because violations of these sections of the Act may only subject an individual to the civil forfeiture provisions,<sup>110</sup> there will be no delay or burden to the movement of interstate commerce.

### *Command Authority*

The legislature also used this Act to clarify "command authority" at the site of a hazardous materials release. Federal, state and local authorities have conflicting jurisdiction over the various elements of emergency response. The incident at Miamisburg brought together local fire and police departments, State Fire Marshal, Highway Patrol, State Health Department, State and local Disaster Services and State and Federal EPA.<sup>111</sup> On site responsibilities include decisions as to traffic control, evacuations, use of various forms of clean up, disposal and fire-

<sup>105</sup>*Id.* at § 4905.81(E)(1)-(6).

<sup>106</sup>*Id.* at § 4905.81(E), 4905.83(A).

<sup>107</sup>Costello, Testimony on H.B. 428, April 13, 1988.

<sup>108</sup>49 U.S.C.A. §§ 1801-1813 (West 1986).

<sup>109</sup>OHIO REV. CODE ANN. § 4905.81(E) (Anderson 1988).

<sup>110</sup>*Id.* at § 4905.83(A).

fighting; all of which have health and environmental consequences. The training and expertise of each discipline may preclude proper consideration for the consequences and side effects of certain actions. The state agencies cooperate through a Memorandum of Understanding that delineates the responsibilities of various agencies.<sup>112</sup> For example, among state agencies, the Fire Marshal is in charge when there is a fire or imminent chance of a fire.<sup>113</sup> When the risk of a fire has terminated, the EPA is in charge of clean-up and disposal.<sup>114</sup> Congress has delegated to USEPA certain preemptive powers where it seeks to exercise its authority.<sup>115</sup>

This Act includes a provision that places the local fire chief in charge of "primary coordination of the on-scene activities of all agencies of the State, the United States Government, and political subdivisions that are responding to the emergency situation until the chief relinquishes that responsibility . . ." <sup>116</sup>

It remains to be seen whether this statutory delegation of power will be followed in emergency situations, especially where the responsibility has been defined as "primary coordination."<sup>117</sup> It is further unclear how responsibility may be relinquished or whether other public agencies are willing to accept the responsibility if offered.<sup>118</sup> The designation of command authority may also conflict with recent legislation outlining the jurisdiction of the Emergency Management Agency.<sup>119</sup> Despite these uncertainties, this bolstering of the local fire chief's role should at a minimum clarify the relationship among the local responders and should serve as a starting point for effective mitigation of hazardous material releases.

#### ENFORCEMENT AND COMPLIANCE

The Act establishes a system of civil forfeitures for the enforcement of safety and hazardous material regulations.<sup>120</sup> This administrative procedure eliminates the burden of filing violations in one of the many local courts throughout Ohio.

Under prior Ohio law, generally a Public Utilities Commission field investigator discovered safety violations through a random field inspection. A criminal citation was issued to the driver of the motor vehicle.<sup>121</sup> The statutory

<sup>112</sup>Memorandum of Understanding, State of Ohio.

<sup>113</sup>*Id.* at 3.

<sup>114</sup>*Id.* at 3, 4.

<sup>115</sup>SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1617-1618 (1986).

<sup>116</sup>OHIO REV. CODE ANN. § 3737.90 (Anderson 1977).

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>1988 Ohio Legis. Bull. 128 (Anderson).

<sup>120</sup>OHIO REV. CODE ANN. § 4905.83 (Anderson 1988).

<sup>121</sup>Public Utilities Commission safety rules are issued under the statutory authority of the Commission to prescribe safety regulations for common carriers OHIO REV. CODE ANN. § 4921.04(D)(Anderson 1977) and private carriers (ORC § 4923.03). These rules include the federal motor carrier safety regulations (49 C.F.R. §§ 383, 390-397 (1987) and the federal hazardous materials transportation regulations (49 C.F.R. §§ 171-179 (1987)), incorporated by reference, Ohio Admin. Code § 4901:2-5-02(A) (1988).

penalty for violation of these rules was a fine of \$25 to \$1000.<sup>122</sup> This fine was levied by the municipal court, county court, or mayor's court in whose jurisdiction the violation occurred.

However, because in Ohio there are approximately 167 county and municipal courts, as well as countless mayor's courts, enforcement of the safety rules was not uniform. Often, local judges and prosecutors were unfamiliar with the safety rules, and the hazardous materials regulations. Moreover, because the safety violations are considered to be traffic offenses and are subject to the Ohio Traffic Rules, at least ninety percent of the offenders never appeared before a judge or magistrate.<sup>123</sup> Instead, the offender merely executed a bond waiver and paid a fine according to a waiver schedule determined in advance by the local court.<sup>124</sup>

The fines were frequently so small that carriers could consider them a cost of doing business rather than a deterrent to committing violations. The Commission conducted a survey of the bond waiver schedules of the municipal and county courts in July 1986. The results were as follows (not including court costs):

<u>Offense</u>	<u>Average Waiver</u>	<u>Low</u>	<u>High</u>
Vehicle equipment	\$ 47.56	\$10.00	\$125.00
Hazardous Materials			
Placards	80.61	10.00	250.00
Shipping papers	77.17	10.00	250.00
Tank inspection	77.17	10.00	250.00
Carrying poison with food	114.35	10.00	250.00
Smoking near flammable materials	111.69	10.00	250.00
Failure to stop at railroad crossing	111.18	10.00	250.00
Other hazardous materials offense	76.50	10.00	250.00

The average fine assessed for a Public Utilities Commission safety violation from 1981 to 1985 was only \$63.46.<sup>125</sup>

The Commission does have a tool to encourage intrastate common carriers to maintain their safety records; the Commission can revoke the authority of those carriers if the carrier's safety record is inadequate.<sup>126</sup> This is a cumbersome enforcement tool at best. The Commission is able to revoke the authority of only the carriers with the worst safety records due to the severity of the penalty. Because the Commission is reluctant to completely put a carrier out of business,

<sup>122</sup>OHIO REV. CODE ANN. §§ 4921.99, 4923.99 (Anderson 1977).

<sup>123</sup>Leland, Decker & Lesser, *supra* note 21, at 1521.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>OHIO REV. CODE ANN. § 4921.10 (Anderson 1977).

the power to revoke authority can only be of limited use in encouraging compliance with the safety rules.<sup>127</sup>

The Act institutes a new system of enforcement by imposing civil forfeitures rather than criminal penalties.<sup>128</sup> The civil forfeiture provisions are modeled after systems employed by the State of Illinois<sup>129</sup> and the U.S. Department of Transportation<sup>130</sup> with one important distinction. Ohio has the first civil forfeiture system which encompasses motor carrier safety violations as well as hazardous materials violations.<sup>131</sup> Because bad breaks or a fatigued driver on a vehicle carrying hazardous materials can be a greater threat to public safety or the environment than failure to placard the vehicle correctly, this distinction is crucial in making Ohio's system effective.

Under the civil forfeiture system, after the discovery of a violation on any vehicle carrying hazardous materials,<sup>132</sup> a report is filed with the Public Utilities Commission. The Commission then assesses the culpable party a civil forfeiture of up to \$10,000 per violation per day.<sup>133</sup> The Act lists factors the Commission must consider in determining the amount of the forfeiture. These factors are the nature, circumstances, extent, and gravity of the violation and the degree of culpability and history of violations of the offender.<sup>134</sup> The Act changed the jurisdiction of the Commission so that civil forfeitures may be imposed against the carrier or shipper.<sup>135</sup> Parties who are assessed civil forfeitures may appeal the Commission decision to the Franklin County Common Pleas Court.<sup>136</sup> In ad-

<sup>127</sup>There are two further restrictions on the Commission's ability to revoke authority. Under Ohio law, the Commission cannot prevent private carriers, who transport persons or property on a not-for-hire basis, from engaging in intrastate or interstate operations. Because of the Commerce Clause, the Commission cannot revoke the authority of interstate common carriers, although the Commission may petition the Interstate Commerce Commission to do so. With the post-war expansion of the definition of "interstate commerce" and with the increase in the proportion of private carriers in the industry, the usefulness of the Commission's power to revoke authority is limited at best. Leland, Decker & Lesser, *supra* note 21, at 1505.

<sup>128</sup>A Civil forfeiture is not a criminal penalty; it is a civil penalty, levied by an administrative agency for the violation of a statutory or administrative prohibition. In *State ex rel. Ewing v. "Without A Stitch,"* 37 Ohio St.2d 95, 307 N.E. 2d 911 (1974), appeal dismissed *Art Theatre Guild, Inc. v. Ewing*, 421 U.S.923, (1974), the Ohio Supreme defined "forfeitures" as "the divestment of property without compensation in consequence of some act prohibited by law; such forfeitures are imposed "by the law-making power to insure a prescribed course of conduct." *Id.* at 918, (quoting *Justice v. Lowe* 26 Ohio St.372, 374 (1875)).

<sup>129</sup>92 Ill. Admin. Code tit. 92 § 401 (1984).

<sup>130</sup>49 C.F.R. § 386 (1986).

<sup>131</sup>The federal motor carrier safety rules, 49 C.F.R. § 383, 390-397 (1987), deal primarily with the qualifications for drivers of the equipment, and the maintenance of commercial motor vehicles. As such, they apply to all commercial motor vehicles under the jurisdiction of the Federal Highway Administration and the Public Utilities Commission. The hazardous materials regulations, 49 C.F.R. § 171-179, (1987) deal with insuring the safe transportation of hazardous materials and regulate issues such as placarding, packaging, and labeling hazardous material.

<sup>132</sup>49 C.F.R. § 172.504 (1986).

<sup>133</sup>OHIO REV. CODE ANN. § 4905.83(A) (Anderson 1988).

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>*Id.* at § 4905.83(C).



dition to the provisions for civil forfeiture, the Act also provides for a mechanism for "compliance" with the safety and hazardous material regulations. By instituting a simple, efficient administrative process to deal with violations, the Commission will encourage offenders to address specific concerns of the staff and to upgrade their internal safety programs. Thus, the Commission may protect both the public and the environment while still maintaining a sound transportation industry in Ohio. Through this centralized system, enforcement violations will be handled on a consistent basis not subject to 167 variations. In addition, because the Act requires the Commission to factor in the violation history of a carrier, consistent violators or "bad actors" will be identified and dealt with appropriately. Thus, carriers cannot dismiss the penalties as a cost of doing business because further violations can result in increased penalties. To achieve this result the compliance information will be linked with the already existing data bank of motor carrier inspection reports known as Safety-Net. Within the Safety-Net system the Commission has instant access to the safety inspection history of over 15,000 motor carriers and can provide the Commission with valuable information on motor carriers hauling hazardous materials.<sup>137</sup>

Another unique aspect of the Act is the expansion of the jurisdiction of the Public Utilities Commission to include shippers and all carriers of hazardous materials. The shippers and carriers are recognized under the federal regulations as parties responsible for hazardous materials regulations<sup>138</sup> such as packaging and labeling. Previously, the criminal penalties were imposed primarily on the driver because carriers and shippers are often located beyond the jurisdiction of the local court or out of state. Local law enforcement officials could not be expected to secure the arrest of these offenders based on the small potential criminal penalty. This expansion of jurisdiction will allow the party responsible for the violation to be held accountable for its actions.

The Act also extends Commission jurisdiction to railroads. The Commission originally had broad regulatory power over intrastate railroads.<sup>139</sup> However, Congress preempted state regulation of railroad safety when it passed the Federal Rail Safety Act.<sup>140</sup>

Congress expressed its intention to preempt state regulation of railroad safety in the Federal Rail Safety Act when it stated:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has

<sup>137</sup>The Safety-Net system, as well as the inspections by Commission investigators are funded by the federal government under the Motor Carrier Safety Assistance Program, created under Surface Transportation Act of 1982.

<sup>138</sup>49 C.F.R. §§ 171-179 (1986).

<sup>139</sup>Leland, Decker & Lesser, *supra* note 21, at 1496-1500.

<sup>140</sup>45 U.S.C.A. §§ 421, 432, 443 (West, 1986).

adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.<sup>141</sup>

The statute expressly holds that states may not adopt and enforce federal rail safety rules, but may investigate and report safety violations to the Federal Rail Administration (FRA), if certified to do so by the FRA.<sup>142</sup> Ohio was one of the first states to be so certified by the FRA, in 1975.<sup>143</sup>

It appears, however, that Congress did not preclude the states from enforcing hazardous materials regulations,<sup>144</sup> promulgated pursuant to the HMTA.<sup>145</sup> Congress did not expressly include preemption of hazardous materials enforcement in the Federal Rail Safety Act.<sup>146</sup> Congress does define the term "Federal railroad safety laws" as including the Hazardous Materials Transportation Act,<sup>147</sup> but this definition is limited to Section 441, which pertains to the protection and rights of employees.<sup>148</sup> Because Congress did not extend this definition of "Federal Railroad safety laws" to the entire chapter when it had the opportunity to do so, it may not have intended to preempt state enforcement of the hazardous materials regulations<sup>149</sup> as they apply to railroads.

Moreover, as previously discussed, there are separate provisions for the preemption of state enactments which are "inconsistent" with the regulations adopted under the HMTA.<sup>150</sup> Because within the Act, Ohio adopts these regulations in their entirety by reference,<sup>151</sup> Ohio's rules will be consistent with the federal regulations. Moreover, the HMTA expressly provides that state requirements are not preempted if the Secretary of Transportation determines that the requirement "(1) affords an equal or greater level of protection to the public than is afforded [by the federal hazardous materials regulations] and (2) does not unreasonably burden commerce."<sup>152</sup> Therefore, Congress clearly intended for the states to have a role in the regulation of hazardous materials transportation,

<sup>141</sup>45 U.S.C.A. § 434 (West 1986).

<sup>142</sup>45 U.S.C.A. § 435(a) (West 1986).

<sup>143</sup>Leland, Decker & Lesser, *supra* note 21, at 1508.

<sup>144</sup>49 C.F.R. §§ 171-179 (1987).

<sup>145</sup>49 U.S.C.A. § 1801-1813 (West 1986).

<sup>146</sup>45 U.S.C.A. § 434 (West 1986).

<sup>147</sup>49 U.S.C.A. § 1801-1813 (West 1986).

<sup>148</sup>45 U.S.C.A. § 441(e) (West 1986).

<sup>149</sup>49 C.F.R. § 171-179 (1987).

<sup>150</sup>49 U.S.C.A. § 1811 (West 1986).

<sup>151</sup>OHIO REV. CODE ANN. § 4907.64 (Anderson 1988).

<sup>152</sup>49 U.S.C.A. § 1811(b) (West 1986).

including transportation by rail. Consequently, Ohio is one of the first states to assert jurisdiction over railroads for hazardous materials regulations since 1970, when the Federal Rail Safety Act<sup>153</sup> was passed.

#### CONCLUSION

With the enactment of H.B.428, Ohio moved to the forefront in the area of Hazardous Material Transportation regulation. While recognizing that the transportation of these materials is essential to the fabric of our modern society, the Act nonetheless provides a simple and efficient framework for information gathering and dissemination, training, and effective enforcement and compliance regarding the transportation of these potentially dangerous materials.

This Act is no panacea, but it does provide Ohio Citizens with the means to protect themselves and their environment from the foreseeable and preventable Hazardous Material incident, while at the same time creating an effective balance between community concerns and the existence of a viable, and profitable transportation industry.

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<sup>153</sup>45 U.S.C.A. § 421, 431-443 (West 1986).