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S.B. 269: The Impact of Federal Legislation on Ohio's Hazardous Waste Disposal Program

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S.B. 269: THE IMPACT OF FEDERAL LEGISLATION ON OHIO'S HAZARDOUS WASTE DISPOSAL PROGRAM.

I. INTRODUCTION

In 1980 the Ohio legislature enacted major hazardous waste legislation in Senate Bill (S.B.) 269.[1] Senate Bill 269 amends and enacts new provisions of Chapter 3734 (Solid Waste Disposal) of the Ohio Revised Code and represents Ohio's efforts to create a statutory framework for a comprehensive hazardous waste management program which closely parallels the federal Resource Conservation and Recovery Act.[2] The scope of S.B. 269, together with the regulations[3] promulgated under it, encompasses all aspects of the activity surrounding hazardous wastes from generation to reclamation. Enactment of S.B. 269, however, raises uncertainty for both those administering the program and those seeking to comply with it. S.B. 269 also may create problems for Ohio in its efforts to gain federal authorization to administer a state hazardous waste management program in lieu of the federal program. This note will briefly explain federal activity which prompted the passage of a state hazardous waste management program, analyze the Ohio law, and discuss potential conflicts between S.B. 269 and the federal hazardous waste program.

II. HAZARDOUS WASTE LEGISLATION

A. Federal Hazardous Waste Legislation

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), the first direct federal regulation of activity involving the generation, treatment, storage and disposal of hazardous waste.[4] Prior to its passage, some states had attempted to regulate the problems connected with unplanned disposal of hazardous waste, but this piecemeal approach produced a lack of uniformity among states with respect to management of hazardous materials and motivated industry to locate in states with the fewest environmental controls on land disposal.[5] The clear danger to the health and safety of the popula-

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1. A.M. S.B. 269, 113th General Assembly (1980) (codified in OHIO REV. CODE ANN. §§ 3734.01-.10, 3734.12-.13, 3734.99, 3734.14-.27 (Page Supp. 1980)).

2. Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C.A. § 6901-6987 (1977 & Supp. 1981) [hereinafter referred to as RCRA].

3. For a compilation of the rules promulgated pursuant to S.B. 269, *see generally* 1980-81 Ohio Monthly Record, 3745-50-01 (Baldwin).

4. Sullivan, *Overview of the Resource Conservation and Recovery Act*, RESOURCE CONSERVATION AND RECOVERY ACT: A COMPLIANCE ANALYSIS 9 (1979).

5. Kovacs, *Federal Controls On The Disposal of Hazardous Wastes On Land*, RESOURCE

tion and to the quality of the environment, and the many problems caused by the lack of a national approach with uniform minimum requirements for the disposal of hazardous wastes were identified by Congress to be overriding concerns in connection with the passage of title C of RCRA.[6] Enactment of RCRA and promulgation by the federal Environmental Protection Agency (EPA) of corresponding regulations[7] were designed to achieve nationwide regulatory uniformity in the generation,[8] transport,[9] and treatment and disposal[10] of hazardous wastes.[11] The federal scheme also established, in accordance with congressional intent,[12] the legal vehicle by which the states could eventually assume primary responsibility for the regulation of hazardous wastes. RCRA provides that a state may gain federal approval to implement and operate its own hazardous waste management program, in lieu of the federal program, provided that the state program meets federal minimum requirements for both administering and enforcing the law.[13] It is this aspect of RCRA with which S.B. 269 is concerned since one of the primary goals of the bill is to gain federal approval of Ohio's program.

Under the RCRA framework, EPA has developed a phased process whereby a state may become authorized to operate its own hazardous waste management program.[14] A phased approach was developed because of the considerable time required to develop, enact, and implement state programs which will meet federal minimum standards. The approach allows EPA to give the states authority to enforce, on behalf of EPA, various aspects of the federal program while the states experiment and develop their own programs. At the same time, the approach allows EPA to maintain nationwide minimum standards for the handling of hazardous wastes.[15]

CONSERVATION AND RECOVERY ACT: A COMPLIANCE ANALYSIS 11, 12 (1979).

6. H.R. REP. NO. 94-1491, 94th Cong., 2nd Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6238, 6241.

7. *See generally* 40 C.F.R. § 263 (1981)(relating to generators); 40 C.F.R. § 263 (1981)(relating to transporters); 40 C.F.R. § 262.34 (1981)(relating to treatment, storage or disposal facilities for on-site generators); 40 C.F.R. § 265 (1981)(relating to treatment, storage and disposal facilities that qualify for interim status).

8. 42 U.S.C.A. § 6922 (Supp. 1981).

9. *Id.* § 6923.

10. *Id.* § 6924.

11. Regulation of hazardous wastes from generation to disposal is commonly referred to as "cradle-to-grave cognizance." *E.g.*, 43 Fed. Reg. 4366 (1978).

12. H. R. REP. NO. 94-1491, 94th Cong., 2nd Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6238, 6262.

13. 42 U.S.C.A. § 6926 (Supp. 1981).

14. *See generally* 45 Fed. Reg. 6752 (1980).

15. The phased approach represents, on the part of EPA, a balancing of competing interests such as the desire to promote uniform state programs as quickly as possible and the desire not to

The federal regulations provide for two general program implementation stages.[16] The first stage is known as Interim Authorization (Phase I and Phase II) and the second is Final Authorization. Prior to obtaining full Interim Authorization status or Final Authorization status, a state operates under a dual system whereby affected parties are subject to both federal and, when implemented, state regulations. After a state has begun to develop and enact the statutory framework necessary to implement its own program, it may apply to the EPA for Interim Authorization. When a state receives Interim Authorization Phase I status, it is authorized to administer a waste program, in lieu of the corresponding federal program, covering basic elements such as identification and listing of hazardous wastes, generator and transporter requirements, the manifest system,[17] and preliminary standards for hazardous waste treatment, storage and disposal facilities. The next step in the process is Interim Authorization Phase II status. Phase II status allows the state to establish and operate a permit program for hazardous waste treatment, storage and disposal facilities in lieu of the federal permit program. Full Interim Authorization status extends for twenty-four months, at which time a state may apply to the EPA for Final Authorization to completely administer and enforce its own hazardous waste program.[18]

Under RCRA, a state will be granted Interim Authorization status when the state has shown EPA that the existing state program is "substantially equivalent" to the federal program.[19] The EPA has interpreted the "substantially equivalent" standard to mean that state requirements during Interim status may, in some instances, be more stringent than those imposed under the federal program.[20] During the period of Final Authorization, however, the EPA has taken the position[21] that state hazardous waste requirements cannot be more stringent than the federal requirements if such a deviation would make the state requirements inconsistent with the corresponding federal requirements.[22]

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disrupt existing state efforts through the imposition of separate and parallel federal requirements. 45 Fed. Reg. 6752 (3rd Col.) (1980).

16. *Id.*

17. *See* 45 Fed. Reg. 6754 (Appendix B) (1980).

18. 42 U.S.C.A. § 6926 (Supp. 1981). EPA has had to refine the authorization program to take into account delays in promulgation of regulations. *See* 46 Fed. Reg. 8298 (1981).

19. 42 U.S.C.A. § 6926 (Supp. 1981).

20. Address by Joseph F. Guida, *Hazardous Waste Seminar* (June 1980) [hereinafter cited as Seminar] (Notes on file at University of Dayton Law Review). *See also* 45 Fed. Reg. 6754 (1980) regarding clarification of the definition of substantial equivalence.

21. *See* 45 Fed. Reg. 6753 (1980) regarding requirements for final authorization.

22. *See* Seminar, *supra* note 20.

B. Ohio Hazardous Waste Legislation

S.B. 269, in both its proposed form and as finally enacted, clearly indicates a serious effort to establish a comprehensive hazardous waste management program which is substantially equivalent to the federal program. It is also an essential step on the road toward achieving state control over the management of hazardous wastes through the state authorization scheme developed by EPA.[23] S.B. 269 amended various sections of Chapter 3734 of the Ohio Revised Code and enacted important new provisions.

C. Hazardous Waste Facility Approval Board

One of the most controversial aspects of S.B. 269 was a new provision which creates the Hazardous Waste Facility Approval Board (Board).[24] The Board, which is composed of five members,[25] is granted the authority, together with the Ohio Environmental Protection Agency (OEPA), to issue installation and operating permits to new and existing hazardous waste facilities.

The permit procedure for new facilities begins with a preliminary determination by OEPA that the application appears to comply with the rules and performance standards set out in section 3734.12.[26] OEPA then transmits the application to the Board which is charged with the responsibility of promptly fixing a date for a public hearing,[27] giving public notice of the date for the public hearing,[28] and promptly fixing a date for an adjudication hearing to decide all disputed issues between the parties who may be adversely affected by the approval or

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23. S.B. 269 was preceded by A.M. Sub. S.B. 266 which amended Chapter 3434 of the Ohio Revised Code to enact various provisions relating to hazardous waste treatment, storage, transportation and disposal. *See* A.M. Sub. S.B. 266, 112th General Assembly (1979). *See* Ohio Manufacturer's Association Newsletter (No. 26, Sept. 14, 1979) which stated "[S.B. 266] was designed to insure that the Ohio EPA could gain the authority to administer the federal law in this state." (Copy on file with the Ohio Legislative Service Commission Library). *See also* correspondence from Rosemary Martin, Director/Energy and Environment and Manager of Small Business Affairs at the Ohio Chamber of Commerce. Ms. Martin stated that amendatory language of S.B. 269 was an effort to obtain interim authorization from EPA (October 6, 1981). (Copy on file at University of Dayton Law Review).

24. OHIO REV. CODE ANN. § 3734.05(C)(1) (Page Supp. 1980).

25. *Id.* The Board is to be composed of the director of OEPA, serving as chairperson, the director of Natural Resources, the chairman of the Ohio Water Development Authority, one geologist and one chemical engineer. There has been some concern expressed about the lack of detached review of applications for operating permits because the director of OEPA also serves as the chairperson of the Board. Interview with Paula Cotter, Solid Waste Scientist-Division of Hazardous Materials Management—OEPA (October 7, 1981) (Notes on file at University of Dayton Law Review).

26. OHIO REV. CODE ANN. § 3734.05(C)(3) (Page Supp. 1980).

27. *Id.* § 3734.05(C)(3)(a).

28. *Id.* § 3734.05(C)(3)(b).

disapproval of the application.[29]

The parties to any adjudication hearing are determined to be the applicant,[30] the staff of OEPA,[31] and the Board of County Commissioners of the County and Chief Executive Officer of the municipal corporation in which the facility is proposed to be located.[32] Any other person who would be aggrieved or adversely affected by the proposed facility may also be made a party provided a petition to intervene in the adjudication hearing is filed not later than thirty days after the date of publication of the notice. The petition will be granted by the Board upon a showing of good cause.[33] The adjudication hearing is to be conducted in accordance with Chapter 119 of the Ohio Revised Code.[34]

The criteria to be followed by the Board for issuing an installation and operation permit include determination: (1) of the nature and volume of the waste to be treated, stored or disposed of at the facility;[35] (2) that the facility complies with the director's hazardous waste standards adopted pursuant to section 3734.12;[36] (3) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature of economics of various alternatives;[37] (4) that the facility represents the minimum risk of contamination of ground and surface water,[38] fires or explosions,[39] or accident during transport of the waste to the facility;[40] and (5) that the facility will comply with Chapters 3704,[41] 3734, and 6111[42] of the Ohio Revised Code and all rules and standards adopted thereunder.[43] An order directing the issuance of a permit is required to be in writing subject to such terms and conditions as the Board finds necessary in order to ensure proper construction and operation of the facility.[44] Any party adversely affected by an order of the Board may seek appellate review in

29. *Id.* § 3734.05(C)(3)(c).
30. *Id.* § 3734.05(C)(4)(a).
31. *Id.* § 3734.05(C)(4)(b).
32. *Id.* § 3734.05(C)(4)(c).
33. *Id.* § 3734.05(C)(4)(d).
34. *Id.* § 3734.05(C)(5). *See also* note 83 *supra.*
35. OHIO REV. CODE ANN. § 3734.05(C)(6)(a) (Page Supp. 1980).
36. *Id.* § 3734.05(C)(6)(b).
37. *Id.* § 3734.05(C)(6)(c).
38. *Id.* § 3734.05(C)(6)(d)(i).
39. *Id.* § 3734.05(C)(6)(d)(ii).
40. *Id.* § 3734.05(C)(6)(d)(iii).
41. Chapter 3704 is entitled Air Pollution Control.
42. Chapter 6111 is entitled Water Pollution Control.
43. OHIO REV. CODE ANN. § 3734.05(C)(6)(e) (Page Supp. 1980).
44. *Id.* § 3734.05(C)(6)(e).

the Court of Appeals of Franklin County.[45]

The Board also is charged with receiving and acting on applications for operating permits by facilities which were in existence immediately prior to the effective date of S.B. 269 (October 9, 1980).[46] The short form permit process for existing facilities provides that upon receipt of a completed application, an operating permit shall be issued subject to the requirements of section 3734.05(C)(6) and (7) of the Ohio Revised Code and all applicable federal regulations provided the facility: (1) was in operation immediately prior to the effective date of S.B. 269;[47] (2) was in substantial compliance with applicable statutes and rules in effect immediately prior to the effective date of S.B. 269;[48] (3) demonstrated to the Board that its operations after the effective date complied with applicable performance standards adopted by the director;[49] and (4) submitted a completed application for a permit within six months after the effective date.[50] Section 3734.05(D)(1) required the Board to act on applications for existing facilities permits within twelve months after the effective date of S.B. 269.[51]

Existing facilities were authorized to continue operation on an interim basis immediately after the effective date up to receipt of an existing facility operation permit provided the facility: (1) complied with applicable performance standards;[52] (2) submitted a completed application for permit within 6 months after the effective date;[53] and (3) ob-

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45. *Id.* § 3734.05(C)(7).

46. *Id.* § 3734.05(D)(1)(a). There were many uncertainties with respect to what in fact constituted "in operation" for purposes of qualifying as an existing facility. For example, a facility which had reached a certain construction phase and was not fully completed on the effective date of S.B. 269 could qualify as an existing facility. The problem lies in determining what stage of incompleteness could qualify as being "in operation." Interview with Paula Cotter, Solid Waste Scientist-Division of Hazardous Materials Management—OEPA (October 7, 1981). (Notes on file at University of Dayton Law Review).

47. OHIO REV. CODE ANN. § 3734.05(D)(1)(b) (Page Supp. 1980).

48. *Id.*

49. *Id.* § 3734.05(D)(1)(c).

50. *Id.* § 3734.05(D)(1)(d). Applicable rules pursuant to Chapter 3734 as amended by S.B. 269 were not issued until April 15, 1981. The six month deadline for submitting a completed application caused considerable confusion for operators of existing facilities who were attempting to come within the purview of the existing facility provisions as set by S.B. 269 since the procedure for submission of an application was to be covered by the rules.

51. The imposition of a one-year limit for acting on applications for existing facilities caused serious timing problems since before applications could be acted on the Board had to begin operations and start to conduct inspections of those facilities applying for permits. The short amount of time allotted for these procedures, complicated by the delay in promulgation of rules until April, 1981, resulted in the issuance by the Board of scores of permits during the week of October 5 - 9, 1981, so as to come within the mandate of S.B. 269 (i.e. 1 year from effective date).

52. OHIO REV. CODE ANN. § 3734.05(D)(2)(a) (Page Supp. 1980).

53. *Id.* § 3734.05(D)(2)(b).

tained a permit within 12 months after the effective date.[54] S.B. 269 preempts any local activity with respect to the permit process.[55] It also provides that subsequent to the issuance of a permit by the Board the facility is subject to the rules and supervision of the director during the period of its operation and closure.[56] Failure to keep or submit information as required by Chapter 3734 is a violation.[57]

The creation of the Board is controversial because it presents problems for both the administering authority and those attempting to comply with the state permit program. Prior to passage of S.B. 269, most persons engaged in hazardous waste management were subject only to federal hazardous waste permit standards. The state was not involved in the hazardous waste permit process except to the extent that such wastes were regulated under the prevailing solid waste program. The state permit program administered by the Board is based on federal standards[58] and therein lies the problem. EPA had not promulgated all of the regulations dealing with the issuance of final permits before the commencement of the Board's permit process.[59] Therefore the final permits being issued at the state level are based on interim standards. This situation raises three questions: (1) what will be EPA's reaction when Ohio applies to it for Interim Authorization Phase II? In effect, Ohio will be asking EPA to ratify its issuance of final permits on the basis of interim standards;[60] (2) in light of the first question, does the Board contemplate issuance of a second round of permits;[61] and, if

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54. *Id.* § 3734.05(D)(2)(c). Compliance by the Board with the division (D)(1)(d) time limit directing the Board to act on the application within 12 months of the effective date was absolutely essential in order to stay within S.B. 269's directives and avoid total discontinuance of operation by existing facilities.

55. *Id.* § 3734.05(D)(3).

56. *Id.* § 3734.05(D)(4).

57. *Id.* § 3734.05(F).

58. Ohio reportedly is committed to following federal EPA standards as closely as possible. Interview with Joseph F. Guida, associate with law firm of Smith & Schnacke, a Legal Professional Association (August 21, 1981). (Notes on file at University of Dayton Law Review).

59. EPA issued interim status standards on May 19, 1980. *See* 40 C.F.R. § 265 (1981). These standards are very basic, dealing with items such as record keeping requirements. Portions of the more detailed final permit standards, gradually are being promulgated by the EPA. *See* 40 C.F.R. § 264 (1981). Final permitting standards require submission of more detailed information to justify the continued operation of the facility. The problem is further complicated by the fact that some of the May 19, 1980, standards have since been modified by the EPA.

60. According to Mark Stanga, Legal Advisor to the Director of OEPA, this situation is not a problem since Ohio's program at this point in time is simply a parallel to the federal program currently operating in Ohio. With respect to those cases where the EPA May 19, 1980, standards are modified, Ohio is committed to a policy of revising outmoded standards on a six month schedule. Interview with Mark Stanga, Legal Advisor to Director of OEPA (October 7, 1981). (Notes on file at the University of Dayton Law Review).

61. Stanga stated that Ohio does not contemplate a second round of permitting. *Id. But see* conversation with Paula Cotter, Solid Waste Scientist — Division of Hazardous Materials Man-

so, are the permits currently being issued merely interim permits?; and last, (3) what statutory authority does the Board have to issue interim permits and order a second round of permitting? All three questions which arise due to ambiguities in S.B. 269 have created problems for OEPA and the Board[62] and those parties attempting to comply with dual permit requirements. A state program more amenable to change and developments in the federal program would have allowed Ohio to incorporate into its program the final permit standards when promulgated by EPA. A repetitive permit program could have been avoided and the uncertainties surrounding the Board's statutory authority to issue two kinds of permits would not arise.

D. Hazardous Waste Facility Management Special Account

Another major innovation of S.B. 269 concerns the creation of the Hazardous Waste Facility Management Special Account. S.B. 269 enacts section 3734.18(B) to establish the Hazardous Waste Facility Management Special Account (Special Account).[63] This account provides funds which will enable the state to respond to releases of hazardous substances. The Special Account is funded by fees imposed[64] on the disposal of hazardous wastes at state approved facilities.[65] [Editor's Note: Passage of the Ohio state budget bill (H. 694, eff. 11-15-81) significantly changes the funding provisions of S.B. 269 (Ohio Rev. Code Ann. § 3734.18 (Page Supp. 1980). Fees are subject to an overall increase and are expanded to include treatment facilities as well as disposal facilities. The fee for facilities located off the premises where hazardous waste is generated is increased from four to six per cent of the charge made by the facility owner. The fee for facilities located on the premises is increased from one thousand to two thousand dollars for

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agement—OEPA. Ms. Cotter perceives this issuance of final permits as a problem, noting that final permits are subject to three-year renewal, a renewal process which may be likened to a second round of permitting. (Notes on file at the University of Dayton Law Review). Compare these insights with those gained by Joseph F. Guida during a conversation with Peggy Vince, Executive Director of the Hazardous Waste Facility Approval Board. According to Guida, Ms. Vince intimated that a second round of permitting, based on federal Part B standards when promulgated, is contemplated between now and the renewal period. Interview with Joseph F. Guida (October 10, 1981) (Notes on file at the University of Dayton Law Review).

62. OEPA and the Board face severe administrative problems as a result of S.B. 269 in terms of attempting to issue final permits on the basis of interim status standards. One example of these problems involves the inspections which are required before a permit may be issued by the Board. Inspection crews have been in operation since July of 1981. However, since the inspection standards were based on interim status standards (federal), promulgation by the EPA of final permit standards would presumably require that the sites be reinspected.

63. OHIO REV. CODE ANN. § 3734.18(B) (Page Supp. 1980).

64. *Id.* § 3734.18.

65. *Id.* § 3734.05. *See notes 38-40 supra.*

facilities up to five acres in size. The charge for additional acres is increased from two hundred dollars to four hundred dollars, and each deep well facility charge is increased from twenty-five hundred dollars to five thousand dollars. The total annual fee for each facility is also increased from five thousand dollars to ten thousand dollars.]

Two types of fees are charged and credited to the Special Account for the disposal of hazardous wastes.[66] The fees are collected at all disposal facilities to which the Board has issued a Hazardous Waste Facility Installation and Operation permit pursuant to section 3734.05 of the Ohio Revised Code.[67]

A disposal fee is imposed on the generators of hazardous waste when disposal takes place off the premises where the hazardous waste is generated.[68] The disposal fee is equal to four percent of each charge the facility owner or operator makes.[69] The owner or operator acts as trustee for the state by collecting and forwarding the disposal fee to the director.[70]

Disposal facilities located on the premises where the hazardous waste is generated are taxed on a completely different basis. An annual fee of one thousand dollars is charged for each disposal facility up to five acres in size[71] with a charge of two hundred dollars for each additional acre.[72] Each deep well disposal site is charged two thousand five hundred dollars.[73] The total annual charge may be a combination of these charges and may not exceed five thousand dollars per year.[74] The owner or operator of the facility must pay the fee on the anniversary of the date of the issuance of the Installation and Operation permit.[75] Late payments are charged a penalty of ten percent of the fee for each month the payments are overdue.[76]

Any money collected through disposal fees is deposited in minority banks[77] and is credited to the Special Account.[78] The Special Account is also credited with funds received as reimbursement of the state for

66. OHIO REV. CODE ANN. § 3734.18 (Page Supp. 1980).
67. *Id.* § 3734.18(A).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* § 3734.18(B).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. A minority bank is owned or controlled by one or more socially or economically disadvantaged persons which may include Afro-Americans, Puerto Ricans, Spanish-speaking Americans, and American Indians. *Id.* § 135.04(G)(1).
78. *Id.* § 3734.18(B).

the cost of reclamation[79] commensurate with the increase in market value attributable to reclamation work performed on a facility.[80] Additional funds flow into the Special Account when the director, with the approval of the Attorney General, sells a facility.[81]

The total amount of funds in the Special Account may not exceed twenty million dollars.[82] If the funds do reach such a level, the director will reduce or suspend the fees until the Account total is fifteen million dollars.[83]

S.B. 269 provides for numerous uses of the Special Account funds. Primary uses are the expenditures to insure proper closure of hazardous waste facilities,[84] to pay for development and construction of suitable hazardous waste facilities,[85] and payments of costs necessary to abate conditions which pose a substantial threat to public health or safety.[86]

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79. *Id.* § 3734.22. This section of the Ohio Revised Code further requires that the director of OEPA enter into agreements with the owners of land upon which a facility is located. These agreements would specify the measures to be performed and authorize the director's agents to perform such measures. *Id.*

The reimbursement provisions of the agreement are based on appraisals of the market value of the property before and after the reclamation. Such agreement may also include provisions for payment to the state for the share of income derived from certain activities, imposition of a lien equal to the increase in fair market value, and even waiver of reimbursement if the increase in value is insubstantial when compared to the benefits to the public from the abatement action. *Id.*

80. *Id.* § 3734.22.

81. *Id.* § 3734.24.

82. *Id.* § 3734.18.

83. Chapter 3745 of the Ohio Revised Code creates the Ohio Environmental Protection Agency and establishes that agency's powers and duties.

An agency must comply with a set procedure in the adoption, amendment, or recision of any rule. Steps in the procedure include that reasonable notice be given at least thirty days in advance of a public hearing at which any person affected by the action may appear and be heard; the agency must file the full text of the proposed rule, amendment, or rule to be rescinded with the secretary of state at least sixty days prior to the effective date of change; and the agency, prior to the effective date, shall make a reasonable effort to inform those affected by the rule, amendment, or recision. *Id.* § 119.03.

84. *Id.* § 3734.21(A).

85. The decision to develop or construct suitable hazardous waste facilities must be based on the determination of the director of OEPA to the extent that such facilities are not available. *Id.*

86. Agents of the director may enter upon a facility in order to abate such threats to public health and safety. Upon entry, only measures necessary for abatement may be taken. The measures to be employed must be contained in a plan, developed by the director. *Id.* § 3734.21(B). The plan must be accompanied by an estimate of the cost. *Id.* Abatement measures include:

> establishment and maintenance of an adequate cover of soil and vegetation to prevent the infiltration of water into cells where hazardous waste is buried, the accumulation of runoff of contaminated surface water, the production of leachate, the air emissions of hazardous wastes; the collection and treatment of contaminated surface water runoff; the collection and treatment of leachate; or, if conditions so require, the removal of hazardous waste from the facility and the treatment or disposal of the waste at a suitable hazardous waste facility.

Id.

In addition, the funds of the Special Account may be used for repayment of and interest on loans made by the Ohio Water Development Authority to OEPA.[87]

Funds of the Special Account may also be used to make grants to political subdivisions[88] and certain other owners of facilities.[89] If all other available remedies have been exhausted, the director may expend Special Account funds to acquire a facility which constitutes an imminent and substantial threat to public health or safety or results in air or water pollution.[90]

The major concern with the creation of the Ohio Special Account and the funding provisions is whether or not they are preempted by federal legislation.

Two months after the enactment of S.B. 269, President Carter signed into law the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[91] The Act is aimed at the cleanup of hazardous waste spills as well as hazardous waste dumpsites. CERCLA provides the President of the United States with response and abatement authority equivalent to the authority granted to the director of OEPA under S.B. 269.[92]

The most significant feature of CERCLA is the establishment of the Hazardous Substance Response Trust Fund[93] (Superfund) to meet

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87. *Id.*

88. Upon approval of an application by the director of OEPA, a municipal corporation, county or township may receive a grant from the Hazardous Waste Facility Management Special Account for payment of up to two-thirds of the reasonable and necessary expenses for proper closure of the abatement of air or water pollution from a facility which contains significant quantities of hazardous waste and which the political subdivision owns and once operated. The application must be accompanied by detailed plans and specifications of the measures to be performed, an estimate of the cost, a description of the project's benefits, and other information essential to the director's determination. *Id.* § 3734.25.

89. No grant may be made if the present owner of the land at any time owned and operated the facility for profit. Grants are available to any subsequent owner of the land. If approved by the director, a grant may be made to qualifying owners of up to fifty percent of the cost of proper closure or abatement of air or water pollution. *Id.* § 3734.26.

90. *Id.* § 3734.23. Lands or facilities purchased under this procedure are deeded to the state, contingent upon approval of the title by the Attorney General. *Id.*

91. 42 U.S.C.A. § 9601 *et. seq.* (Supp. Special Pamphlet 1980).

92. The President of the United States is authorized to take response measures consistent with the national contingency plan in order to protect the public health or welfare or environment. 42 U.S.C.A. § 9604.

When the President determines that there may be an imminent and substantial danger to the public health or welfare or environment, he may require the Attorney General of the United States to secure relief necessary to abate the danger. Jurisdiction is granted to, and relief would be provided through, the district court of the United States in the district in which the threat occurs. 42 U.S.C.A. § 9606(a).

93. 42 U.S.C.A. § 9631 (Supp. Special Pamphlet 1980). The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 also establishes the Post-closure Trust Fund. Under this provision the Post-closure Trust Fund assumes liability for hazardous waste disposal

the cleanup costs incident to releases of hazardous substances.[94] The Superfund is financed through taxes on petroleum,[95] and certain chemicals,[96] and through authorized appropriations.[97] The enactment of CERCLA could possibly sound the death knell for the Ohio Special Account as it now exists. CERCLA contains specific preemption language which reads, "except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title . . . ."[98] Under this provision, the Ohio fund will probably be found to serve the same purpose as the Superfund and, therefore, be preempted by the federal legislation.[99]

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sites closed in accordance with federal requirements. 42 U.S.C.A. § 9641 (Supp. Special Pamphlet 1980). This fund will be financed by a tax of $2.13 per dry ton of hazardous waste and will be levied on owners of facilities who receive hazardous waste after September 30, 1983. I.R.C. § 4681 (1981).

94. Amounts in the Superfund are available in connection with actual or threatened releases of hazardous substances into the environment. The President may make expenditures from the Superfund for the uses described in section 111 of the CERCLA including response costs and claims asserted and compensable, but unsatisfied, under section 311 of the Clean Waters Act. At least eighty five percent of the amounts appropriated to the Superfund are reserved for section 111 purposes and for costs of administration of the Superfund. 42 U.S.C.A. § 9631(c) (Supp. Special Pamphlet 1980).

Under the provisions of CERCLA, any person who at the time of disposal of any hazardous substance owned or operated a facility where substances were disposed of or who transported any hazardous substance from which there was a release or threatened release shall be liable for all costs of removal or remedial action incurred by the United States Government or a state, any necessary costs of response by other persons, and damages for injury to or destruction of or loss of natural resources. 42 U.S.C.A. § 9607(a) (Supp. Special Pamphlet 1980). Individual liability is limited to fifty million dollars in damages plus all costs of response. *Id.* § 9607(C)(1)(D).

95. I.R.C. § 4611 (1981). A tax of 0.79 cent a barrel is imposed on crude oil received at a United States refinery and on petroleum products entering the United States for consumption, use, or warehousing. *Id.* § 4611 (a). The tax is also imposed on any domestic crude oil used in or exported from the United States which was not originally taxed. *Id.* § 4611(b). This tax shall not apply after September 30, 1985. The tax may be discontinued on an earlier date if certain conditions are met. *Id.* § 4611(d).

96. *Id.* A tax is imposed on the manufacturer, producer or importer of certain chemicals in accordance with a table of affected substances. The table lists forty-two chemicals and corresponding per ton tax charges ranging from $.24 to $4.87. *Id.* § 4661(b). The tax is subject to the same termination provisions as provided in section 4611(d) of the Internal Revenue Code.

97. 42 U.S.C.A. § 9631(b)(2) (Supp. Special Pamphlet 1980). Specific appropriations have been authorized for the years 1981 through 1985 in the amount of $44,000,000 annually. *Id.* Subsequent to the enactment of CERCLA, Congress approved a supplemental appropriation of $68,000,000 for EPA activities under CERCLA. [1981] 12 ENVIR. REP. (BNA) 219. Payments from this supplemental appropriation have included four million dollars for the cleanup projects at Love Canal in Niagara Falls, New York, *Id.* at 416-17; and three million dollars to a hazardous waste dump in Oswego, New York in the "first remedial action to be taken" by EPA using Superfund money. *Id.* at 440.

98. 42 U.S.C.A. § 9614(c) (Supp. Special Pamphlet 1980).

99. The "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. cl. 2.

The preemption question again creates a number of uncertainties which face those parties attempting to administer and comply with these provisions of S.B. 269. As enacted, S.B. 269 offers no clear direction to affected parties. It is unclear whether Ohio generators of hazardous wastes will be subject to funding provisions at both the state and federal level.

No litigation has yet taken place regarding the specific preemption of the Ohio Special Account. The question of federal preemption of a state "Superfund-type" law has arisen in three current cases concerning New Jersey's Spill Compensation and Control Act.[100] The New Jersey statute is the equivalent of S.B. 269 and the cases may be a foreshadowing of the preemption battle which may face Ohio.[101]

See, e.g., Commonwealth Edison Co. v. Montana, 449 U.S. 1033 (1981). A state statute enacted within the purview of state power and not in conflict with any constitutional prohibition may be unenforceable if, under the Supremacy Clause, valid federal legislation preempts state authority. In addition to an express preemption provision it may be found that it was Congress' "clear and manifest purpose" to preempt the state law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congressional purpose may be inferred if the federal regulation is so pervasive that it leaves "no room for the States to supplement it" or may concern a field in which the federal interest is so dominant that the "federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.*

The existence of an express preemption provision in CERCLA and the obvious Congressional desire to enact a unified system of control over hazardous substances indicate a purpose to preempt concurrent state laws.

100. N. J. STAT. ANN. § 58:10-23.11 (West Supp. 1980). The Spill Compensation and Control Act was enacted April 1, 1977. The Act creates the Spill Compensation Fund financed through taxes on petroleum products at a rate of .01 cent per barrel. Other hazardous substances are taxed on the greater of .01 cent per barrel or .4% of the fair market value of the product. The taxes continue until the balance of the funds equals or exceeds fifty million dollars. Provisions exist to increase the tax per barrel if that amount is required to meet annual claims. *Id.* § 58:10-23.11h(b).

The Spill Compensation Fund is strictly liable for costs of cleanup and removal as well as other property losses associated with the discharge of hazardous substances. The New Jersey statute designates hazardous substances be " 'consistent to the maximum extent possible' with EPA's list of hazardous substances developed under section 311 of the Clean Water Act." INTERAGENCY TASK FORCE ON COMPENSATION AND LIABILITY FOR RELEASES OF HAZARDOUS SUBSTANCES, THE SUPERFUND CONCEPT, 27 (1979).

The liability of an owner or operator of a major facility is limited to fifty million dollars. The owner or operator may be found jointly and severally liable if damages were a result of gross negligence or willful misconduct. N.J. STAT. ANN. § 58:10-23.11g(b) (West Supp. 1980).

Ohio's Hazardous Waste Facility Management Special Account differs from the New Jersey Fund in the fact that Ohio does not tax petroleum products.

101. In New Jersey v. United States, No. 81-0945 (D.D.C., complaint filed April 21, 1981), the state of New Jersey seeks a declaratory judgment that CERCLA does not preempt the state's ability to tax hazardous substances and petroleum pursuant to the state's Spill Compensation and Control Act. The state further contends that the preemption language of CERCLA is ambiguous and has jeopardized the existence of the New Jersey plan. 6 ENVIR. L. REP. 65,694-95 (1981). The United States, on July 17, 1981, filed a motion to dismiss. The government argues that the case fails to present a justiciable controversy which is ripe for review. *Id.* at 65,708. On the same day the state filed a cross-motion for summary judgment. New Jersey contends that summary

In order for the Ohio legislation to satisfy CERCLA requirements, the bill must undergo extensive amendment. Specifically, the response and funding provisions of S.B. 269 would be all but eliminated except when explicitly provided for in CERCLA.

CERCLA would not preclude Ohio from using general revenue (as opposed to the present direct fee system) to finance the Special Account.[102] The state would also be allowed to impose a tax or fee on persons or substances to "finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances . . . ."[103]

E. New Provisions

S.B. 269 also adopted new provisions with respect to the recovery of resources from hazardous waste,[104] the registration of transport-

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judgment is an appropriate resolution of the controversy since the issue is the purely legal question of the scope of the preemption language of CERCLA. *Id.* at 65,709.

In a related case, owners and operators of chemical producing facilities have brought suit against New Jersey to prevent the state from collecting revenues under the New Jersey Spill Compensation and Control Act. Exxon v. Hunt, No. 81-1458-M (D.N.J., complaint filed May 12, 1981). Plaintiffs argue that they will be forced to pay the federal and state taxes, both of which are intended to provide response costs to discharges of hazardous substances, in violation of the preemption language of the CERCLA. *Id.* at 65,695. The plaintiffs also seek that the court order the state to refund more than $750,000 which has been paid into the New Jersey fund since the effective date of the CERCLA. *Id.* at 65,695-96. The State of New Jersey, on July 2, 1981, moved to dismiss the suit. *Id.* at 65,709. The state argued that the Tax Injunction Act, (28 U.S.C. § 1341 [1976]) which prohibits federal courts from presiding over actions challenging state tax schemes if state law provides the taxpayer with an opportunity to litigate their claims in the state court, bars the plaintiff from challenging the tax in the federal courts. The motion to dismiss was granted on July 27, 1981. *Id.* at 65,709.

A third case challenges the constitutionality of CERCLA contending that the preemption language violates the Tenth Amendment of the United States Constitution because it infringes upon the state's reserved power to implement a fiscal system to ensure revenue related to the police power and the protection of the safety and health of the citizens of New Jersey. Lesniak v. United States, No. 81-977 (D.N.J., complaint filed April 2, 1981); *Id.* at 65,695.

102. 42 U.S.C.A. § 9614(c) (Supp. Special Pamphlet 1980).

103. *Id.* § 9604(d)(1). This response equipment would be used by a state pursuant to a contract or cooperative agreement entered into by the state and the President. The state would then take actions in accordance with criteria and priorities established by CERCLA and would be reimbursed from the Superfund for the reasonable costs of response. *Id.*

No remedial action will be provided through the Superfund unless the state in which the release occurs first enters into the contract or cooperative agreement. This contract or cooperative agreement must provide insurances that the state will

> (A) . . . assure all future maintenance and remedial actions . . . ; (B) . . . assure the availability of a hazardous waste disposal facility . . . for any necessary offsite storage, destruction, treatment or secure disposition of the hazardous substances; and (C) . . . pay or assure payment of (i) 10 percentum of the costs of the remedial action, including all future maintenance, or (ii) at least 50 percentum . . . of any sums expended in response to a release at a facility that was owned . . . by the state or a political subdivision thereof.

42 U.S.C.A. § 9604(C)(3) (Supp. Special Pamphlet 1980).

104. OHIO REV. CODE ANN. § 3734.14 (Page Supp. 1980).

ers,[105] and the scope of liability for transporters,[106] generators[107] and owners and operators of treatment facilities[108] for violations of any regulations adopted pursuant to Chapter 3734 of the Ohio Revised Code.

The Ohio bill now adds section 3734.14 to provide that the director periodically determine the market potential and feasibility of the exchange, use and recovery of resources from hazardous wastes.[109] In connection with this responsibility, the director is authorized to order exemptions from the requirements of Chapter 3734 of the Ohio Revised Code when necessary or desirable to facilitate the exchange and use of hazardous waste.[110]

F. Hazardous Waste Transporters

The enactment of section 3734.15 of the Ohio Revised Code is a further effort to provide a comprehensive, cradle-to-grave hazardous waste management program. Section 3734.15(A) prohibits the transport of hazardous waste anywhere in the state by a person or business entity without first obtaining a registration certificate from OEPA.[111] The registered transporter is responsible for the safe delivery of any hazardous waste he transports from the time that he obtains the waste until it is delivered to a treatment, storage, or disposal facility as recorded on the required manifest. An intentional violation of Chapter 3734 or any related promulgated rules while transporting hazardous waste renders the registered transporter liable for *any* damage or injury caused by the violation and for costs of rectifying the violation and conditions caused by the violation.[112] The Agency is authorized to suspend a transporter's registration certificate if the Agency believes that the transporter has violated any provision of Chapter 3734 or any rule thereunder. Subsequent to the issuance of the suspension order, the Agency is directed to conduct an adjudication hearing to determine the validity of the charge. If it is determined that a violation has occurred, the Agency must issue an appealable revocation order.[113]

The statute also prohibits any generator of hazardous waste from

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105. *Id.* § 3734.15.
106. *Id.* §§ 3734.15, .17.
107. *Id.* § 3734.16.
108. *Id.* § 3734.17.
109. *Id.* § 3734.14.
110. *Id.*
111. *Id.* § 3734.15(A). *See* § 3734.12(C)(7) which authorizes the director of OEPA to adopt rules which are consistent with and substantially equivalent to federal regulations with respect to the registration of any transporter of hazardous waste including the issuance of registration certificates.
112. *Id.* § 3734.15(B).
113. *Id.*

causing a waste to be transported by an unregistered transporter. In addition, it prohibits any operator of a treatment, storage or disposal facility from knowingly accepting a waste from an unregistered transporter. An operator of a treatment, storage or disposal facility who is requested to accept a waste from an unregistered transporter is charged with the responsibility of notifying the proper officials in his location.[114] If a generator knowingly causes an unregistered transporter to transport a hazardous waste, the generator, the unregistered transporter and any person who accepts the waste shall be jointly and severally liable for any damage of injury caused by the handling of the waste unless the generator or accepting party has made a "diligent effort" to comply with Chapter 3734 of the Ohio Revised Code and its rules.[115]

Section 3734.16 of the Ohio Revised Code defines the scope of liability of a generator who intentionally violates any of the director's rules to include liability for any damage or injury caused by the violation and the costs of rectifying the violation and conditions caused by the violation.[116] Section 3734.17 prohibits any transporter or operator of a treatment, storage or disposal facility from knowingly accepting a hazardous waste from a generator who has violated any rules promulgated by the director in accordance with section 3734.12(B).[117] In addition, any person who accepts for treatment, storage or disposal any hazardous waste, and who knowingly violates any of the rules promulgated by the director pursuant to section 3734.12(D) shall be liable. The scope of liability includes any damage or injury caused by the violation, and costs of rectifying the violation and conditions caused by the violation.[118] In essence, these liability provisions create a self-policing enforcement system in an attempt to obviate the great expense and administrative burdens which would be posed by a system relying on constant, day-to-day Agency policing. Each party involved in any activity surrounding the handling of hazardous waste is charged with a responsibility to see that the rules governing the particular activity are followed.

Finally, S.B. 269 amended various existing sections of Chapter 3734 of the Ohio Revised Code in keeping with its overall goal to establish the statutory framework for a more comprehensive hazardous waste program.

Section 3734.01 was amended to include definitions of the terms

114. *Id.* § 3734.15(C).
115. *Id.*
116. *Id.* § 3734.16.
117. *Id.* § 3734.17.
118. *Id.*

"closure"[119] and "premises."[120] The term "closure" means that time when a hazardous waste facility no longer accepts hazardous waste for treatment, storage or disposal and encompasses the effective date of an order revoking the permit for a hazardous waste facility. The term "closure" also includes measures performed to restore the physical condition of the facility to protect public health and safety, prevent air or water pollution, or make the facility suitable for other purposes. Some of the measures which may be used to effect the restoration of the physical condition of the facility are the establishment and maintenance of a cover over cells in which hazardous waste is buried, the construction of air and water quality monitoring facilities, and the removal and proper disposal of hazardous waste when necessary to protect public health.[121]

The term "premises" means either geographically contiguous property owned by a generator, or noncontiguous property that is owned by a generator and connected by a right-of-way that the generator controls and to which the public does not have access.[122]

The powers of the director of the OEPA in connection with the regulation of hazardous waste activity are outlined in section 3734.02 of the Ohio Revised Code. This section has been amended to state that permits for the establishment or operation of a hazardous waste facility or use of a solid waste facility for the storage, treatment or disposal of any hazardous waste shall be issued subject to the approval by the Hazardous Waste Facility Approval Board.

This section raises an interesting question about the interaction between the state hazardous wastes program and the solid wastes program.

Chapter 3734 of the Ohio Revised Code provides the statutory framework for the regulation of both types of wastes, but by definition[123] the two regulatory schemes can be considered as entirely sepa-

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119. *Id.* § 3734.01(O).

120. *Id.* § 3734.01(P).

121. *See* note 119, *supra. See also* § 3734.12(D)(7) which authorizes the director of OEPA to adopt rules which are consistent with and substantially equivalent to federal regulations for the establishment of performance standards which require owners and operators of hazardous waste facilities to file a closure and long-term care surety bond or equivalent in cash or certificates of deposit. In addition the director is authorized to require the filing, with the application for a permit, of plans relating to closure, and long-term care surety bond or equivalent in cash or certificates of deposit.

122. *See* note 120 *supra. See also* § 3734.12(B)(5) which requires a manifest for any hazardous waste transported off the premises where located.

123. A solid waste is defined as an unwanted residual solid or semisolid material that is not harmful or inimical to public health. OHIO REV. CODE ANN. § 3734.01(E) (Page Supp. 1980). A hazardous waste is defined to be any waste or combination of wastes in solid, liquid, semi-solid or contained gaseous form that may cause or significantly contribute to an increase in mortality or an

rate.[124] Any particular waste should be covered by either the solid waste regulations or the hazardous waste regulations. However, OEPA may not be willing to recognize this apparent dichotomy for all purposes. For example, the OEPA has reportedly considered the imposition of solid waste permit amendment procedures for the acceptance of new hazardous wastes at permitted hazardous waste facilities.[125] (Under the regulatory framework in place at the beginning of 1982 the operator of a licensed hazardous waste facility had no statutory or regulatory vehicle whereby he could begin to accept a new hazardous waste after receiving his operating license.)[126] In addition, the question of which set of regulations governs the disposal of small quantities of hazardous wastes is debatable. On the one hand, the hazardous waste regulations exclude from coverage small quantity wastes disposed of at facilities approved to accept municipal and industrial solid wastes. On the other hand, the solid waste regulations permit the disposal of hazardous wastes at a solid waste disposal facility only with approval of the director.[127] One possible resolution of this inconsistency is to interpret the small quantity exclusion under the hazardous waste regulations as general approval by the director for permitted solid waste facilities to manage hazardous wastes entitled to the small quantity exclusion. However, it is more likely that facilities affected by this inconsistency will be forced to turn to the discretion of OEPA and the Board, which will probably resolve questions on a case-by-case basis. It is doubtful that such an *ad hoc* method would be as successful as a statutory directive would be in terms of achieving uniformity in result and facilitating administration and compliance.

Pursuant to section 3734.02(G) of the Ohio Revised Code the director has the authority to exempt persons from the provisions dealing with the generation, storage, treatment and disposal of solid or hazardous wastes under certain circumstances. This section has been amended to change the standard to be used for exempting such persons from

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increase in serious irreversible or incapacitating reversible illness or pose a substantial present or potential hazard to human health or safety or to the environment when improperly stored, treated, transported, disposed of or otherwise managed. *Id.* § 3734.01(J).

124. *Compare* Ohio's statutory framework with the federal framework. Under federal law a hazardous waste is a subset of solid wastes. 40 C.F.R. § 261.2, .3(1980).

125. Interview with Joseph F. Guida, an associate with the law firm of Smith & Schnacke, a Legal Professional Association (October 10, 1981). (Notes on file at University of Dayton Law Review).

126. The situation where the operator of a hazardous waste landfill desires to begin accepting for disposal a new hazardous waste should be very common. Interview with Joseph F. Guida, an associate with the law firm of Smith & Schnacke, a Legal Professional Association (October 7, 1981). (Notes on file at University of Dayton Law Review).

127. *See* O.A.C. § 3745-51-05 (hazardous waste regulations); O.A.C. § 3745-27-09(C)(1) (solid waste regulations).

"consistent to" federal regulations to "consistent with and substantially equivalent to" federal regulations.[128] S.B. 269 also enacted two new provisions to section 3734.02. Section 3734.02(H) prohibits the filling, grading, excavating, building, drilling or mining on land in those cases where a hazardous waste facility or a solid waste facility was operated and where the director has determined that significant amounts of hazardous waste were disposed there without first obtaining authorization from the director. The director is granted the authority to establish the application procedure for obtaining authorization subject to the provision of Chapter 119 of the Ohio Revised Code.[129]

Section 3734.02(I) of the Ohio Revised Code prohibits the owner or operator of a hazardous waste facility from permitting the emission of any odor which constitutes a "public nuisance."[130] Section 3734.03 has been amended to prohibit the disposal of solid wastes by open burning or open dumping except as authorized by the director in regulations adopted in accordance with section 3734.02.[131]

S.B. 269 amends section 3734.07 of the Ohio Revised Code so that the director may revoke or suspend a facility's operating license or permit if entry, inspection or investigation is refused, hindered or thwarted.[132]

The enforcement provisions of section 3734.10 have been amended so that the legislative authority of a political subdivision where a violation occurs is authorized to prosecute an action against any person violating any section of Chapter 3734. S.B. 269 also mandates that the court give precedence to such an action over all other cases. This provision further states that Chapter 3734 does not abridge rights of action or remedies in equity or under common law to suppress nuisances or abate pollution.[133]

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128. The change in the standard to be used by the director in his power to exempt certain persons allows him greater leeway in issuing exemptions and is acceptable to EPA as long as the standard used is not inconsistent with federal standards.

The best example of the scope of the director's exemption authority can be seen in the small generator exclusion. In essence a small generator of hazardous wastes may, by the director's order, be excused from compliance with hazardous waste regulations. This exemption raises some interesting questions as a matter of public policy as to how these exempted hazardous wastes will be disposed. Interview with Mark Stanga, Legal Advisor to Wayne Nichols, Director of OEPA (October 7, 1981). (Notes on file at University of Dayton Law Review). *See also* § 3734.12 with respect to language "consistent with and substantially equivalent to."

129. OHIO REV. CODE ANN. § 3734.02(H) (Page Supp. 1980).

130. *Id.* § 3734.02(I). The director may declare the emission to be a public nuisance if it unreasonably interferes with the comfortable enjoyment of life or property by persons living or working in the vicinity of the facility.

131. *Id.* § 3734.03.

132. *Id.* § 3734.07(C).

133. *Id.* § 3734.10. This section authorizes an enforcement action where a violation *occurs*. The EPA has indicated to OEPA that the lack of statutory authority which would allow an en-

Section 3734.12 of the Ohio Revised Code outlines the permissible scope of the rules regarding hazardous waste and sets guidelines for standards.[134] Prior to enactment of S.B. 269, the director was authorized to adopt, modify, suspend or repeal rules which were "consistent with and no more stringent than"[135] federal regulations promulgated pursuant to RCRA. S.B. 269 authorizes the director to adopt rules which are "consistent with and substantially equivalent to"[136] federal regulations. The standard imposed by S.B. 269 is higher than that previously imposed. The prior standard limited the degree of stringency to that allowable under the federal regulations. The new standard gives OEPA greater latitude with respect to issuing rules and is consistent with EPA policy which tolerates the imposition of more stringent rules during Interim Authorization to the extent that they are not inconsistent with federal regulations.[137]

S.B. 269 also includes new language which states that the director's hazardous waste standards shall be based on the degree of hazard potentially presented by a particular waste or category of wastes.[138] The standards are to be designed to achieve a degree of protection consistent with the hazard presented by the various wastes or categories of wastes.[139] S.B. 269 directs that rules adopted under section 3734.12(H) of the Ohio Revised Code relating to disposal of hazardous waste be consistent with and substantially equivalent to federal regulations promulgated pursuant to RCRA unless the director determines that a specific characteristic of a specific waste is so hazardous that the waste's disposal under those regulations would present an imminent danger to human health or safety.[140] In such a case the director is authorized to adopt disposal techniques more stringent than those in the regulations.[141] The director is also authorized to issue rules in the absence of federal regulations.[142]

III. CONCLUSION

It is possible that the public's perception of the serious threat

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forcement action to lie where there is the threat of a *potential* violation will hinder Ohio's efforts to obtain Interim Authorization Phase I. Interview with Mark Stanga, Legal Advisor to Wayne Nichols, Director of OEPA (October 7, 1981). (Notes on file at University of Dayton Law Review).

134. OHIO REV. CODE ANN. § 3734.12 (Page Supp. 1980).
135. *Id.*
136. *Id.*, as amended by S.B. 269.
137. *See* text accompanying notes 19-22 *supra.*
138. OHIO REV. CODE ANN. § 3734.12(H) (Page Supp. 1980).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

posed by unregulated activity involving hazardous wastes, together with industry's desire to operate under a state hazardous waste program, forced the legislature to enact S.B. 269. The legislature's hasty action is evidenced by the problems inherent in the permit authority of the Board and the probable preemption of the Ohio Special Account by federal legislation. S.B. 269 was an attempt to provide specific guidelines to persons involved with hazardous waste activities. The resulting program, however, fails to interact with the directives of RCRA and CERCLA. In addition, it is doubtful that S.B. 269 greatly enhanced Ohio's efforts towards obtaining Interim Authorization from EPA. OEPA planned to submit to EPA a draft Interim Authorization application in December 1981 with April 1982 projected as the earliest date for receipt from EPA of Interim Authorization.[143] Perhaps a more carefully drafted bill would have resulted in the creation of a hazardous waste management program which met the requirements of the existing federal program and at the same time provided the necessary framework for eventual implementation and enforcement of a state program. At the very least, an approach more cognizant of federal legislation would have eased the administration and compliance burdens inherent in the present program.

Mary Jo S. Korona
Joseph G. Interlichia

LEGISLATIVE HISTORY:
Code Sections Affected: 3734.01-.10, 3734.12, 3734.13, 3734.14, 3734.14-.27 and 3734.99.
Effective Date: October 9, 1980.
Sponsor: Meshel (S).
Committees: Agriculture(S), Conservation and Environment(S), Agriculture and Natural Resources(H).

143. OEPA Interoffice Memo dated September 16, 1981 (Notes on file at University of Dayton Law Review). EPA has indicated that states must submit draft applications for Interim Authorization Phase I by January 12, 1982. Failure to do so will require states to comply with additional regulations for Interim Authorization Phase II (Part B permit standards). Letter from EPA Region V dated October 23, 1981 (On file at University of Dayton Law Review). At the present time Ohio is operating under a cooperative arrangement with EPA. A cooperative arrangement is a contractual agreement where the state is paid RCRA grant money to enforce various aspects of the federal program. Under the current cooperative arrangement OEPA performs the following on behalf of EPA: (1) provides technical review and processing for permit programs; (2) takes care of manifest discrepancy reports; (3) conducts generator, transporter and treatment, storage and disposal facility inspections; (4) follows up on annual reports; (5) follows up on nonnotifiers; and (6) maintains emergency response teams. Interview with Martha Gibbons, RCRA Administrator at OEPA (November 16, 1981) (Notes on file at University of Dayton Law Review). The cooperative arrangement is in essence a quasi-interim authorization stage which allows a state which does not qualify for interim authorization to enforce various aspects of the federal program while enforcing the State program and thereby avoid some duplication of effort.